

In the matter of the General Data Protection Regulation

DPC Inquiry Reference: IN-18-5-7

In the matter of TSA, a complainant, concerning a complaint directed against Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) in respect of the Instagram Service

Decision of the Data Protection Commission made pursuant to Section 113 of the Data Protection Act, 2018

and Articles 60 and 65 of the General Data Protection Regulation

Further to a complaint-based inquiry commenced pursuant to Section 110 of the Data Protection Act 2018

DECISION

Decision-Maker for the Commission:

Helen Dixon

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Commissioner for Data Protection

Dated the 31<sup>st</sup> December 2022



Data Protection Commission  
21 Fitzwilliam Square South  
Dublin 2, Ireland

An Coimisiún um Chosaint Sonraí, 21 Cearnóg Mhic Liam, Baile Átha Cliath 2.

Data Protection Commission, 21 Fitzwilliam Square, Dublin 2.

[www.cosantasonrai.ie](http://www.cosantasonrai.ie) | [www.dataprotection.ie](http://www.dataprotection.ie) | [eolas@cosantasonrai.ie](mailto:eolas@cosantasonrai.ie) | [info@dataprotection.ie](mailto:info@dataprotection.ie) Tel: +353 (0)76 1104800

1. Introduction .....	4
2. Factual Background and the Complaint .....	4
<i>FACTUAL BACKGROUND</i>	
.....	5
<i>OVERVIEW OF THE COMPLAINT</i> .....	
8	Legal Basis of Processing
.....	8
Transparency .....	10
Corrective Powers .....	11
<i>SCOPE OF THE COMPLAINT</i> .....	
11	
3. Issue 1 – Whether Clicking on the “Agree to Terms” Button Constitutes or must be consent for the purposes of the GDPR .....	15
<i>Introduction</i> .....	
15	
<i>Relevant Provisions</i> .....	
15	
<i>Whether Clicking “Agree to Terms” Constitutes Consent for the Purposes of the GDPR</i> .....	
16	
<i>Whether Meta Ireland must rely on Consent</i> .....	
19	
4 Issue 2 - Reliance on 6(1)(b) GDPR as a lawful basis for personal data processing .....	24
<i>Introduction</i> .....	
24	

<i>Relevant Provisions</i> .....	24
<i>Assessment of whether Meta Ireland was entitled to Rely on Article 6(1)(b) GDPR</i> .....	25
Relationship between the Terms of Use and the Data Policy .....	25
Whether Meta Ireland was Entitled to Rely on Article 6(1)(b) GDPR .....	27
Finding 2: .....	49
5 Issue 3 – Whether Meta Ireland provided the requisite information on the legal basis for processing on foot of Article 6(1)(b) GDPR and whether it did so in a transparent manner .....	49
<i>Introduction</i> .....	49
<i>Relevant Provisions</i> .....	50
The “Layered” Approach .....	52
<i>Information provided to the Data Subject in respect of the purposes and/or legal basis of processing</i> ..	55
<i>Information provided by Meta Ireland in relation to Processing in accordance with Article 6(1)(b)</i> .....	67
<i>Whether Meta Ireland Complies with Article 5(1)(a), 12(1) and 13(1)(c) GDPR</i> .....	73
<i>Article 5(1)(a) GDPR – Principle of Transparency</i> .....	78
Finding 3: .....	81
6 Whether Meta Ireland infringed the article 5(1)(a) principle of fairness .....	82
Finding 4: .....	85
7 Summary of Findings .....	86
8 Decision on Corrective Powers .....	86
9. Order to Bring Processing into Compliance .....	87
10. Administrative Fine .....	91

ARTICLE 83(2)(A): THE NATURE, GRAVITY AND DURATION OF THE INFRINGEMENT TAKING INTO ACCOUNT THE NATURE SCOPE OR PURPOSE OF THE PROCESSING CONCERNED AS WELL AS THE NUMBER OF DATA SUBJECTS AFFECTED AND THE LEVEL OF DAMAGE SUFFERED BY THEM .....	105
ARTICLE 83(2)(B): THE INTENTIONAL OR NEGLIGENT CHARACTER OF THE INFRINGEMENT .....	118
ARTICLE 83(2)(C): ANY ACTION TAKEN TO MITIGATE THE DAMAGE TO DATA SUBJECTS .....	123
ARTICLE 83(2)(D): THE DEGREE OF RESPONSIBILITY OF THE CONTROLLER OR PROCESSOR TAKING INTO ACCOUNT TECHNICAL AND ORGANISATIONAL MEASURES IMPLEMENTED BY THEM PURSUANT TO ARTICLES 25 AND 32 .....	124
ARTICLE 83(2)(E): ANY RELEVANT PREVIOUS INFRINGEMENTS BY THE CONTROLLER OR PROCESSOR .....	126
ARTICLE 83(2)(F): THE DEGREE OF COOPERATION WITH THE SUPERVISORY AUTHORITY, IN ORDER TO REMEDY THE INFRINGEMENT AND MITIGATE THE POSSIBLE ADVERSE EFFECTS OF THE INFRINGEMENT .....	128
ARTICLE 83(2)(G): THE CATEGORIES OF PERSONAL DATA AFFECTED BY THE INFRINGEMENT .....	129
ARTICLE 83(2)(H): THE MANNER IN WHICH THE INFRINGEMENT BECAME KNOWN TO THE SUPERVISORY AUTHORITY, IN PARTICULAR WHETHER, AND IF SO TO WHAT EXTENT, THE CONTROLLER OR PROCESSOR NOTIFIED THE INFRINGEMENT ..	131
ARTICLE 83(2)(I): WHERE MEASURES REFERRED TO IN ARTICLE 58(2) HAVE PREVIOUSLY BEEN ORDERED AGAINST THE CONTROLLER OR PROCESSOR CONCERNED WITH REGARD TO THE SAME SUBJECT-MATTER, COMPLIANCE WITH THOSE MEASURES .....	131
ARTICLE 83(2)(J): ADHERENCE TO APPROVED CODES OF CONDUCT PURSUANT TO ARTICLE 40 OR APPROVED CERTIFICATION MECHANISMS PURSUANT TO ARTICLE 42 .....	132
ARTICLE 83(2)(K): ANY OTHER AGGRAVATING OR MITIGATING FACTOR APPLICABLE TO THE CIRCUMSTANCES OF THE CASE, SUCH AS FINANCIAL BENEFITS GAINED, OR LOSSES AVOIDED, DIRECTLY OR INDIRECTLY, FROM THE INFRINGEMENT .....	132
WHETHER TO IMPOSE AN ADMINISTRATIVE FINE .....	134
11 OTHER RELEVANT FACTORS .....	146
ARTICLE 83(3) GDPR .....	146
ARTICLE 83(5) GDPR .....	152
SUMMARY OF ENVISAGED ACTION .....	157

## 1. INTRODUCTION

1. This document is a Decision (“the Decision”) of the Data Protection Commission (“the Commission”) made in accordance with Section 113 of the Data Protection Act 2018 (“the 2018 Act”), arising from an inquiry conducted by the Commission, pursuant to Section 110 of the 2018 Act (“the Inquiry”).
2. The Inquiry concerned a complaint made to the Belgian Data Protection Authority: *L’Autorité de protection des données* (the “Belgian DPA”) on 25 May 2018 in respect of the Instagram service (the “Complaint”). As the Instagram service is provided in connection with Meta Platforms, formerly the Facebook Group, the Complaint was made in respect of Facebook Ireland Limited (“Facebook”). Following the completion of the inquiry stage, Facebook passed a special resolution to change the company name to “Meta Platforms Ireland Limited” (“Meta Ireland”), effective from 22 December 2021. Insofar as there are any references to “Facebook” in this Decision, these should be construed to refer to “Meta Ireland”.
3. The Inquiry, which commenced on 20 August 2018, examined whether Meta Ireland, in the context of the Instagram service, complied with its obligations under the EU General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and of the Council) (“the GDPR”) in respect of the subject matter of a Complaint. For completeness, the Complaint was made by the non-profit organisation “noyb – European Center for Digital Rights” (the “Complainant”) on behalf of T. S. A. (“the Data Subject” or “Named Data Subject”). The Complaint was referred to the Commission by the Belgian Data Protection Authority: *L’Autorité de protection des données* (“The Belgian DPA”) on 31 May 2018. In advance of the finalisation of this Decision, a preliminary version of this document (the “Preliminary Draft”) was circulated to Meta Ireland and the Complainant to enable them to make submissions on my findings. I have taken account of any such submissions in finalising this document.
4. This Decision further reflects the binding decision that was made by the European Data Protection Board (the “Board” or, otherwise, the “EDPB”) pursuant to Article 65(2) of the GDPR,<sup>5</sup> (the “Article 65 Decision”) which directed changes to certain of the positions reflected in the draft decision that was presented by the Commission for the purposes of Article 60 (the “Draft Decision”), as detailed further below. The Article 65 Decision will be published on the website of the Board, in accordance with Article 65(5) of the GDPR, and a copy of same is attached to this Decision.
5. Further details of procedural matters pertaining to the Inquiry are set out in Schedule 1 to this Decision.

## 2. FACTUAL BACKGROUND AND THE COMPLAINT

### FACTUAL BACKGROUND

6. Instagram is a global online social network service (the “Instagram Service”) which allows registered users to communicate with other registered users through messages, audio, video calls and video chats, and by sending images and video files. It is made available to registered users without payment. The Instagram service was launched in 2010 and was acquired by Meta Platforms, Inc., then Facebook, Inc., in 2012; it is now wholly owned by Meta Platforms, Inc. The Instagram service can be accessed using a standalone mobile phone application, but can also be viewed as a webpage using a web-browser.
7. To use the Instagram service, a prospective user must create an Instagram account. To create an Instagram account, a prospective user is required to provide certain information (e.g. name, email address etc.) and must accept a series of terms and conditions referred to as the Terms of Use (the “Terms of Use”). When a prospective user accepts the Terms of Use, the terms contained therein constitute a contract between the (new) user and Meta Ireland in respect of the Instagram service. It is only on acceptance of the Terms of Use that the individual becomes a registered Instagram user. An unregistered user – i.e. a user who has not created an Instagram account and accepted the Terms of Use – has limited access to the Instagram service; while they can view certain content on the webpage version of an Instagram user’s profile page, they cannot access the mobile phone Instagram application as it is restricted to registered users.
8. In April 2018, Meta Platforms updated the Terms of Use and related Instagram policies to give effect to changes it sought to implement to comply with the obligations which would arise when the GDPR became applicable from 25 May 2018. Obligations introduced by the GDPR include, *inter alia*, a requirement for controllers to provide detailed information to users about the purposes and the legal bases of any processing of personal data. To continue to have full access to the Instagram service, all registered users were required to accept the updated Terms of Use prior to 25 May 2018. The “*How We Will Handle Disputes*” section of the Terms of Use stated:

*“If you are a consumer and habitually reside in a Member State of the European Union, the laws of that Member State will apply to any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms (‘claim’), and you may resolve your claim in any competent court in that Member State that has jurisdiction over the claim. In all other cases, you agree that the claim must be resolved in a competent court in the Republic of Ireland and that Irish law will govern these Terms and any claim, without regard to conflict of law provisions”.*
9. In May 2018, the updated Terms of Use were brought to the attention of existing Instagram users by way of a series of information notices and options on the Instagram service, referred to as an “engagement flow” or “user flow” (for clarity, this Decision will refer to either term as the “user engagement flow”). The user engagement flow was designed to guide users through

the process of accepting the updated Terms of Use. It presented existing users with two separate information pages entitled “Review and Agree”.<sup>1</sup> The first such information page, containing the subheading “Changes to How We Manage Data” includes a hyperlink to the full text of the Data Policy.<sup>2</sup> The purpose of the Data Policy was to outline the information Meta Platforms – and possibly other entities in the Meta Platforms Group – processes in the context of the delivery of the Instagram service.<sup>3</sup>

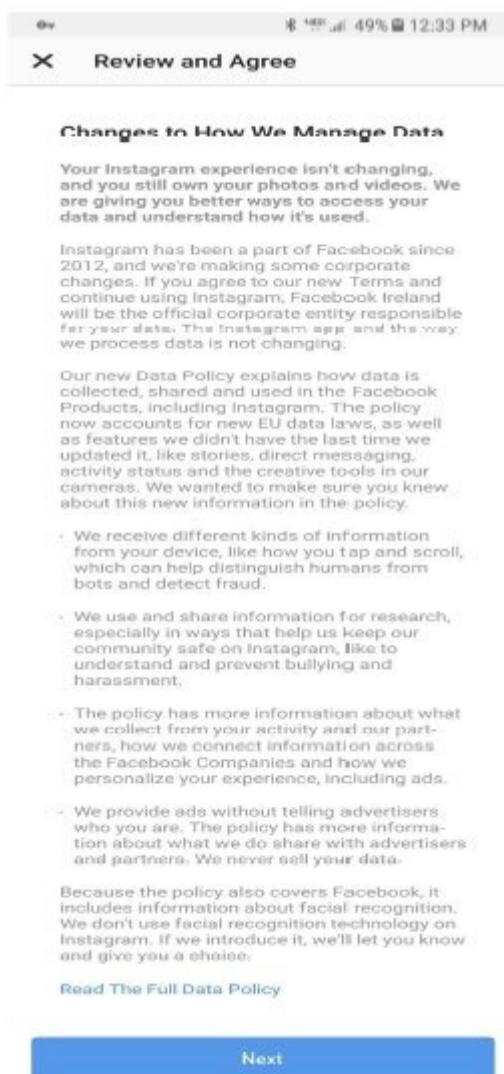


Figure 1: “Changes to How We Manage Data” Page

10. On pressing the “next” button on the “Changes to How We Manage Data” page, the user was brought to the second “Review and Accept” information page. This page required existing users

<sup>1</sup> Meta Ireland’s Submissions dated 28 September 2018, at pp. 21 to 23.

<sup>2</sup> Meta Ireland’s Submissions dated 28 September 2018, at p. 21.

<sup>3</sup> See the Instagram Data Policy annexed to Meta Ireland’s Submissions dated 28 September 2018.

to confirm whether he/she were over the age of 18. It also provided a high-level overview of the changes to the Terms of Use and included a hyperlink to the full text of the updated Terms of Use. Existing users were then presented with a binary choice: either “Agree to Terms” or “see other options”. The visual presentation of the options differed; to select the former, the user was required to press a blue button stating “Agree to Terms” whereas the latter required the user to select the hyperlinked text “see other options” below the “Agree to Terms” button. According to the Complaint, the only option available to a user who selected “see other options” was the deletion of his/her Instagram account.<sup>4</sup> Moreover, the updated Terms of Use stated that a user who continues to use Instagram service will be bound by the new terms. It further stated that a user who does not wish to be bound by the updated terms could delete his/her account.<sup>5</sup>

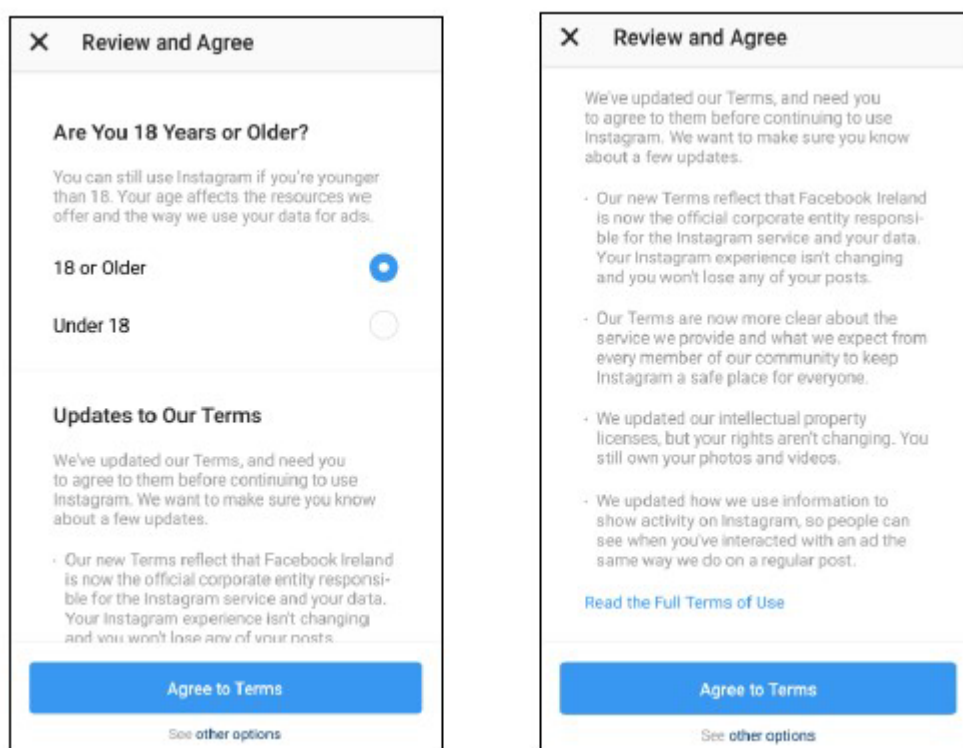


Figure 2: Review and Agree Page

## OVERVIEW OF THE COMPLAINT

<sup>4</sup> Complaint made by NOYB in respect of the Instagram Service dated 25 May 2018 (the “Complaint dated 25 May 2018”), at p. 7.

<sup>5</sup> Instagram Terms of Use, revised 19 April 2018, annexed to the Complaint; see subheading “Updating these Terms”.



11. The Complaint was made in the context of Instagram’s updated Data Policy and Terms of Use. In particular, the Complaint concerned the requirement for existing (registered) users to accept the updated terms and policies as so to continue to use the Instagram service. In this context, the Complaint concerns whether there is a legal basis for the processing of personal data of registered users in the context of the Instagram service. In this vein, the Complaint relates to the processing of both (i) personal data and (ii) special category data.<sup>6</sup> The Complaint is also concerned with whether the transparency obligations in the GDPR have been complied with.<sup>7</sup> For clarity, I will summarise each aspect of the Complaint in turn.

#### Legal Basis of Processing

12. In respect of the legal basis of the processing of personal data, the Complainant alleged that *all* processing operations referred to in the Data Policy and Terms of Use must be assumed to be based on consent due to the requirement that existing users must accept the updated terms and policies to continue to use the Instagram service.<sup>8</sup> The Complainant further alleged that existing users were given a binary choice: (1) either accept the Terms of Use and the associated Data Policy by selecting the “Agree to Terms” button or (2) delete his/her Instagram account.<sup>9</sup> Indeed, the Complainant considered it to be, *“clear that consenting to the privacy policy and terms above is the only way the data subject can maintain access to his account and therefore be able to use the said services”*.<sup>10</sup>

13. The Complaint also highlighted processing operations which, in the view of the Complainant, are explicitly based on consent.<sup>11</sup> According to the Complainant, these include:

- *“processing data with special protections (such as your religious views, political views, who you are “interested in,” or your health, if you share this information in your Facebook profile fields or Life Events), so we can share with those you choose and personalise your content”*;
- *“using data that advertisers and other partners provide us about your activity off of Facebook Company Products, so we can personalise ads we show you on Facebook Company Products, and on websites, apps, and devices that use our advertising services”*; and
- *“collecting information you allow us to receive through the device-based settings you enable (such as access to your GPS location, camera or photos), so we can provide the features and services described when you enable the settings”*.<sup>12</sup>

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<sup>6</sup> Complaint dated 25 May 2018, at pp. 1-2.

<sup>7</sup> Complaint dated 25 May 2018, at p. 3.

<sup>8</sup> Complaint dated 25 May 2018, at p. 2-3.

<sup>9</sup> Complaint dated 25 May 2018, at p. 7.

<sup>10</sup> Complaint dated 25 May 2018, at p. 6.

<sup>11</sup> Complaint dated 25 May 2018, at p. 2.

<sup>12</sup> Complaint dated 25 May 2018, at pp. 2-3.

14. The Complainant has also submitted that consent to certain processing operation is “*hidden*” and “*seems to pretend that these processing operations would then fall under Article 6(1)(b) of GDPR [sic]*”.<sup>13</sup> In essence, the Complainant alleged that the controller had misled data subjects into believing that certain processing (the Complaint referred to personalised advertising) was a contractual obligation. Accordingly, the Complainant submitted that non-core elements of the Terms of Use must be interpreted as a form of consent.<sup>14</sup>
15. Following this, the Complaint outlined the Complainant’s submissions as to why consent cannot amount to a valid legal basis for the purposes of Article 6(1)(a) GDPR in the context of the processing at issue. In this regard, the Complaint addressed each component of consent, as understood in the context of Article 6(1)(a) GDPR, in turn.
16. First, the Complainant submitted that the act of consent was not “freely given” as required by Article 4(11) and 7(4) GDPR as users were not “*offered a genuine and realistic choice to accept or decline the terms of a service or to decline these terms without detriment*”.<sup>15</sup> The Complainant alleged that the act of consent was not freely given in this context for the following reasons:
- i. There was a “*clear imbalance of power*” between Meta Ireland (via the Instagram service), as the controller, and data subjects, as Instagram occupies dominant market position in “*photo sharing services*”. In turn, this has given rise to a “*network effect*”, i.e. that the service is “*a closed and proprietary network, the data subject is factually forced to join or maintain a profile with the controller*”. In the Complainant’s view, this was further supported by the “*lock-in effect*” of the Instagram service which occurs where “*data subject uses the services of the controller for years and has invested substantial time and effort to build a profile on the service ... [and] would lose access to personal information, connections and a very important network for the social, personal and professional life*”.<sup>16</sup>
  - ii. Continued access to Instagram is conditional on the data subject’s consent which cannot be considered to be freely given in accordance with the requirements set out in Article 7(4) and Recital 43 GDPR.<sup>17</sup>
  - iii. The consent provided lacked specificity as it is “*bundled*” with both the Terms of Use and the Data Policy and thus there is an “*all or nothing approach*”.<sup>18</sup>

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<sup>13</sup> Complaint dated 25 May 2018, at p. 3.

<sup>14</sup> Complaint dated 25 May 2018, at p. 5.

<sup>15</sup> Complaint dated 25 May 2018, at p. 9.

<sup>16</sup> Complaint dated 25 May 2018, at pp. 9-12.

<sup>17</sup> Complaint dated 25 May 2018, at pp. 12-14.

<sup>18</sup> Complaint dated 25 May 2018, at pp. 14-15.

- iv. Data subjects who refused to provide consent in this context suffer detriment as the *“controller has threatened to ... discontinue the contract with anyone that does not agree to the new privacy policy and delete the existing account”*. In this regard, the Complainant further alleged that a data subject may suffer a *“secondary disadvantage”* in the form of the *“los[s of] a crucial form of social interaction among his peers”*.<sup>19</sup>

17. In the alternative, the Complainant also argued that the consent was not sufficiently informed and thus could not be valid. According to the Complaint, *“[e]ven if a trained lawyer reads all the text that the controller provides, he/she can only guess what data is processed, for which exact purpose and on which legal basis”*.<sup>20</sup> In this vein, the Complainant further asserted that the consent is not specific as it could relate to *any* of the processing operation detailed in the Data Policy.<sup>21</sup> Moreover, the Complainant submitted that consent was not distinguishable from irrelevant material in the Terms of Use and the Data Policy.<sup>22</sup> The Complainant also noted that the controller could not rely on previous acts of consent in accordance with Recital 177 GDPR.<sup>23</sup>

#### Transparency

18. Notwithstanding the Complainant’s submission that processing must be assumed to be based on consent, the Complainant alleged that it was unclear which legal basis (if any) applied in respect of each processing operation as the *“controller simply lists all six bases for lawful processing under Article 6 of the GDPR in its privacy policy without stating exactly which legal basis the controller relies upon for each specific processing operation”*.<sup>24</sup> In this regard, it appears that the Complainant’s argument rested on the premise that the legal basis for every individual processing operation must be identified and communicated to the data subjects with specificity.

19. The Complaint also addressed whether the information provided to data subjects satisfies the transparency requirements of the GDPR. In this regard, the Complainant asserted that the lack of clarity as to *“what data is processed, for which exact purpose and on which legal basis”* is contrary to the transparency and fairness requirements set out in Articles 5(1)(a) and 13(c) GDPR.<sup>24</sup> The Complainant further alleged that *“[a]sking for consent for a processing operation, when the controller relies in fact on another legal basis is fundamentally unfair, misleading and non-transparent within the meaning of Article 5(1)(a) of the GDPR”*.<sup>26</sup>

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<sup>19</sup> Complaint dated 25 May 2018, at pp. 15-16.

<sup>20</sup> Complaint dated 25 May 2018, at pp. 16-17.

<sup>21</sup> Complaint dated 25 May 2018, at p. 17.

<sup>22</sup> Complaint dated 25 May 2018, at p. 17.

<sup>23</sup> Complaint dated 25 May 2018, at p. 18.

<sup>24</sup> Complaint dated 25 May 2018, at p. 2.

<sup>24</sup> Complaint dated 25 May 2018, at pp. 16-17.

<sup>26</sup> Complaint dated 25 May 2018, at p. 18.

20. In essence, this aspect of the Complaint concerns the transparency requirements set out in the GDPR, which require controllers to provide detailed information to users at the time when personal data are obtained, including the provision of information about the purposes of the processing as well as the legal bases for the processing.

#### Corrective Powers

21. Finally, I also note that the Complaint outlined several corrective measures which the Complainant sought to impose in this context. In this regard, the Complainant requested that the matter is “*fully investigated*” and the results made available to it. The Complainant further requested an order prohibiting the relevant processing operations and the imposition of effective, proportionate and dissuasive fines.<sup>25</sup> At this juncture, I note that the Complainant may not compel the Commission, or indeed any other supervisory authority, to carry out certain actions or impose particular corrective powers. Indeed, in this regard, I note that Article 52 GDPR stipulates that each supervisory authority must act with “*complete independence*” in discharging its functions under the GDPR. Therefore, while I take account of the parties’ submissions, I am not compelled to act or impose certain corrective powers by virtue of any such submissions.

#### *SCOPE OF THE COMPLAINT*

22. I have carried out my assessment of the scope of the Complaint to the extent that it relates to specified data processing and specified alleged infringements as outlined in paragraphs 123 – 150 of Schedule 1. A chronology of issues that arose (1) as between the parties and (2) as between the parties and the Commission in the course of establishing the substantive scope of the complaint is also included in Schedule 1. Also included in Schedule 1 are details of the approach I have adopted in concluding those issues raised. In determining the precise parameters of the scope of the Complaint, I have had regard to the Complaint as a whole and, in particular, I have taken note of the express statements in the Complaint which seek to define its scope. I have also had regard to the Investigator’s analysis in respect of the scope of the Complaint.
23. On his assessment of the Complaint, the Investigator concluded that there were four key issues to be analysed in the context of the Inquiry.<sup>26</sup> The issues, as identified by the Investigator, are as follows:
- a. Whether the Named Data Subject’s acceptance of the Instagram Terms of Use and/or Data Policy was to be construed as the provision of consent within the meaning of Articles

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<sup>25</sup> Complaint dated 25 May 2018, at pp. 18-20.

<sup>26</sup> Final Inquiry Report dated 18 January 2021, at para. 90.

4(11) and 6(1)(a) GDPR to the processing of personal data described in those documents – the Investigator’s views 1 and 2 of the Final Report address this issue.

b. Whether Meta Ireland, as the controller, could rely on Article 6(1)(b) GDPR as a lawful basis for the processing of personal data in respect of the Instagram Terms of Use – the Investigator’s view 3 of the Final Report addresses this issue.

c. Whether Meta Ireland misrepresented the legal basis for processing personal data in such a manner that would lead the data subject to believe that any such processing is based on consent – the Investigator’s view 4 of the Final Report addresses this issue.

d. Whether Meta Ireland failed to provide the requisite information in respect of its legal basis for processing of personal data in connection with the Terms of Use and/or Data Policy and thus did not comply with its transparency obligations in this regard – the Investigator’s views 5, 6, 7, 8, 9, 10 and 11 of the Final Report address this issue.

24. I agree with the Investigator’s summary of the core issues in respect of issues (a) and (b). However, I take a different view in treating issues (c) and (d) as raising distinct legal issues.

25. Issue (c), as identified by the Investigator, solely addresses the allegation that Meta Ireland has misrepresented the lawful basis it relies on for processing personal data in connection with the Instagram service, such that it has misled the data subject to believe that any such processing is based on consent. By contrast, the Investigator considered issue (d) to be a broader assessment of whether the Instagram Terms of Use and/or Data Policy complies with the transparency requirements as set out in Articles 5(1)(a), 12(1) and 13(1)(c) GDPR in the context of processing carried out on the basis of Article 6(1)(b) GDPR.

26. I am not convinced that there is a legal distinction between these issues. Rather, it is my view that both issues are components of the same question of whether Meta Ireland has complied with its transparency requirements in respect of processing carried out on the basis of Article 6(1)(b). More specifically, it is my view that where a controller has not complied with its transparency requirements, it logically follows that a data subject may be misled, deliberately or otherwise, as to legal basis of any processing in this context. By contrast, where the controller has provided sufficient information to data subjects such that the transparency requirements have been complied with, it cannot be the case that the data subject has been misled as to the legal basis. The factual question of whether the data subject was misled as to the legal basis is therefore part of the broader question as to whether there was compliance with transparency requirements and should not be considered in isolation of this broader issue.

27. In its submissions on the Preliminary Draft, Meta Ireland disagreed with my view that issues (b), (c) and (d) fell within the scope of the Complaint.<sup>27</sup> In particular, Meta Ireland submitted that:

*“an investigation into a specific complaint should abide by the parameters of that complaint, which here is focused on “forced consent” only, in order to respect the integrity of the mandate provisions under Article 80 GDPR. Where an investigation is said to be into allegations raised by a specific complaint, a supervisory authority should confine its investigation accordingly”.*<sup>28</sup>

28. I agree with Meta Ireland to some extent that the Complaint *primarily* outlined concerns as to “forced consent”, however, I am of the view that the Complaint was not solely limited to consent. Rather, as I have outlined above, the Complaint concerned the legal basis of the processing<sup>29</sup> and, where Meta Ireland has not sought to rely on consent as the legal basis, it follows that the Commission is entitled to investigate and consider the legal basis which Meta Ireland has in fact sought to rely on. In terms of the transparency of the information provided, I would emphasise that the Complaint explicitly alleges that the information provided on the legal bases (in the Privacy Policy) is such that data subjects “*can only guess what data is processed, for which exact purpose and on which legal basis. This is inherently non-transparent and unfair within the meaning of Articles 5(1)(a) and 13(c)*”.<sup>30</sup> This clearly concerns the transparency of the information provided and, accordingly, I am of the view that it falls within the scope of the Complaint.

29. In its submissions on the Preliminary Draft, the Complainant alleged that the scope of the Complaint as identified in the Preliminary Draft did “*not adequately deal with the issues*” raised by the Complainant and, indeed, did “*not even come close*” to doing so.<sup>31</sup> As set out in both this Decision and the attached Schedule 1, the Complaint is clearly limited to the lawfulness of processing carried out on foot of the “agreement”, i.e. acceptance of the (Meta Ireland) Terms of Service and/or Instagram Terms of Use. I therefore do not accept that the matters addressed in the Preliminary Draft did not cover all aspects of the Complaint.

30. I also note that the Complainant’s submissions on the Preliminary Draft also alleged that there had been a failure by the Commission to fully investigate the relevant facts, in particular in respect of whether the “agreement” entered into by the individual data subject and Meta Ireland was for “a consent” or “a contract”.<sup>32</sup> I considered this matter in depth in the Preliminary Draft. In this respect, I also note the Complainant’s submissions on the Preliminary Draft call for the Commission to engage in a thorough investigation as to the nature of this

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<sup>27</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 4 – 5 (Section 3).

<sup>28</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 4, at para. 3.4.

<sup>29</sup> For example, see Complaint dated 25 May 2018, at p. 19.

<sup>30</sup> Complaint dated 25 May 2018, at p. 16.

<sup>31</sup> NOYB’s Submissions on the Preliminary Draft for IN-18-5-5 dated 11 June 2021, at pp. 12-13.

<sup>32</sup> NOYB’s Submissions on the Preliminary Draft for IN-18-5-5 dated 11 June 2021, at pp. 11-12.

agreement, having regard to the scope of the Complaint, this is, in my view, entirely unnecessary and would not divulge any new information or serve a useful purpose at this stage. As is set out in Section 3 below, there is no dispute in relation to the fact that there is a contract between Meta Ireland and the Complainant or the fact no consent within the meaning of the GDPR has been provided by the Complainant in concluding the “agreement” in dispute. What is in dispute, as set out in detail in this Decision and in Schedule 1, is the lawfulness of the personal data processing and the transparency of the information provided.

31. Following the circulation of the Draft Decision to the supervisory authorities concerned for the purpose of enabling them to express their views in accordance with Article 60(3) GDPR the supervisory authorities of Austria, Germany, Finland, France and the Netherlands raised objections in relation to the Commission’s assessment of the scope of the Complaint, as summarised above.

32. The EDPB determined, at paragraph 202 of the Article 65 Decision, that the inquiry underpinning this Decision ought to have included an examination of “*[Meta Ireland’s] processing operations, the categories of data processed (including to identify special categories of personal data that may be processed), and the purposes they serve*”. Accordingly, the EDPB directed, at paragraph 203 of the Article 65 Decision, the Commission to commence a new inquiry into these matters. While that direction cannot be addressed by the Commission in this Decision, the Commission considers it necessary to note the position, in light of the Commission’s assessment of the scope of the Complaint (as already recorded above) and for the purpose of ensuring compliance with its obligation, pursuant to Article 65(6) GDPR, to adopt its final decision on the basis of the Article 65 Decision. The EDPB further directed the Commission to remove its proposed conclusion on Finding 1 (as set out in the Draft Decision). That aspect of matters is addressed at the conclusion of the Commission’s assessment of Issue 1, below.

33. On the basis of the above, the issues that will be addressed in the Decision are as follows:

- Issue 1 – Whether clicking on the “Agree to Terms” button constitutes or must be considered consent for the purposes of the GDPR and, if so, whether it is valid consent for the purposes of the GDPR.
- Issue 2 – Whether Meta Ireland could rely on Article 6(1)(b) GDPR as a lawful basis for processing of personal data in the context of the Terms of Use and/or Data Policy.
- Issue 3 – Whether Meta Ireland provided the requisite information on the legal basis for processing on foot of Article 6(1)(b) GDPR and whether it did so in a transparent manner.

3. ISSUE 1 – WHETHER CLICKING ON THE “AGREE TO TERMS” BUTTON CONSTITUTES OR MUST BE CONSENT FOR THE PURPOSES OF THE GDPR

*Introduction*

33. As a preliminary issue, I note that Article 6(1)(a) GDPR provides that consent may be a lawful basis for the processing of personal data. While the legal basis of data processing in the context of the Instagram service is within the scope of the Complaint (see, Issue 2 below), this first issue is limited to the narrow assessment of whether the act of clicking the “Agree to Terms” button amounts to – or must amount to – consent for the purposes of the GDPR.

34. Therefore, in this section of the Decision, I will focus on consent and will assess two interrelated considerations: first, whether clicking the “Agree to Terms” button actually constitutes consent for the purposes of the GDPR and, second, whether the act of clicking “Agree to Terms” necessarily must be considered consent for such purposes. In this respect, I note that Meta Ireland’s position is that it did not seek to obtain the Data Subject’s consent via acceptance of the Terms of Use for processing in connection with the Terms of Use.<sup>33</sup>

*Relevant Provisions*

35. As noted above, Article 6(1) GDPR enumerates the lawful bases for processing personal data and states:

*“Processing shall be lawful only if and to the extent that at least one of the following applies:*

*(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes”.*

36. Consent is defined in Article 4(11) GDPR 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”.*

37. Interpretative guidance is found in Recital 32 GDPR which states that consent is an act which establishes a *“freely given, specific, informed and unambiguous indication of the data subject’s agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement”*. Recital 32 GDPR recognises that the act of consent may take several forms – for example, ticking an unchecked box, selecting

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<sup>33</sup> See, *inter alia*, Meta Ireland’s Submissions dated 22 February 2019, at p. 2, para. 2.5.



certain settings or a statement or conduct which “clearly indicates” the data subject’s agreement – but does not extend to “[s]ilence, pre-ticked boxes or inactivity”.

38. The conditions for valid consent are set out in Article 7 GDPR as follows:

*“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.”*

#### *Whether Clicking “Agree to Terms” Constitutes Consent for the Purposes of the GDPR*

39. As outlined above, the Complaint submitted that

*“the controller required the data subject to “agree” to the entire privacy policy and the terms [which] ... leads to our preliminary assumption, that all processing operations described therein are based on consent, or that the controller at least lead the data subject to belief that all these processing operations are (also) based on Article 6(1)(a) and/or 9(2)(a) of the GDPR”.*<sup>34</sup>

40. The Complaint also alleged that the consent was “forced” and misled data subjects – including the Named Data Subject – into believing that the processing was required as a contractual obligation.<sup>35</sup> In this regard, the Complainant premised its position on the assertion that Meta Ireland has relied on a “deceptive design” in respect of the user engagement flow.<sup>36</sup> As the Complainant’s

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<sup>34</sup> Complaint dated 25 May 2018, at p. 3.

<sup>35</sup> Complaint dated 25 May 2018, at pp. 3 -4.

<sup>36</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 27

<sup>39</sup> Meta Ireland’s Submissions dated 22 February 2019, at para. 1.1.

submissions in respect of “*misleading data subjects*” concern the transparency of the information provided to data subjects, this will be further considered in the context of Issue 3.

41. Meta Ireland’s position is that not all processing in the context of the Instagram Terms of Use is based on consent.<sup>39</sup> In relation to whether the act of clicking on the “Agree to Terms” button constitutes consent, Meta Ireland submitted that agreeing to the Instagram Terms of Use amounts to a contractual agreement and is not an act of consent for the purposes of Article 6(1)(a) GDPR.<sup>37</sup> Meta Ireland further asserted that it “*does not in any way seek to ‘infer’ consent from a user to process personal data based on their agreement to the Terms of Use*” and that there is a strict distinction between accepting the Terms of Use and obtaining consent for the purposes of the GDPR.<sup>38</sup> Moreover, Meta Ireland stated that the “*Terms of Use user flow was designed to enable the user to accept the Terms of Use and enter into a contract with Facebook Ireland [now Meta Ireland]*” and not as a mechanism for obtaining user consent.<sup>39</sup> For completeness, I acknowledge that Meta Ireland provided information as to the sets of processing operations for which consent is sought in the context of the Instagram service.<sup>40</sup>

42. As regards the individual act of clicking the “Agree to Terms” button, the Investigator stated that he was

*“not satisfied that this form of acceptance of the Data Policy constituted the data subject’s consent to processing within the meaning of the GDPR, because such an agreement does not objectively accord with the specific conditions for data protection consent as prescribed in Article 4(11) GDPR. In particular, this type of acceptance would not be regarded as freely given or unambiguous consent pursuant to Article 4(11) GDPR in circumstances where the Data Policy describes many different types of processing, performed for separate purposes.”*<sup>41</sup>

43. In setting out the above to the Parties in the Preliminary Draft, I took the view that Meta Ireland did not seek to rely on consent in requiring users to select the “Agree to Terms” button in the user engagement flow but rather that this related to the acceptance of the Terms of Use. In response to this, in its submissions on the Preliminary Draft dated 4 February 2022, Meta Ireland reaffirmed its position that “*it has not sought consent to the processing of personal data described in the Data Policy by asking users to agree to the Terms of Use*” as the latter is an “*entirely distinct document*” from the former.<sup>42</sup>

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<sup>37</sup> Meta Ireland’s Submissions dated 22 February 2019, at paras. 2.6 – 2.7.

<sup>38</sup> Meta Ireland’s Submissions dated 22 February 2019, at para. 2.9.

<sup>39</sup> Meta Ireland’s Submissions dated 22 February 2019, at para. 3.9.

<sup>40</sup> Meta Ireland’s Submissions dated 28 September 2018, at paras. 2.35 - 2.43; Meta Ireland’s Submissions dated 22 February 2019, at paras. 3.10, 3.13; Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 2.1.

<sup>41</sup> Final Inquiry Report dated 18 January 2021, at para. 187.

<sup>42</sup> Meta Ireland’s Submissions dated 4 February 2022, at para. 4.1.

44. On the contrary, it is the Complainant’s position, as expressed in its submissions on the Preliminary Draft, that “Facebook never *openly* ‘sought to rely on consent’”.<sup>43</sup> In particular, the Complainant sought to rely on the principle of *falsa demonstratio*, i.e. that the agreement between the Named Data Subject and Meta Ireland must be interpreted by reference to what “*truly intended to be, not at what it is labeled as*”.<sup>44</sup> In this regard, the Complainant sought to rely on the intention of the parties, the “*economic background and the common understanding of the agreement*” and the fact that Meta Ireland had only recently changed the provisions to support this position.
45. While the Complainant’s submissions may have some relevance to the issue of reliance on Article 6(1)(b) GDPR as the lawful basis for the processing (considered in Issue 2 below), it does not appear to me that this addresses the issues underpinning reliance on Article 6(1)(a) GDPR. Indeed, I am satisfied that, in requiring registered users to select the “Agree to Terms” button in the user engagement flow, Meta Ireland was not considering this act to amount to an act of consent. The user engagement flow relates to acceptance of the Terms of Use. I note in this regard that the Terms of Use refer to (and indeed contains a link to) the Instagram Data Policy, stating that the document “*explains how we collect, use, and share information across the Facebook Products. It also explains the many ways you can control your information, including in the Instagram Privacy and Security Settings*”.<sup>45</sup> It is clear from the text of the Data Policy that Meta Ireland does not intend to rely on consent for all data processing in the context of the Instagram service.<sup>46</sup> It further appears that the Parties are in agreement that acceptance of the Terms of Use was not valid consent for the purposes of the GDPR.
46. For the reasons outlined above, I proposed to conclude that, as a matter of fact, Meta Ireland did not – and did not seek – to rely on consent as the legal basis for all processing in connection with the Terms of Use and was satisfied that Meta Ireland considered that selecting the “Agree to Terms” button represented acceptance of the Terms of Use.

As noted already above, however, the EDPB instructed the Commission (by way of paragraph 203 of the Article 65 Decision) to remove, from its Draft Decision, “its conclusion on Finding 1”. Finding 1 included proposed conclusions on two linked questions, namely: (i) whether Meta Ireland sought to rely on consent in order to process personal data to deliver the Terms of Service; and (ii) whether Meta Ireland was legally obliged to rely on consent in order to do so. Given that my previously proposed conclusion (as noted immediately above) in relation to the first of these questions is encompassed by the EDPB’s instruction, I make no finding on this first question.

<sup>43</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 15.

<sup>44</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 15.

<sup>45</sup> See the Section entitled “The Data Policy” of the Instagram Terms of Use.

<sup>46</sup> In this regard, see Section V entitled “What is our legal basis for processing data?” of the Instagram Data Policy.

### *Whether Meta Ireland must rely on Consent*

47. In the course of the Inquiry, the Complainant advanced, what appears to me to be, an additional and alternative argument in respect of consent. In essence, the Complainant alleged that processing in connection with the Instagram Terms of Use must be based on consent. In other words, the Complainant asserted that Article 6(1)(a) – consent of the data subject – could, as a matter of law, be the only legal basis applicable to processing of personal data in connection with the Instagram service. It further appears to me that the Complainant also alleged that, as Meta Ireland did not rely on consent as the lawful basis for such processing, the processing was therefore to be considered unlawful.
48. In this regard, in its submissions dated 19 August 2020, the Complainant sought to draw a distinction between contracts on the basis of their subject matter; i.e. between contracts which are “*primarily data processing*” and contracts which concern “*primarily some other contractual service*”.<sup>47</sup> In drawing this distinction, the Complainant suggested that Article 6(1)(a) GDPR is the appropriate legal basis for the former category of contracts (i.e. those which primarily concern data processing) whereas Article 6(1)(b) may be appropriate in respect of latter. The effect of this position would be that consent would be required to be the default legal basis for agreements which (primarily) concern data processing activities. I also note that the Complainant asserted that Article 6(1)(a) was *lex specialis* as compared to any other legal basis in Article 6 GDPR and sought to draw a distinction between the “definition of consent” and the “legal conditions for validity”.<sup>48</sup> If accepted, this approach would imply that there may be a hierarchy of legal bases.
49. The Complainant further stated that it would be “*utterly absurd*” if consent requirements were circumvented by controllers presenting “declarations” as “data processing contracts” (such as, the Terms of Use in this context).<sup>49</sup> In this regard, the Complainant added that there should be a “*systemic interpretation*” to create a distinction between Articles 6(1)(a) and 6(1)(b) on the basis that “[a]llowing the controllers free reign on choosing which legal basis is the most appropriate for them would go against the intention of the EU legislator and would definitely undermine the protection of data subjects”.<sup>50</sup> The Complainant further argued that, as the modified parts of the Terms of Use solely concerned data protection issues, those modifications could not constitute contractual terms.<sup>51</sup> In this regard, I emphasise that the Commission does not have competence to consider whether a particular term is valid as a matter of domestic contract law.
50. In his consideration of this matter, the Investigator noted that the Complaint is premised on the fact that as the Named Data Subject “*had to agree to*” the updated Terms of Use and Data Policy in 2018, it followed that “*all processing operations*” referenced in Terms of Use and Data Policy

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<sup>47</sup> Complainant’s Submissions dated 19 August 2020, at p. 44.

<sup>48</sup> Complainant’s Submissions dated 19 August 2020, at p. 68.

<sup>49</sup> Complainant’s Submissions dated 19 August 2020, at p. 48.

<sup>50</sup> Complainant’s Submissions dated 19 August 2020, at p. 48.

<sup>51</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 44.

must be based on consent.<sup>52</sup> It does not appear to me that the Complaint is sensitive to the distinction between the act of agreeing to a contract (even in circumstances where that contract concerns the processing of personal data) and the act of providing consent for the purpose of legitimatising the processing of personal data. It is important to emphasise the EDPB's view that these are entirely distinct concepts which "*have different requirements and legal consequences*".<sup>53</sup> Indeed, these concepts refer to entirely different legal bases, with different components and all the consequences that that entails.

51. In the Preliminary Draft, I emphasised that any implication that the GDPR contains a hierarchy of legal bases is, in my view, inherently problematic and contradicts the wording of the GDPR. Indeed, it cannot be said that "*one ground has normative priority over the others*", and nor does the text of the GDPR even suggest that there may be a hierarchy of legal bases.<sup>54</sup> This is the position expressed by the Article 29 Working Group, which, while not strictly speaking legally binding on the Commission, provides guidance which is illustrative. In respect of the former Article 7 of the Data Protection Directive (i.e. Directive 95/46/EC), which as with Article 6 GDPR concerns the legal basis of processing, the Article 29 Working Group stated that "*the text ... does not make a legal distinction between the six grounds and does not suggest that there is a hierarchy among them*".<sup>55</sup> This also appears to be the view of the EDPB, as it has stated that the "*application of one of these six bases must be established*" [my emphasis].<sup>56</sup> Moreover, the CJEU, also in the context of Directive 95/46/EC, held that the obtaining of consent is not a precondition for reliance on legitimate interests as a legal basis.<sup>57</sup> The effect of this finding is that consent is not considered to be a necessary or mandatory legal basis where a controller has sought to rely on another legal basis.

52. In the Preliminary Draft, I noted that the Complainant also relied on Directive 93/13/EEC, i.e. the Unfair Terms in Consumer Contracts Directive, to support the argument that consent takes precedence over other legal bases.<sup>58</sup> In particular, the Complainant alleged that, on the basis of Article 5 thereof, the "*terms of service are to be interpreted in the interests of the consumer in the event of ambiguity*".<sup>59</sup> In this regard, I emphasise that Article 55(1) GDPR limits the competence of supervisory authorities to that conferred by the GDPR. Therefore, it cannot be said that the

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<sup>52</sup> Final Inquiry Report dated 18 January 2021, at para. 133.

<sup>53</sup> Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, at para. 17.

<sup>54</sup> C Kuner *et al* (eds.), *The EU General Data Protection Regulation: A Commentary (Oxford 2020)*, at p. 329.

<sup>55</sup> Article 29 Working Group, "Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC" (adopted on 9 April 2014), at p. 10.

<sup>56</sup> EDPB Guidelines on Consent (adopted 4 May 2020), at paras 121 - 123. I note that the Consent Guidelines are merely a "*slightly updated version*" of the Article 29 Working Party Guidelines on consent under Regulation 2016/679<sup>59</sup> which were adopted on 10 April 2018, i.e. prior to the date on which the Complaint was made

<sup>57</sup> Case 708/18 *Asociația de Proprietari bloc M5A-ScaraA v TK* ECLI:EU:C:2019:1064, at para. 41.

<sup>58</sup> Complainant's Submissions dated 19 August 2020, at p.49.

<sup>59</sup> Complainant's Submissions dated 19 August 2020, at p.49.

GDPR implies that supervisory authorities must necessarily – or indeed are competent to - give effect to concepts provided for in other measures.

53. In its submissions on the Preliminary Draft, Meta Ireland stated that the GDPR does not contain an *“automatic activation of consent as a legal basis”* where there is a contractual agreement between the relevant parties.<sup>60</sup> Meta Ireland also agreed with my view that there is no hierarchy between the lawful bases under the GDPR. In support of this position, Meta Ireland also referred to the recent statement of the European Commission that *“the six legal bases for the processing of personal data under the GDPR are equally valid and protective”*.<sup>61</sup> For the avoidance of doubt, I restate my position that no legal basis has primacy over any other and further note that, despite the arguments initially advanced by the Complainant, in its submissions on the Preliminary Draft, the Complainant agreed that there is no hierarchy of legal bases under the GDPR.<sup>62</sup>
54. Accordingly, on the basis of the above, I am of the view that Article 6(1) GDPR – or indeed any other provision of the GDPR – does not envisage or require that certain processing based on particular circumstances must necessarily be based on consent.
55. Where a contract has been entered into between a consumer and an organisation, it may be the case that the lawful basis is *“necessity for the performance of a contract”*, provided for in Article 6(1)(b) GDPR. It cannot be said that the fact of agreeing to certain contractual terms necessarily means that any processing of personal data under such contract is based on consent for the purposes of the GDPR. As I have stated above, there is an important distinction between the act of accepting contractual terms and providing consent to data processing, even in circumstances where the relevant contract is premised on data processing. Reliance on Article 6(1)(b) GDPR turns on the particular agreement entered into by the parties and where the relevant processing operation(s) or set(s) of operations are necessary for the performance of that particular agreement. It cannot be said that the type of contract (in particular when divorced from the content of the contract) dictates the legal basis. To this, I would add that the EDPB has advised that where the relevant processing is necessary for the performance of a contract, it is not appropriate to rely on consent as the legal basis.<sup>63</sup>
56. Relying on the Complainant’s distinction between contracts primarily concerning data processing and contracts relating to other contractual services (which I have described above), the Complainant alleged that *“the intention, purpose and the context of the Instagram Terms of Use obviously about concern data processing and not a civil law contract”* and must be based on

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<sup>60</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 6, at para 5.2.

<sup>61</sup> Letter from Didier Reynders, Member of the European Commission to MEPS Sophie in ‘t Veld, Birgit Sippel, Tineke Strik and Cornelia Ernst (undated); annexed to Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022.

<sup>62</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 16.

<sup>63</sup> EDPB Guidelines on Consent (adopted 4 May 2020), at para. 31.

consent as they could not be considered contractual clauses.<sup>64</sup> In this respect, I am not aware of any caselaw or authority which suggests that controllers cannot rely, at least in part, on Article 6(1)(b) GDPR as a legal basis for processing personal data simply because their businesses “*primarily*” concern data processing. In the absence of any such authority, I cannot read in such additional conditions and provisos to the GDPR.

57. In response to the Preliminary Draft, the Complainant alleged that “*all other legal bases simply do not ‘fit’ the types of processing in the dispute. There is simply no contract under Article 6(1)(b) ... or legal obligation under Article 6(1)(c) GDPR. So as a matter of logic, Article 6(1)(a) GDPR is simply the remaining option for auxiliary processing*”.<sup>65</sup> This response further affirms my position, as expressed in the Preliminary Draft, that the substance of the Complainant’s argument concerns an entirely separate point, namely that Meta Ireland is not entitled to rely on Article 6(1)(b) GDPR as a lawful basis for processing in the context of the Instagram service. If the Complainant succeeds in that latter argument, it follows that another legal basis must be relied on and in this instance, in the Complainant’s view, that legal basis would have to be consent. In my view, this alternative argument - to the effect that consent is the only remaining possible lawful basis because no other basis can be used lawfully for this particular agreement – is properly considered in the context of Issue 2, i.e. whether Meta Ireland is entitled to rely on Article 6(1)(b) GDPR.

58. For completeness, I shall return to and address the Complainant’s assertion that the definition of consent must be distinguished from the condition of validity.<sup>69</sup> Elaborating on this point, the Complainant sought to rely on Article 7(2) and (4) GDPR. As I have outlined above, Article 7(2) GDPR states:

*“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.”*

59. Article 7(4) GDPR states:

*“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.”*

60. At this juncture, I note that Meta Ireland’s position on this matter (as expressed in its submissions on the Preliminary Draft) is that “*arguments by the Complainant on the ‘conditions for validity’ of*

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<sup>64</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 44.

<sup>65</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 16.

<sup>69</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 68.

*consent are entirely irrelevant to the Inquiry because Meta Ireland does not seek to obtain consent when it obtains contractual agreement from its users to the Terms of Use*".<sup>66</sup> I further note that Meta Ireland does rely on consent for processing data provided by Meta Ireland's "partners" (i.e. third parties) about user activity off-Instagram for the purposes of providing personalised advertising but obtains consent via a distinct user engagement flow and not via acceptance of the Terms of Use.<sup>67</sup>

61. In this respect, it is important to emphasise that Article 7 GDPR concerns the "conditions for consent" but is only applicable where consent is being relied on as the legal basis for processing. This was the view of Advocate General Szpunar in *Planet49*.<sup>68</sup> Article 7 GDPR does not operate as a free-standing provision which indicates which lawful basis a controller must or indeed should rely on in a particular context. Rather, the purpose of Article 7 GDPR is to assist with the determination of whether the "conditions for validity" (to borrow the Complainant's language) have been met.

62. I further note that the EDPB Guidelines on Consent consider a number of circumstances in which "bundling" (or what the Complainant refers to as "forced consent"<sup>69</sup> or "hidden consent"<sup>70</sup>) may occur.<sup>71</sup> For example, this occurs when consent can neither be freely given nor easily withdrawn because the provision of consent is made part of the terms of a contract, particularly in circumstances where there is an unequal balance of power between the data controller and the data subject.<sup>76</sup> As with Article 7 GDPR, consideration of bundling is only relevant where the controller has purported to rely on consent in the first place.

63. Having considered the submissions of the Parties, including the submissions on the Preliminary Draft, in the Draft Decision, I therefore proposed to conclude that the legal basis for processing of personal data under the Terms of Use between Meta Ireland and Instagram users, including the Complainant, does not, as a matter of law, have to be consent under Article 6(1)(a) GDPR and, as a matter of fact, Meta Ireland does not rely on consent for this purpose and the agreement to the Terms of Use does not constitute consent for the purposes of the GDPR.

As noted already above, however, the EDPB instructed the Commission (by way of paragraph 203 of the Article 65 Decision) to remove, from its Draft Decision, "its conclusion on Finding 1". In

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<sup>66</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at p. 7, at para 5.2.

<sup>67</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at p. 7, at para 5.2.

<sup>68</sup> Case 673/18 *Planet49 GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*, (Opinion of AG Szpunar), at para. 97.

<sup>69</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 41.

<sup>70</sup> Complaint dated 25 May 2018, at p. 3.

<sup>71</sup> EDPB Guidelines on Consent (adopted 4 May 2020), at paras. 25 – 41, in particular paras. 26 and 29.

<sup>76</sup> EDPB Guidelines on Consent (adopted 4 May 2020), at pp. 6-7.



accordance with that instruction, I make no finding on the matters encompassed by the above assessment of Issue 1.

#### 4 ISSUE 2 - RELIANCE ON 6(1)(B) GDPR AS A LAWFUL BASIS FOR PERSONAL DATA PROCESSING

##### *Introduction*

64. As outlined above, the Complainant has submitted that Meta Ireland’s processing of personal data under the Instagram Terms of Use must, as a matter of law, be based entirely on consent as a legal basis under the GDPR. The Complainant’s argument also rests on the contention that Meta Ireland cannot rely on Article 6(1)(b) GDPR to process personal data in order to perform the Instagram Terms of Use.

##### *Relevant Provisions*

65. Pursuant to Article 8 of the EU Charter of Fundamental Rights (the “Charter”):

*“1. Everyone has the right to the protection of personal data concerning him or her.*

*2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.”*

66. Further detail on the principles underpinning the processing of personal data is found in Article 5 GDPR; in particular, Article 5(1)(a) GDPR provides that personal data must be “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”.

67. Interpretative guidance is found in Recital 39 GDPR which states that “[a]ny processing of personal data should be lawful and fair”. Moreover, Recital 40 GDPR provides that:

*“In order for processing to be lawful, personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law, either in this Regulation or in other Union or Member State law.”*

68. Article 6(1) GDPR enumerates six lawful bases for processing personal data and states:

*“Processing shall be lawful only if and to the extent that at least one of the following applies:*

*...*

*(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract...”*

69. In this regard, Recital 44 GDPR states:

*“Processing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract.”*

70. Recital 68 GDPR states:

*“... Furthermore, that right [the right to receive personal data] should not prejudice the right of the data subject to obtain the erasure of personal data and the limitations of that right as set out in this Regulation and should, in particular, not imply the erasure of personal data concerning the data subject which have been provided by him or her for the performance of a contract to the extent that and for as long as the personal data are necessary for the performance of that contract.”*

71. In considering reliance on Article 6(1)(b) as a legal basis for processing, regard must be had, *inter alia* to the respective rights of the parties to a contract, as well as Article 16 of the Charter which provides for the freedom to conduct a business. It states that “[t]he freedom to conduct a business in accordance with Community law and national laws and practices is recognised.”

*Assessment of whether Meta Ireland was entitled to Rely on Article 6(1)(b) GDPR*

72. In considering this matter, in the Draft Decision, I first examined the relationship between the Terms of Use and the Data Policy. This assessment was necessitated by the fact that the Named Data Subject has alleged that he agreed to the Data Policy by virtue of accepting the updated Instagram Terms of Use.<sup>72</sup> Having addressed this matter, I then, in the Draft Decision, considered the more substantive issue of whether Meta Ireland is entitled to rely on Article 6(1)(b) GDPR as the legal basis underpinning the processing of personal data in connection with the Terms of Use.

*Relationship between the Terms of Use and the Data Policy*

73. The Complainant alleged that *“the controller required the data subject to ‘agree’ to the entire privacy policy and the terms”*;<sup>73</sup> that is, by clicking the “Agree to terms” button, the Complainant contended that the Named Data Subject agreed to both the Terms of Use and the Data Policy. As the Investigator noted, the Complainant alleged that *“that the data subject consented to processing described in the Data Policy by clicking on the ‘Next button at the end of the first information page of the Instagram user engagement flow”*.<sup>74</sup> Meta Ireland’s position is that the selection of the “Agree to Terms” button does not mean that a data subject has agreed to the Data Policy.<sup>75</sup>

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<sup>72</sup> Complaint dated 25 May 2018, at p. 3.

<sup>73</sup> Complaint dated 25 May 2018, at p. 3.

<sup>74</sup> Final Inquiry Report dated 18 January 2021, at para. 187, referring to Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at pp. 42 – 43.

<sup>75</sup> Meta Ireland’s Submissions dated 22 February 2019, at p.2, para. 2.5.

74. The Investigator was of the view that the Instagram Data Policy was the means by which Meta Ireland provided information on data processing to Instagram users and was not the means by which Instagram users provided consent to any such data processing.<sup>76</sup> While the Investigator noted that the user engagement flow was “*ambiguous and unclear*” and it “*would not be unreasonable for a person reading the Data Policy information page to conclude that they had, in some sense, agreed to the Data Policy*”, he nonetheless concluded that the Data Policy and Terms of Use were separate.<sup>77</sup>
75. In the Preliminary Draft, I expressed the preliminary view that the acceptance in question was not an act of consent but, on its terms, constituted acceptance of, or agreement to, a contract i.e. the Terms of Use. In its submissions on the Preliminary Draft, Meta Ireland agreed with my assessment in this regard.<sup>78</sup> The Complainant’s submissions on the Preliminary Draft did not express any further views on this issue.
76. I see no reason to depart from my earlier view. Although the Data Policy was hyperlinked in the course of the engagement flow (see Figure 1 above), I am not satisfied that the Data Policy was thereby incorporated into the Terms of Use. The “Agree to Terms” button clearly referred to acceptance of the “terms” as distinct from the Data Policy (and indeed the Cookies Policy). In this sense, I agree with Meta Ireland’s view that the Data Policy is an “*information document... rather than being contractual in nature*”.<sup>84</sup> Indeed, the Data Policy is a document through which Meta Ireland seeks to comply with particular provisions of the GDPR in relation to transparency, whereas the Terms of Use is the contract between Meta Ireland and the Instagram user. Meta Ireland relies on various legal bases for various data processing operations, some of which are based on contractual necessity. Where the legal basis of contractual necessity is relied on, the contract in question is the Terms of Use. In my view, the contract in question, and therefore the contract for which the analysis based on Article 6(1)(b) GDPR must take place, is the Terms of Use only. The Data Policy is only relevant insofar as it sheds light on the processing operations carried out for which Meta Ireland relies on Article 6(1)(b) GDPR.
77. The Data Policy itself references a very wide range of processing operations. As noted in Schedule 1, the Complainant sought to direct the Commission to conduct an assessment of all processing operations carried out by Meta Ireland in the context of the Instagram service. I have explained why it is not open to a Complainant – who must present a complaint with a reasonable degree of specificity – to demand such an assessment. While the Complaint refers to various examples of data processing, e.g. the processing of behavioural data, it does not go so far as to directly link the Complaint to specific processing operations by reference to an identifiable body of data with any great clarity or precision. In the circumstances, it is necessary to consider the issue relating to reliance on Article 6(1)(b) GDPR at the level of principle, and my findings are made on that basis.

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<sup>76</sup> Final Inquiry Report dated 18 January 2021, at para. 188.

<sup>77</sup> Final Inquiry Report dated 18 January 2021, at paras. 186 - 188.

<sup>78</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 8, at para. 6.6.

<sup>84</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at p. 16.

78. More specifically, insofar as the Complaint refers to particular processing activities, it has a specific focus on data processed to facilitate behavioural advertising. This will accordingly be the focus of the analysis in this Decision. In the Draft Decision, in order to ensure that it had a reasonable degree of specificity, I considered whether Meta Ireland could, in principle, rely on Article 6(1)(b) GDPR for processing under the Instagram Terms of Use, including and in particular in the context of behavioural advertising.

#### Whether Meta Ireland was Entitled to Rely on Article 6(1)(b) GDPR

##### *Positions of the Complainant, Meta Ireland and the Investigator*

79. In considering whether Meta Ireland was in fact entitled to rely on Article 6(1)(b) GDPR as the legal basis for processing in connection with the Terms of Use, it is necessary to delineate the positions of (i) the Complainant, (ii) Meta Ireland, and (iii) the Investigator.

##### The Complainant

80. In the Complaint, the Complainant expressed concern that Meta Ireland were seeking to “to pretend that these processing operations would then fall under Article 6(1)(b) of GDRP [sic]”.<sup>79</sup> In outlining their understanding of Article 6(1)(b) GDPR, the Complainant relied on the following from the Opinion 06/2014 of the Article 29 Working Party:

*“The provision [now, Article 6(1)(b)] must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller. Also the fact that some data processing is covered by a contract does not automatically mean that the processing is necessary for its performance. For example, Article 7(b) [now, Article 6(1)(b)] is not a suitable legal ground for building a profile of the user’s tastes and lifestyle choices based on his click-stream on a website and the items purchased. ... Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them ‘necessary’ for the performance of the contract”.*<sup>80</sup>

In subsequent submissions, the Complainant expanded upon its understanding of the concept of “necessity” in data protection law.<sup>81</sup> The Complainant alleged that “processing which is not strictly

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<sup>79</sup> Complaint dated 25 May 2018, at p. 3.

<sup>80</sup> Complaint dated 25 May 2018, at pp. 3 – 4, citing Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, at p. 16, [https://ec.europa.eu/justice/article29/documentation/opinion-recommendation/files/2014/wp217\\_en.pdf](https://ec.europa.eu/justice/article29/documentation/opinion-recommendation/files/2014/wp217_en.pdf).

<sup>81</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 65.

*'necessary' for a contract would automatically imply a violation of Article 8 in conjunction with Article 52(1) of the Charter as it would not pass the necessity test".<sup>82</sup>*

81. In the text of the Complaint, the Complainant further stated that Meta Ireland could only rely on Article 6(1)(b) as a legal basis for processing which concerned a *"core element of a social network"*.<sup>83</sup> The Complainant added that, in its view, the sections of the Terms of Use which concerned *"advertisement[s], sponsored content, analysis and improvement of the controller's products and alike"* were not such *"core elements"* or a *"relevant contractual obligation"* and, accordingly, Meta Ireland could not rely on Article 6(1)(b) GDPR.<sup>90</sup> In subsequent submissions, the Complainant alleged that while the EDPB envisages that Article 6(1)(b) GDPR might be a lawful basis for processing which occurs for the *"personalisation of content"*, it could not constitute a lawful basis where the processing *"is not an integral part of using the Service"*.<sup>84</sup>

82. The Complainant expanded on its position in respect of Article 6(1)(b) GDPR as a legal basis for processing in subsequent submissions. In this regard, the Complainant relied on the following statement from the EDPB Guidelines on Article 6(1)(b): *"it is important to determine what the scope of the contract is and what data would be necessary for the performance of that contract"*.<sup>85</sup> The Complainant alleged that neither the Commission nor the Belgian DPA had conducted such an exercise.<sup>86</sup> The Complainant also proposed several steps that the Commission should follow in our assessment of the matter. In particular, the Complainant alleged that the Instagram Terms of Use should be assessed by reference to Belgian contract law.<sup>87</sup>

83. In addition, the Complainant submitted that Meta Ireland did not identify, with specificity, the *"specific processing operations [which] are "necessary" for specific clauses of the contract"*.<sup>88</sup> Rather, it is the Complainant's position that the Commission must first clarify which clauses in the contract between the Named Data Subject and Meta Ireland are relied on as being objectively necessary for the performance of the contract. In the Complainant's view:

*"None of these "statements" [in the Instagram Terms of Use] can reasonably be considered an "obligation" under the applicable provisions of the Belgian Civil Code; they*

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<sup>82</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 65.

<sup>83</sup> Complaint dated 25 May 2018, at p. 5.

<sup>90</sup> Complaint dated 25 May 2018, at p. 5.

<sup>84</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 67, citing the Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019).

<sup>85</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 58.

<sup>86</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 58.

<sup>87</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at pp. 59 - 60.

<sup>88</sup> Complainant's Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 51.

*are neither enforceable, nor in possession of a specific subject matter that could be described as a contractual commitment”.*<sup>89</sup>

The Complainant also considered the individual clauses contained in the Instagram Terms of Use to be not contractual in nature.<sup>97</sup>

84. I further note the Complainant’s position that processing under Article 6(1)(b) GDPR could only be lawful where such processing is in the interests of the data subject. That is, the Complainant suggested that it is important to *“draw a line in order to separate the processing necessary to provide the services of a social network (e.g. own page, news, photo uploads) from the processing in the sole interest of Facebook (e.g. advertising, product development)”*.<sup>98</sup>

### Meta Ireland

85. In the course of the Inquiry, Meta Ireland submitted that it does not seek to mislead the user by relying on “hidden” consent in connection with any user’s acceptance of the Terms of Use.<sup>90</sup> In any case, Meta Ireland alleged that *“the Complainant has failed to articulate any meaningful argument that any of the specific processing described in the “The Instagram Service” section of the Terms of Use cannot be based on Article 6(1)(b)”*.<sup>91</sup> In addition, Meta Ireland asserted that *“the concept of what is necessary in the context of Article 6(1)(b) GDPR does not mean that processing must be strictly essential to the performance of the contract, or the only way to perform the underlying contract”*.<sup>101</sup> In this vein, it considered that *“the processing which is necessary to perform the full agreement entered into between the parties can include optional or conditional elements of contract, and this is a matter for the parties to the contract”*.<sup>92</sup> Meta Ireland also did not consider that the contract must be in the interests of the data subject.<sup>93</sup>

### The Investigator

86. First, the Investigator did not accept the argument that the acceptance of the Terms of Use amount to “hidden” consent.<sup>94</sup> Second, the Investigator formed the view that the substance of the agreement between the parties must be examined but that the term “necessary” *“does not mean that processing must be strictly essential to performance of the contract, or the only way to perform the underlying contract”* but extends to processing which is necessary for the

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<sup>89</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 60.

<sup>97</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 62.

<sup>98</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 72.

<sup>90</sup> Meta Ireland’s Submissions dated 22 February 2019, at paras. 2.8 – 2.10.

<sup>91</sup> Meta Ireland’s Submissions dated 22 February 2019, at para. 2.12. <sup>101</sup>

Meta Ireland’s Submissions dated 22 June 2020, at para. 4.2.

<sup>92</sup> Meta Ireland’s Submissions dated 22 June 2020, at para. 4.3 [footnotes omitted].

<sup>93</sup> Meta Ireland’s Submissions dated 22 June 2020, at para. 4.4.

<sup>94</sup> Final Inquiry Report dated 18 January 2021, at para. 223.

performance of the entire agreement entered into by the relevant parties.<sup>95</sup> The Investigator was not convinced that the assessment of the entire agreement implied the identification of “core functions” of the contract.<sup>96</sup> Third, the Investigator was not satisfied that Article 6(1)(b) GDPR was limited to contracts which were deemed to be in the interests of the data subject.<sup>97</sup> On this basis of this analysis, the Investigator formed the view that Meta Ireland could rely on Article 6(1)(b) GDPR as the lawful basis for processing in the context of the Instagram service.

### *My Consideration of the Issue*

87. In considering this issue, I have had regard to the guidance of the EDPB on the processing of personal data under Article 6(1)(b) GDPR (the “Article 6(1)(b) Guidelines”).<sup>98</sup> Although I emphasise that the Article 6(1)(b) Guidelines are, strictly speaking, not legally binding and have considered this issue in high-level, general terms, these guidelines are nonetheless instructive as to the factors to be taken into account in addressing this issue. I note that the Article 6(1)(b) Guidelines clearly states that Article 6(1)(b) may be relied on as a legal basis for processing where “*the processing in question must be objectively necessary for the performance of a contract with a data subject*”.<sup>99</sup> It is evident from the drafting of Article 6(1)(b) that consideration of the meaning of the term “contract” within a data protection context is required, as the existence of a contract is a prerequisite for reliance on Article 6(1)(b) as a legal basis. However, I also consider that an assessment of the meaning of the terms “necessary” and “performance” within this context is also required. For completeness and contrary to the Complainant’s submissions on this matter in its response to the Preliminary Draft,<sup>100</sup> I note that I do not have competence to consider substantive issues of contract law,<sup>101</sup> and, accordingly, my analysis is limited to the specific contract entered into by the Named Data Subject and Meta Ireland in respect of the Instagram service.

88. In considering the meaning of “performance” in the context of Article 6(1)(b) GDPR, I first note that that the precise legal definition of what constitutes performance of a contract is also a matter primarily determined by the applicable national law. Nonetheless, the recognition by the EDPB that “*processing is necessary in order that the particular contract with the data subject can be performed*” is instructive.<sup>102</sup> In general terms, a contract is performed when each party to that contract discharges their contractual obligations by reference to the bargain struck between the

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<sup>95</sup> Final Inquiry Report dated 18 January 2021, at paras. 231 - 232.

<sup>96</sup> Final Inquiry Report dated 18 January 2021, at para. 235.

<sup>97</sup> Final Inquiry Report dated 18 January 2021, at para. 244.

<sup>98</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019).

<sup>99</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 22.

<sup>100</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at pp. 16 - 17.

<sup>101</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at paras. 9 and 13.

<sup>102</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 26.

parties. It further seems to me that the Article 6(1)(b) Guidelines implicitly endorse an assessment of performance of those contractual obligations by reference to whether “*a requested service can be provided*”.<sup>103</sup> That is, it appears to me that there must be a nexus between the specific processing operations and the bargain struck as part of the contract.<sup>104</sup>

89. An assessment of “performance” is clearly linked to the concept of “necessity” as what is necessary for the performance of a contract is anything which, if it is did not occur, would mean that the specific contract entered into would not have been performed. The mere inclusion of a term in a contract does not necessarily mean that it is necessary for the performance of that contract; rather, a functional assessment of the specific contract should take place. This has been recognised by the EDPB; for example, in the Article 6(1)(b) Guidelines, the EDPB indicated that the fact that a contract mentions or refers to data processing does not necessarily imply that Article 6(1)(b) is engaged.<sup>105</sup> In this regard, I emphasise the EDPB’s view that “*controller should be able to demonstrate how the main subject-matter of the specific contract with the data subject cannot, as a matter of fact, be performed if the specific processing of the personal data in question does not occur*”.<sup>106</sup>

90. It is appropriate to say, at this juncture, that the consideration of what is necessary for the performance of a contract entails more than a simple assessment of what is or is not written into the terms of a contract.<sup>107</sup> In the Article 6(1)(b) Guidelines, the EDPB provided guidance on the interpretation of necessity within the context of data protection law. It remains the case however that necessity cannot be considered entirely in the abstract, and careful regard must be had for what is necessary for the performance of the specific contract freely entered into by the parties. In this regard, I note the EDPB’s view that:

*“Where a controller seeks to establish that the processing is based on the performance of a contract with the data subject, it is important to assess what is objectively necessary to perform the contract. ‘Necessary for performance’ clearly requires something more than a contractual clause” [my emphasis].<sup>108</sup>*

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<sup>103</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 17.

<sup>104</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 30.

<sup>105</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 27.

<sup>106</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 30.

<sup>107</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 23.

<sup>108</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 27.



91. The Article 6(1)(b) Guidelines also set out that controller should:

*“demonstrate how the main object of the specific contract with the data subject cannot, as a matter of fact, be performed if the specific processing of the personal data in question does not occur. The important issue here is the nexus between the personal data and processing operations concerned, and the performance or non-performance of the service provided under the contract.”*<sup>109</sup>

92. I also note that the term “necessary” must be understood in terms of its independent meaning within EU law and also within the context and objective of data protection matters. In this regard, I note that, in *Heinz Huber v Bundesrepublik Deutschland*, the CJEU held that “necessity” has “its own independent meaning” in EU law and “must be interpreted in a manner which fully reflects the objective of that directive” (in that case, the relevant measure was Directive 95/46/EC, the predecessor of the GDPR).<sup>110</sup> In my view, this indicates that necessity should be interpreted by reference to the objectives of the relevant legislative measure, i.e. the GDPR in this context.

93. Moreover, I consider it prudent to emphasise that, in *Huber*, the CJEU also indicated that it may be appropriate to consider whether the chosen course of action enables the “legislation to be more effectively applied”, suggesting that “necessity” does not require the most minimal processing possible.<sup>111</sup> In this regard, I share the Investigator’s view<sup>112</sup> that this implies that a strict necessity test is not envisaged but rather, the test includes processing beyond the most minimal to meet the objective where the processing renders a lawful objective “more effective”.<sup>112</sup> However, the EDPB proposes clear limits to this by stating that “merely referencing or mentioning data processing in a contract is not enough to bring the processing in question within the scope of Article 6(1)(b).”<sup>113</sup>

94. The Article 6(1)(b) Guidelines emphasise that necessity is assessed by reference to the “particular contract with the data subject”.<sup>114</sup> In this respect, the EDPB have regard to the “core” functions of the contract; this is reflective of the Complainant’s position that the core functions of the contract must be determined so as to assess whether the processing is objectively necessary to perform that contract.<sup>115</sup> In the Draft Decision, I expressed the view that it is correct to define

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<sup>109</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at para. 30.

<sup>110</sup> Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-09705 at para. 52.

<sup>111</sup> Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-09705 at para. 66.

<sup>112</sup> Final Inquiry Report dated 18 January 2021, at para. 230(vi).

<sup>112</sup> See Case C-524/06 *Heinz Huber v Bundesrepublik Deutschland* [2008] ECR I-09705 at para. 62.

<sup>113</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 27.

<sup>114</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 26.

<sup>115</sup> Complaint dated 25 May 2018, at p. 5.

necessity by reference to the core functions of the specific contract at issue. I further agreed that the EDPB is correct that necessity for the purposes of Article 6(1)(b) is determined by reference to the particular and specific contract<sup>116</sup> that has been entered into by the controller (and/or processor) and data subject(s). It follows that the approach I had taken in the Draft Decision was to assess whether the relevant processing operation(s) were necessary to fulfil the particular and specific contract entered into by the Named Data Subject and Meta Ireland (i.e. the Instagram Terms of Use).

95. There is an interrelationship between the concepts of “necessary”, “performance” and “contract” and, accordingly, an assessment of the core functions of a contract cannot be considered in isolation from those concepts. That is, it would be incorrect to assess, at a general level, whether the operations are necessary to achieve the objective of a “social network” platform. Rather, the operations must be necessary to fulfil the core agreement between Meta Ireland and the Instagram users, reflected in the terms of the precise contract between those parties. Therefore, I must examine the contract itself and ascertain the core functions of the contract for the purpose of considering whether the processing operations are necessary to fulfil these functions. In doing so, I reiterate my previous statement that issues concerning the validity and/or substance of the contract – as matters of national contract law - are outside the scope of the Commission. Nonetheless, I share the EDPB’s view that, in my assessment, “*regard should be given to the particular aim, purpose, or objective of the service*”.<sup>117</sup> In this sense, I am considering the bargain that was struck between the parties. I agree that the correct approach is to examine the actual bargain which has been struck between the parties and determine the core function of the contract by reference to this. Therefore, the inclusion of a term which does not relate to the core function of the contract could not be considered necessary for its performance.

96. In determining the scope of the contract – and, indeed, whether Article 6(1)(b) GDPR is applicable to the processing at issue – the EDPB recommends considering the following questions:

- *What is the nature of the service being provided to the data subject?*
- *What are its distinguishing characteristics?*
- *What is the exact rationale of the contract (i.e. its substance and fundamental object)?*
- *What are the essential elements of the contract?*
- *What are the mutual perspectives and expectations of the parties to the contract? How is the service promoted or advertised to the data subject? Would an ordinary user of the service reasonably expect that, considering the nature of the service, the*

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<sup>116</sup> I note that the EDPB appears to use “particular” and “specific” interchangeably: Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at paras. 26 and 30.

<sup>117</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 30.

*envisaged processing will take place in order to perform the contract to which they are a party.”<sup>118</sup>*

97. I note that the Complaint does not specify with precision the processing operation(s) or extent thereof which the Complainant does not consider necessary for the performance of the contract between Meta Ireland and Instagram users. Rather, the Complaint stated that operations “*like advertisement, sponsored content, analysis and improvement of the controller’s products*” could not be a “*core element of a social network*”.<sup>130</sup> As I outlined above, there is a difference between what is necessary for a social network and what is necessary to perform a particular contract. Nonetheless, in the interests of good faith, I will consider whether the delivery of personalised advertising (given that the Complainant focusses on these processing operations) is necessary for the performance of the contract between Meta Ireland and the Named Data Subject.

98. Pursuant to the Terms of Use, the contract between Meta Ireland and Instagram users is for the following services:

*“Offering personalized opportunities to create, connect, communicate, discover, and share.*

...

*Fostering a positive, inclusive, and safe environment.*

...

*Developing and using technologies that help us consistently serve our growing community.*

...

*Providing consistent and seamless experiences across other Facebook Company Products.*

...

*Ensuring a stable global infrastructure for our Service.*

...

*Connecting you with brands, products, and services in ways you care about.*

...

*Research and innovation.”*

I note, at this juncture, the Complainant’s submissions, made in the course of the Inquiry, that the services outlined above cannot be considered to be “contractual commitments” under Belgian law as they lack any “enforceable” obligations.<sup>119</sup> To reiterate my position in this regard as outlined in Schedule 1 to this Decision, in discharging my functions the 2018 Act and/or the GDPR, I would be acting outside the remit of the powers and functions contained therein if I were to consider the legality and/or validity of a contract by reference to domestic contract law.

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<sup>118</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects (8 October 2019) at paras. 32 to 33. <sup>130</sup> Complaint dated 25 May 2018, at p. 5.

<sup>119</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at p. 60.

99. In the Preliminary Draft, I carried out an analysis of the Terms of Use for the purposes of ascertaining the core functions of the contract. Despite this analysis, the Complainant alleged that the Commission “has in no way investigated which specific clauses of the ‘Terms of [Use]’ are used by [Meta Ireland] to justify the specific purpose of its processing, the type of data processed, and the applicable legal basis”.<sup>120</sup> Given that I considered each aspect of the Terms of Use which related to personalised advertising, i.e. those which related to the scope of the Complaint (notwithstanding the fact that the Complaint was not clear in this respect), there is simply no truth to this assertion. Rather, it appears to me that the Complainant conflated this issue with the sufficiency of the information provided which is dealt with in Issue 3 below.

100. In respect of the above clauses of the contract between Meta Ireland and Instagram users, I am satisfied that the first (“Offering personalized opportunities to create, connect, communicate, discover, and share”) and the sixth (“Connecting you with brands, products, and services in ways you care about”) clauses concern personalisation. In order to consider the substance of this clause, it is illustrative to outline the further detail provided in the Terms of Use in respect of both.

101. In respect of the first clause, the Terms of Use provides the following additional detail:

*“People are different. We want to strengthen your relationships through shared experiences you actually care about. So we build systems that try to understand who and what you and others care about, and use that information to help you create, find, join, and share in experiences that matter to you. Part of that is highlighting content, features, offers, and accounts you might be interested in, and offering ways for you to experience Instagram, based on things you and others do on and off Instagram” [my emphasis].*

102. The sixth clause of the Terms of Use states:

*“We use data from Instagram and other Facebook Company Products, as well as from thirdparty partners, to show you ads, offers, and other sponsored content that we believe will be meaningful to you. And we try to make that content as relevant as all your other experiences on Instagram” [my emphasis].*

103. I acknowledge the Complainant’s general position that advertising is not necessary in order to deliver a social network, and that simply placing terms providing for (personalised and/or targeted) advertising in the contract does not make them necessary. While I accept that this may be true in some circumstances, I am not satisfied that the fulfilment of both clauses is not

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<sup>120</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 17.

necessary in order to fulfil the specific contract entered into between Meta Ireland and Instagram users. Indeed, it is Meta Ireland’s position that personalised advertising is one of its “core” functions. To borrow from the language of the EDPB, it appears to me that personalised advertising is one of the “*distinguishing factors*” of Instagram and, as Instagram is promoted as such, “*an ordinary user of the service [would] reasonably expect that, considering the nature of the service, the envisaged processing will take place in order to perform the contract*”.<sup>121</sup>

104. In my view, the position of the Complainant seems to go so far as to say that processing will generally only be necessary for the performance of the contract if not carrying out the processing would make the performance of the contract impossible. In this regard, it should be noted that the EDPB states that:

*“as a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services. Normally, it would be hard to argue that the contract had not been performed because there were no behavioural ads. This is all the more supported by the fact that data subjects have the absolute right under Article 21 to object to processing of their data for direct marketing purposes”.* [my emphasis]<sup>122</sup>

105. The Article 6(1)(b) Guidelines, while not binding on the Commission, clearly set out a very restrictive view on when processing should be deemed to be “necessary” for the performance of a contract, and explicitly refer to personalised advertising as an example of processing that will usually not be necessary. The use of the qualifier “as a general rule” is important to note. Indeed, the EDPB has explicitly recognised that there may be some circumstances in which personalised advertising may well be considered necessary for the performance of a contract. In this respect, I also note that the EDPB has acknowledged that the “*personalisation of content may (but does not always) constitute an essential or expected element of certain online services*”.<sup>123</sup> The core issue under consideration is whether, having regard the exact terms of the contract, the inclusion of behavioural advertising as a contractual term makes data processing conditional on the delivery of a contract, where that processing is not itself necessary to actually deliver the contract. The counter-argument to this is that behavioural advertising is the core of both Meta Ireland’s business model and the bargain struck between Meta Ireland and Instagram users and, accordingly, processing in this regard is necessary to fulfil the contract between Meta Ireland and the Named Data Subject.

106. In the Preliminary Draft, I expressed a provisional view that, in considering the specific contract entered into between Meta Ireland and Instagram users, it is made clear, from the first and sixth

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<sup>121</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 33.

<sup>122</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 52.

<sup>123</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 54.

clauses, that the core of the service offered is premised on the delivery of personalised advertising. I note that in its submissions on the Preliminary Draft, Meta Ireland stated that the text of the Terms of Use supports its position that *“the delivery of personalised advertising is a core part of its service to users”*.<sup>124</sup> Moreover, Meta Ireland went further and stated that Instagram users also *“understand... that Meta Ireland offers a service that facilitates the creation of a unique personalised and social online experience for its users, including with respect to personalised advertising”*.<sup>125</sup> The Complainant did not expressly consider these specific clauses in its submissions, either on the Preliminary Draft or during the course of the inquiry.

107. It remains my view that the text of the first and sixth clauses are clear that the core of the service offered by Meta Ireland is premised on the delivery of personalised advertising. This is notwithstanding the EDPB’s view that processing cannot be rendered lawful by Article 6(1)(b) GDPR *“simply because processing is necessary for the controller’s wider business model”*.<sup>126</sup> Indeed, in considering this contract by reference to the criteria set out in paragraph 33 of the Article 6(1)(b) Guidelines, further support for my position can be seen. For example, the Terms of Use describe the Instagram service as being “personalised” and connects users with brands, including by means of providing “relevant” advertising and content. It is clear that the Instagram service is advertised as offering a “personalised” experience, including by way of the advertising it delivers to users.

108. In its submissions on the Preliminary Draft, the Complainant stated that *“there is no evidence for the speculation as to the view of an average data subject on the ‘bargain’”*.<sup>139</sup> While I accept that it is not impossible to ascertain the view of every data subject as to the nature of the bargain struck between that user and Meta Ireland, it is reasonable to assume that the average user would read the text of the Terms of Use prior to acceptance. As the Instagram service is advertised (in the Terms of Use) as being predicated on personalised advertising, it is my view that any reasonable user would understand and expect that this is part of the core bargain that is being struck with Meta Ireland, albeit I acknowledge that users may prefer that the market offer alternative choices.

As personalised advertising forms part of the core bargain struck between Meta Ireland and Instagram users, I am satisfied that any processing necessary for the delivery of such advertising may fall within the scope of Article 6(1)(b) GDPR.

109. In this regard, while I do consider the processing necessary for the performance of the particular contract, I am not making a determination as to whether the contract is impossible to perform in the absence of personalised advertising. In respect of the question as to whether the “necessity” test requires a threshold of “impossibility”, I have already pointed out, and indeed

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<sup>124</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 9, at para. 6.8(D).

<sup>125</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 9, at para. 6.8(C).

<sup>126</sup> Guidelines 02/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the context of the provision of online services to data subjects, version 2.0 (adopted 8 October 2019) at para. 36. <sup>139</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at pp. 17 - 18.

also noted in the Preliminary Draft, that the Article 6(1)(b) Guidelines are not legally binding and do not necessarily determine the application of the general principles to specific cases. In its submissions on the Preliminary Draft, the Complainant considered it noteworthy that I acknowledged that these guidelines were non-binding in nature<sup>127</sup> whereas Meta Ireland shared the view that they were non-binding.<sup>128</sup>

110. Notwithstanding my position that the guidelines are non-binding, it is important to emphasise that I agree with the majority of the arguments of both the Complainant and the EDPB in relation to the correct interpretation of Article 6(1)(b) GDPR. However, I do have difficulty with a strict threshold of “impossibility” in the assessment of necessity. By “impossibility”, I am referring to the argument put forward that a particular term of a contract (here, behavioural advertising) is not necessary to deliver an overall service or contract. In particular, I consider that is not correct to assess necessity as against the delivery of an overall service in the abstract. Rather, as I have stated above, I consider the appropriate assessment to be one which considers what is necessary by reference to core function of the particular contract.
111. I accept that either form of assessment will require an element of reasoning in the abstract (in particular, when considering the mutual perspectives and expectations), I am also of the view that it is not for an authority such as the Commission, tasked with the enforcement of data protection law, to make assessments as to what will or will not make the performance of a contract possible or impossible. Instead, the general principles set out in the GDPR and explained by the EDPB in the guidelines must be applied. That said, it must be emphasised that these principles must be applied on a case-by-case basis. While the examples provided in any form of EDPB guidance are helpful and instructive, they are not necessarily conclusive of the position in any specific case and indeed do not purport to be. This is particularly the case with the Guidelines on Article 6(1)(b) GDPR.
112. For completeness, I note that in its submissions on the Preliminary Draft, Meta Ireland expressed its view as to whether the necessity test encompasses an impossibility threshold. Relying on *Huber*, Meta Ireland asserted that the CJEU consider that the “*the concept of necessity is fact sensitive and must be considered in light of the specific circumstances (i.e. the context) of the processing and the purpose it aims to achieve*”.<sup>129</sup> Without prejudice to this position, Meta Ireland also submitted that were impossibility an aspect of necessity, it would not, in any case, operate as a “*blanket prohibition*” on relying on Article 6(1)(b) GDPR as the legal basis for processing in this context.<sup>130</sup> In essence, it is Meta Ireland’s position that, in the specific context of the Instagram service, personalised advertising may constitute a distinguishing feature of said service which is an “*exact rationale*” and one of the “*essential elements of the Terms of Use*” for

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<sup>127</sup> NOYB’s Submissions on the Preliminary Draft in IN-18-5-5 dated 11 June 2021, at p. 19.

<sup>128</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 9 - 10, at para. 6.8(E).

<sup>129</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 10, at para. 6.8(F).

<sup>130</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 10 - 11, at para. 6.8(G).

which the ordinary user would reasonably expect their personal data to be processed so as to receive the Instagram service as advertised.<sup>131</sup>

113. In the Draft Decision, I noted that, given that it involves a consideration of the specific contract between the relevant parties, it necessarily follows that any assessment of necessity in this context must be fact-specific to a certain degree. In the Draft Decision, I also added that, as I do not consider “impossibility” to form part of a consideration of what is necessary for the performance of that specific contract, it was not necessary to consider Meta Ireland’s submissions on this particular point.
114. On the basis of the above, I concluded, in the Draft Decision, that neither Article 6(1)(b) nor any other provision of the GPDR preclude Meta Ireland from relying on Article 6(1)(b) GDPR as a legal basis for the delivery of a service based on behavioural advertising of the kind provided for under the contract between Meta Ireland and its users at issue in this Complaint. In the Draft Decision, I noted that, as discussed below, other provisions of the GDPR (such as transparency, which I consider at Issue 3) act to strictly regulate the manner in which this service is to be delivered, and the information that should be given to users.
115. Having analysed the submissions of the parties in the course of the Inquiry and on the Preliminary Draft, the terms of the GDPR, and the CJEU jurisprudence and EDPB Guidelines, I found, in the Draft Decision, that there was no basis for the contention that Meta Ireland is precluded in principle from relying on Article 6(1)(b) GDPR for the purposes of legitimising the personal data processing activities involved in the provision of the Instagram service to users, including behavioural advertising insofar as that forms a core part of the service. It was my view, as expressed in the Draft Decision, that there is nothing in the GDPR that restricts or prohibits the use of these terms in the context of processing personal data *per se*. As has been set out earlier, and as set out by the Investigator, it is not for the Commission to rule on matters of contract law and contractual interpretation that extend beyond the remit of data protection law. The lawful basis under Article 6(1)(b) GDPR simply states that personal data may be processed where it is necessary for the performance of a contract. In other words and, as I have already set out in my analysis, the data may be processed if, without such processing, the contract could not be performed. My view, as expressed in the Draft Decision, was that I was not convinced, for the reasons set out, that Article 6(1)(b) GDPR goes a step further and excludes all processing unless the fulfilment of some abstractly discerned purpose would be rendered impossible without that processing. I was also of the view, as outlined in the Draft Decision, that this application conforms broadly to significant elements of the interpretation of Article 6(1)(b) GDPR proposed by the Complainant and by the EDPB.
116. In the Draft Decision, I noted that while I accepted that, as a general rule, the EPDB considers that processing for online behavioural advertising would not be necessary for the performance of a contract for online services, in this particular case, having regard to the specific terms of the

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<sup>131</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 10 - 11, at para. 6.8(G) – (H).



contract and the nature of the service provided and agreed upon by the parties, I concluded that Meta Ireland may in principle rely on Article 6(1)(b) as a legal basis of the processing of users' data necessary for the provision of the Instagram service, including through the provision of behavioural advertising insofar as this forms a core part of that service offered to and accepted by users.

117. I also noted, in the Draft Decision, that having regard to the scope of the Complaint and this Inquiry, as described above, this was not to be construed as an indication that all processing operations carried out on users' personal data are necessarily covered by Article 6(1)(b) GDPR.
118. Following the circulation of the Commission's Draft Decision to the supervisory authorities concerned, for the purpose of enabling them to express their views in accordance with Article 60(3) GDPR, objections to this aspect of matters were raised by the supervisory authorities of Austria, Germany, Spain, Finland, France, Hungary, the Netherlands, Norway and Sweden each raised an objection to the finding proposed under this particular heading. Having considered the merits of those objections, the EDPB determined as follows:

*97. The EDPB considers it necessary to begin its assessment on the merits with a general description of the practice of behavioural advertising carried out in the context of the Instagram service before determining whether the legal basis of Article 6(1)(b) GDPR is appropriate for this practice in the present case, based on the Instagram Terms of Use and the nature of its products and features as described in those terms. The requests for preliminary rulings made to the CJEU in the cases C-252/21 and C-446/21 to which some of the documents in the file refer contain helpful descriptions of Meta's behavioural advertising practices in the context of its Facebook services . Given that behavioural advertising is also carried out in the context of the Instagram service, and given the similarities between the two services, relying on the same Data Policy , the EDPB considers that these cases are also useful in gaining an understanding of the practice of behavioural advertising in relation to the Instagram service. Furthermore, in the request for a preliminary ruling in case C-252/21, it is mentioned that if the CJEU answers the question 7 positively (regarding the competence of a Member State national competition authority to determine, when assessing the balance of interests whether data processing and their terms comply with the GDPR) that the questions 3 to 5 must be answered in relation to data from the use of the group's Instagram service. In addition, Meta IE makes reference to both of these requests for preliminary rulings in its submissions, and therefore clearly considers them relevant to this case .*

98. *These requests for preliminary rulings mention that Meta IE collects data on its individual users and their activities on and off its Facebook service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user's computer or mobile device . According to the descriptions provided, Meta IE links these data with the user's Facebook account to enable advertisers to tailor their advertising to Facebook's individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user's physical location to display content relevant to the user's location. Meta IE offers its services to its users free of charge and generates revenue through this personalised advertising that targets them, in addition to static advertising that is displayed to every user in the same way.*

99. *The EDPB considers that these general descriptions signal by themselves the complexity, massive scale and intrusiveness of the behavioural advertising practice that Meta IE conducts through the Facebook service, as well as off the Facebook service itself, through third party websites and apps which are connected to Facebook.com via programming interfaces ("Facebook Business Tools"), including the Instagram service . Furthermore, among the aspects described in the Instagram Terms of Use is "Providing consistent and seamless experiences across other Facebook Company Products." which involves "shar[ing] technology, systems, insights, and information-including the information we have about you." It is therefore clear that personal data is shared between Facebook companies ("We use data from Instagram and other Facebook Company Products, as well as from third-party partners, to show you ads (...)")*

100. *These are relevant facts to consider to assess the appropriateness of Article 6(1)(b) GDPR as a legal basis for behavioural advertising and to what extent reasonable users may understand and expect behavioural advertising when they accept the Instagram Terms of Use and perceive it as necessary for Meta IE to deliver its service . Accordingly, the EDPB further considers that the IE SA could have added to its Draft Decision a description of behavioural advertising that Meta IE conducts through the Instagram service to appropriately substantiate its reasoning leading to its acceptance of Article 6(1)(b) GDPR as a legal basis for that practice in accordance with the IE SA's duty to state the reasons for an individual decision .*

101. *Notwithstanding the EDPB's considerations above, the EDPB considers that there is sufficient information in the file for the EDPB to decide whether the IE SA needs to change its Draft Decision insofar as it rejects the complainant's claim that the GDPR does not permit Meta IE's reliance on Article 6(1)(b) GDPR to process personal data in the context of its offering of the Instagram service, based on its Terms of Use.*

102. *As described above in section 4.1., the IE SA concludes in Finding 2 of its Draft Decision that the Complainant's case was not made out that the GDPR does not permit the reliance by Meta IE on Article 6(1)(b) GDPR in the context of its offering of Terms of Use, neither Article 6(1)(b) GDPR nor any other provision of the GDPR precludes Meta IE from relying on Article 6(1)(b) GDPR as a legal basis to deliver a service, including behavioural advertising insofar as that forms a core part of the service . The IE SA considers that, having regard to the specific*

*terms of the contract and the nature of the service provided and agreed upon by the parties,*  
Meta IE



may in principle rely on Article 6(1)(b) GDPR as a legal basis of the processing of users' data necessary for the provision of its Instagram service, including through the provision of behavioural advertising insofar as this forms a core part of its service offered to and accepted by its users . The IE SA considers the core of the service offered by Meta IE is premised on the delivery of personalised advertising . The IE SA considers a reasonable user would understand and expect this having read the Terms of Use . Meta IE supports this conclusion of the IE SA .

103. To assess these claims of the IE SA and Meta IE, the EDPB considers it necessary to recall the general objectives that the GDPR pursues, which must guide its interpretation, together with the wording of its provisions and its normative context .

104. The GDPR develops the fundamental right to the protection of personal data found in Article 8(1) of the EU Charter of Fundamental Rights and Article 16(1) of the TFEU, which constitute EU primary law . As the CJEU clarified, "an EU act must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary law as a whole and, in particular, with the provisions of the Charter. Thus, if the wording of secondary EU legislation is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with primary law rather than to the interpretation which leads to its being incompatible with primary law" . In the face of rapid technological developments and increases in the scale of data collection and sharing, the GDPR creates a strong and more coherent data protection framework in the Union, backed by strong enforcement, and built on the principle that natural persons should have control of their own personal data . By ensuring a consistent, homogenous and equivalent high level of protection throughout the EU, the GDPR seeks to ensure the free movement of personal data within the EU . The GDPR acknowledges that the right to data protection needs to be balanced against other fundamental rights and freedoms, such as the freedom to conduct a business, in accordance with the principle of proportionality and has these considerations integrated into its provisions . The GDPR, pursuant to EU primary law, treats personal data as a fundamental right inherent to a data subject and his/her dignity, and not as a commodity data subjects can trade away through a contract . The CJEU provided additional interpretative guidance by asserting that the fundamental rights of data subjects to privacy and the protection of their personal data override, as a rule, a controller's economic interests .

105. The principle of lawfulness of Article 5(1)(a) and Article 6 GDPR is one of the main safeguards to the protection of personal data. It follows a restrictive approach whereby a controller may only process the personal data of individuals if it is able to rely on one of the bases found in the exhaustive and restrictive lists of the cases in which the processing of data is lawful under Article 6 GDPR .

106. The principle of lawfulness goes hand in hand with the principles of fairness and transparency in Article 5(1)(a) GDPR. The principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller .

107. The EDPB agrees with the IE SA and Meta IE that there is no hierarchy between these legal bases . However, this does not mean that a controller, as Meta IE in the present case, has



*absolute discretion to choose the legal basis that suits better its commercial interests. The controller may only rely on one of the legal bases established under Article 6 GDPR if it is appropriate for the processing at stake . A specific legal basis will be appropriate insofar as the processing can meet its requirements set by the GDPR and fulfil the objective of the GDPR to protect the rights and freedoms of natural persons and in particular their right to the protection of personal data . The legal basis will not be appropriate if its application to a specific processing defeats this practical effect “effet utile” pursued by the GDPR and Article 5(1)(a) and Article 6 GDPR . These criteria stem from the content of the GDPR and the interpretation favourable to the rights of data subjects to be given thereto described in paragraph 104 above .*

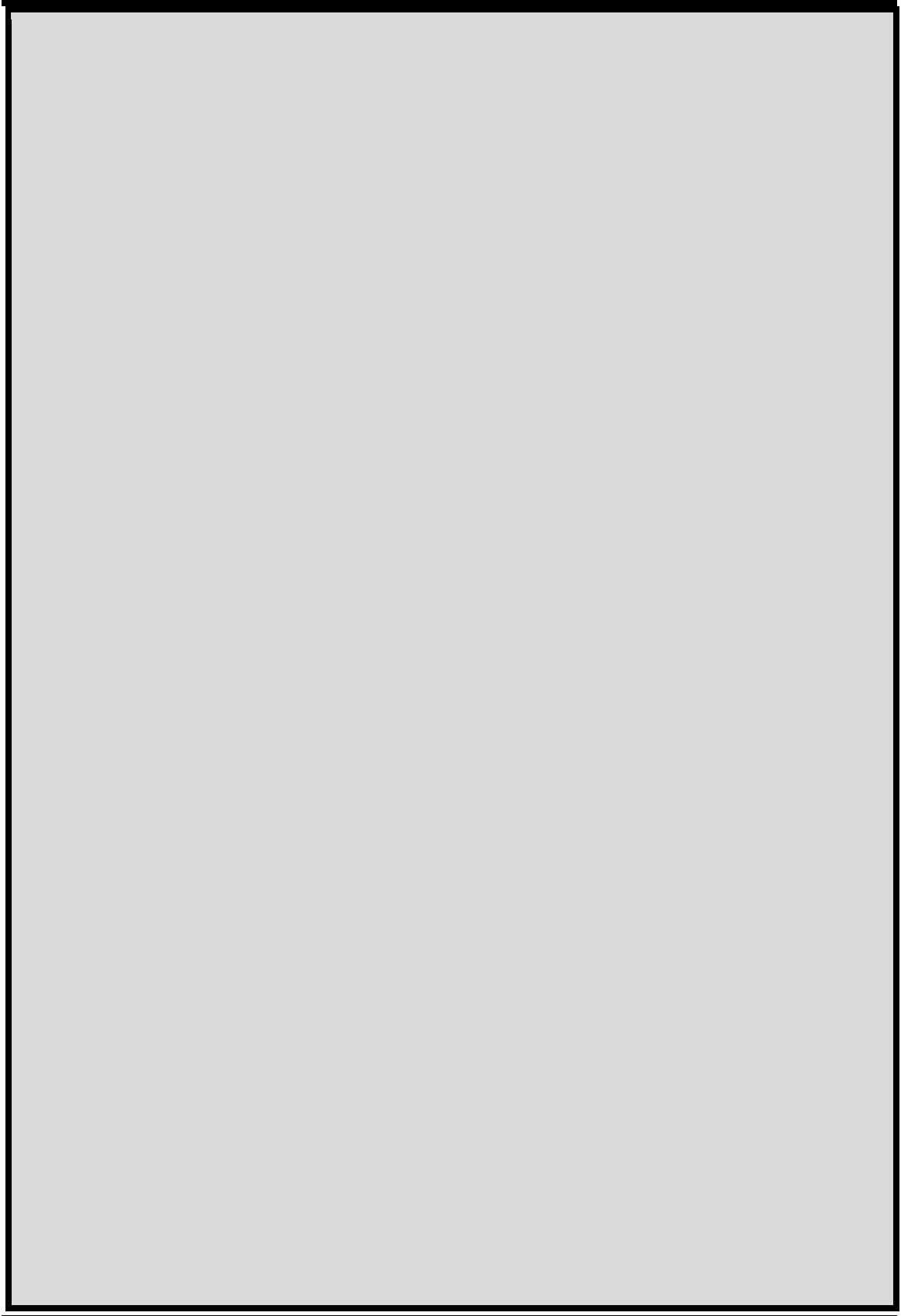
*108. The GDPR makes Meta IE, as a data controller for the processing at stake, directly responsible for complying with the Regulation’s principles, including the processing of data in a lawful, fair and transparent manner, and any obligations derived therefrom . This obligation applies even where the practical application of GDPR principles such as those of Article 5(1)(a) and Article (5)(2) GDPR is inconvenient or runs counter to the commercial interests of Meta IE and its business model. The controller is also obliged to be able to demonstrate that it meets these principles and any obligations derived therefrom, such as that it meets the specific conditions applicable to each legal basis .*

*109. The first condition to be able to rely on Article 6(1)(b) GDPR as a legal basis to process the data subject’s data is that a controller, in line with its accountability obligations under Article 5(2) GDPR, has to be able to demonstrate that (a) a contract exists and (b) the contract is valid pursuant to applicable national contract laws .*

*110. Both the IE SA and Meta IE consider that the Terms of Use make up the entire agreement between the Instagram user and Meta IE and that the Data Policy is simply a compliance document setting out information to fulfil the GDPR transparency obligations . The IE SA thus considers that the contract for which the analysis based on Article 6(1)(b) GDPR takes place, is the Terms of Use .*

*111. The IE SA and Meta IE argue that the GDPR does not confer a broad and direct competence to supervisory authorities to interpret or assess the validity of contracts .*

*112. The EDPB agrees that SAs do not have under the GDPR a broad and general competence in contractual matters. However, the EDPB considers that the supervisory tasks that the GDPR bestows on SAs imply a limited competence to assess a contract’s general validity insofar as this is relevant to the fulfilment of their tasks under the GDPR. Otherwise, the SAs would see their monitoring and enforcement task under Article 57(1)(a) GDPR limited to actions such as verifying whether the processing at stake is necessary for the performance of a contract (Article 6(1)(b) GDPR), and whether a contract with a processor under Article 28(3) GDPR and data importer under Article 46(2) GDPR includes appropriate safeguards pursuant to the GDPR. Pursuant to the IE SA’s interpretation, the SAs would thus be obliged to always consider a contract valid, even in situations where it is manifestly evident that it is not, for instance because there is no proof of agreement between the two parties, or because the contract does not comply with its Member State’s rules on the validity, formation or effect of a contract in relation to a child .*









113. *As the DE and NL SAs argue, the validity of the contract for the Instagram service*

*between Meta IE and the complainant is questionable, given the strong indications that the Complainant was unaware of entering into a contract, and (as the IE SA establishes with its Finding 3 of its Draft Decision) serious transparency issues in relation to the legal basis relied on. In contract law, as a general rule, both parties must be aware of the substance of the contract and the obligations of both parties to the contract in order to willingly enter into such contract.*

*114. Notwithstanding the possible invalidity of the contract, the EDPB, refers to its previous interpretative guidance on this matter to provide below its analysis on whether behavioural advertising is objectively necessary for Meta IE to provide its Instagram service to the user based on its Terms of Use and the nature of the service .*

*115. The EDPB recalls that for the assessment of necessity under Article 6(1)(b) GDPR, “[i]t is important to determine the exact rationale of the contract, i.e. its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance” . As the EDPB has previously stated, regard should be given to the particular aim, purpose, or objective of the service and, for applicability of Article 6(1)(b) GDPR, it is required that the processing is objectively necessary for a purpose and integral to the delivery of that contractual service to the data subject .*

*116. Moreover, the EDPB notes that the controller should be able to justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose. This depends not only on the controller’s perspective, but also on a reasonable data subject’s perspective when entering into the contract .*

*117. The IE SA accepts the EDPB’s position that, as a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services . However, the IE SA considers that in this particular case, having regard to the specific terms of the contract and the nature of the Instagram service provided and agreed upon by the parties, Meta IE may in principle rely on Article 6(1)(b) GDPR to process the user’s data necessary for the provision of its service, including through the provision of behavioural advertising insofar as this forms a core part of that service offered to and accepted by users .*

*118. The IE SA views behavioural advertising as “the core of both Meta Ireland’s business model and the bargain struck between Meta Ireland and Instagram users” . In support of this consideration, the IE SA refers to the “first and sixth clauses” of “the specific contract entered into between Meta IE and Instagram users” . The IE SA considers that from the text of these “clauses” it is “clear that the core of the service offered by Meta Ireland is premised on the delivery of personalised advertising. ” The IE SA considers that this position is supported by the fact that “the Terms of Use describe the Instagram service as being ‘personalised’ and connects users with brands, including by means of providing ‘relevant’ advertising and content.” Based on this, the IE SA is of the view that “It is clear that the Instagram service is advertised as offering a ‘personalised’ experience, including by way of the advertising it delivers to users .” The IE SA considers that as the Instagram service is “advertised” in its Terms of Use “as being predicated on personalised advertising (...) any reasonable user would expect and understand*



*that this is part of the core bargain that is being struck (...)" but acknowledges that "users may*

*prefer that the market offer alternative choices .”*



119. On this issue, the EDPB recalls that the concept of necessity has its own independent meaning under EU law. It must be interpreted in a manner that fully reflects the objective pursued by an EU instrument, in this case, the GDPR . Accordingly, the concept of necessity under Article 6(1)(b) GDPR cannot be interpreted in a way that undermines this provision and the GDPR's general objective of protecting the right to the protection of personal data or contradicts Article 8 of the Charter . On the processing of data in the Facebook services, Advocate General Rantos supports a strict interpretation of Article 6(1)(b) GDPR among other legal bases, particularly to avoid any circumvention of the requirement for consent . Given the similarities between the Facebook and Instagram services, as explained above in paragraph 97, and the fact that this case may concern the legal basis for processing of personal data for the Instagram service .

120. As the IE SA states in its Draft Decision, "Instagram is a global online social network service which allows registered users to communicate with other registered users through messages, audio, video calls and video chats, and by sending images and video files ." Meta IE promotes among its prospective and current users the perception that the main purpose of the Instagram service and for which it processes its users' data is to enable them to share content and communicate with others. Meta IE presents its Instagram service on its "About" page of its website as a platform which "give[s] people the power to build community and bring[s] the world closer together ." At the beginning of its Terms of Use, Meta IE presents its mission for the Instagram service as "To bring you closer to the people and things you love ." The description of the aspects of the service includes "Offering personalized opportunities to create, connect, communicate."

121. The fact that the Terms of Use do not provide for any contractual obligation binding Meta IE to offer personalised advertising to the Instagram users and any contractual penalty if Meta IE fails to do so shows that, at least from the perspective of the Instagram user, this processing is not necessary to perform the contract . Providing personalised advertising to its users may be an obligation between Meta IE and the specific advertisers that pay for Meta IE's targeted display of their advertisements in the Instagram service to Instagram users, but it is not presented as an obligation towards the Instagram users.

122. Nor does Meta IE's business model of offering services, at no monetary cost for the user to generate income by behavioural advertisement to support its Instagram service make this processing necessary to perform the contract. Under the principle of lawfulness of the GDPR and its Article 6, it is the business model which must adapt itself and comply with the requirements that the GDPR sets out in general and for each of the legal bases and not the reverse. As the Advocate General Rantos stressed recently in his opinion on Meta IE's processing in Facebook, based on Article 5(2) GDPR, it is the controller (Meta IE) in this case who is responsible for demonstrating that the personal data are processed in accordance with the GDPR .

123. As the EDPB provided in its guidance, "Assessing what is 'necessary' involves a combined, fact-based assessment of the processing 'for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal'. If there are realistic,

*less intrusive alternatives, the processing is not 'necessary'. Article 6(1)(b) will not cover processing which is useful but not objectively necessary for performing the contractual service or for taking*





*relevant pre-contractual steps at the request of the data subject, even if it is necessary for the controller's other business purposes. "*

124. *On the question of whether here there are realistic, less intrusive alternatives to behavioural advertising that make this processing not "necessary", the EDPB considers that there are. The AT and SE SAs mention as examples contextual advertising based on geography, language and content, which do not involve intrusive measures such as profiling and tracking of users. In his recent opinion on Facebook, Advocate General Rantos also refers to the Austrian Government's "pertinent" observation that in the past, Meta IE allowed Facebook users to choose between a chronological presentation and a personalised presentation of newsfeed content, which, in his view, proves that an alternative method is possible. By considering the existence of alternative practices to behavioural advertising that are more respectful of the Instagram users' right to data protection, the EDPB, as the Advocate General did in relation to Facebook users, aims to assess if this processing is objectively necessary to deliver the service offered, as perceived by the Instagram user whose personal data is processed, and not to dictate the nature of Meta IE's service or impose specific business models on controllers, as Meta IE and the IE SA respectively argue. The EDPB considers that Article 6(1)(b) GDPR does not cover processing which is useful but not objectively necessary for performing the contractual service, even if it is necessary for the controller's other business purposes.*

125. *The EDPB considers that the absolute right available to data subjects, under Article 21(2)(3) GDPR to object to the processing of their data (including profiling) for direct marketing purposes further supports its consideration that, as a general rule, the processing of personal data for behavioural advertising is not necessary to perform a contract. The processing cannot be necessary to perform a contract if a data subject has the possibility to opt out from it at any time, and without providing any reason.*

126. *The EDPB finds that a reasonable user cannot expect that their personal data is being processed for behavioural advertising simply because Meta IE briefly refers to this processing in its Instagram Terms of Use (which Meta IE and the IE SA consider as constituting the entirety of the contract), or because of the "wider circumstances" or "recognised public awareness of this form of processing" derived from its "widespread prevalence of OBA processing" to which the IE SA refers. Behavioural advertising, as briefly described in paragraph 98 above, is a set of processing operations of personal data of great technical complexity, which has a particularly massive and intrusive nature. In view of the characteristics of behavioural advertising, coupled with the very brief and insufficient information that Meta provides about it in the Instagram Terms of Use and Data Policy (a separate document that the IE SA and Meta IE do not even consider part of the contractual obligations), the EDPB finds it extremely difficult to argue that an average user can fully grasp it, be aware of its consequences and impact on their rights to privacy and data protection, and reasonably expect it solely based on the Instagram Terms of Use. The EDPB recalls its Guidelines 2/2019 on Article 6(1)(b) GDPR, in which it argues that the expectations of the average data subject need to be considered in light, not only of the terms of service but also the way this service is promoted to users. Advocate General Rantos expresses similar doubts where he says in relation to Facebook behavioural advertising practices "I am curious as to what extent the processing might correspond to the expectations of an average*

*user and, more generally, what 'degree of personalisation' the user can expect from the service he or she signs up for" and adds in a footnote that he does not "believe that the collection and*



*use of personal data outside Facebook are necessary for the provision of the services offered as part of the Facebook profile” .*

*127. The EDPB notes that the mission of the Instagram service, as expressed in its Terms of Use, is formulated in a vague and broad manner (“To bring you closer to the people and things you love.”) When using the Instagram service, a user is primarily confronted with the possibility of viewing photographs and videos by people or organisations that they follow, as well as sharing such content with their followers. This is acknowledged by the IE SA which provides the following description of the Instagram service in its Draft Decision: “Instagram is a global online social network service which allows registered users to communicate with other registered users through messages, audio, video calls and video chats, and by sending images and video files .”*

*128. Based on the considerations above, the EDPB considers that the main purpose for which users use Instagram and accept its Terms of Use is to share content and communicate with others, not to receive personalised advertisements.*

*129. Meta IE infringed its transparency obligations under Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR by not clearly informing the complainant and other users of the Instagram Service specific processing operations, the personal data processed in them, the specific purposes they serve, and the legal basis on which each of the processing operations relies, as the IE SA concludes in its Draft Decision . The EDPB considers that this fundamental failure of Meta IE to comply with its transparency obligations contradicts the IE SA’s finding that Instagram users could reasonably expect online behavioural advertising as being necessary for the performance of their contract (as described in the Instagram Terms of Use) with Meta IE .*

*130. The EDPB recalls that “controllers should make sure to avoid any confusion as to what the applicable legal basis is” and that this is “particularly relevant where the appropriate legal basis is Article 6(1)(b) GDPR and a contract regarding online services is entered into by data subjects”, because “[d]epending on the circumstances, data subjects may erroneously get the impression that they are giving their consent in line with Article 6(1)(a) GDPR when signing a contract or accepting terms of service” . Article 6(1)(b) GDPR requires the existence, validity of a contract, and the processing being necessary to perform it. These conditions cannot be met where one of the Parties (in this case the data subject) is not provided with sufficient information to know that they are signing a contract, the processing of personal data that it involves, for which specific purposes and on which legal basis, and how this processing is necessary to perform the services delivered. These transparency requirements are not only an additional and separate obligation, as the IE SA seems to imply, but also an indispensable and constitutive part of the legal basis .*

*131. The risks to the rights of data subjects derived from this asymmetry of information and an inappropriate reliance on this legal basis are higher in situations such as in the present case, in which the Complainant and other Instagram users face a “take it or leave it” situation resulting from the standard contract pre-formulated by Meta IE and the lack of few alternative services in the market. The EU legislator has regularly identified and aimed to address with*

*multiple legal instruments these risks and the imbalance between the parties to consumer contracts. For example, Directive 93/13/EEC*



*on unfair terms in consumer contracts mandates, as the transparency obligations under the GDPR, the use of plain, intelligible language in the terms of the contracts offered to consumers . This Directive even provides that where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail . Processing of personal data that is based on what is deemed to be an unfair term under this Directive will generally not be consistent with the requirement under Article 5(1)(a) GDPR that the processing is lawful and fair*

*132. Advocate General Rantos concludes in reference to Meta IE that the fact that an undertaking providing a social network enjoys a dominant position in the domestic market for online social network for private users “does play a role in the assessment of the freedom of consent within the meaning of that provision, which it is for the controller to demonstrate, taking into account, where appropriate, the existence of a clear imbalance of power between the data subject and the controller, any requirement for consent to the processing of personal data other than those strictly necessary for the provision of the services in question, the need for consent to be specific for each purpose of processing and the need to prevent the withdrawal of consent from being detrimental to users who withdraw it .” In line with the logic of this argument, the EDPB considers that the dominant position of Meta IE also plays an important role in the assessment of Meta IE’s reliance on Article 6(1)(b) GDPR for its Instagram service and its risks to data subjects, especially considering how deficiently Meta IE informs the Instagram users of the data it strictly needs to process to deliver the service.*

*133. Given that the main purpose for which a user uses Instagram service is to share and receive content, and communicate with others , and that Meta IE conditions their use to the user’s acceptance of a contract and the behavioural advertising they include, the EDPB cannot see how a user would have the option of opting out of a particular processing which is part of the contract as the IE SA seems to argue . The users’ lack of choice in this respect would rather indicate that Meta IE’s reliance on the contractual performance legal basis deprives users of their rights, among others, to withdraw their consent under Articles 6(1)(a) and 7 and/or to object to the processing of their data based on Article 6(1)(f) GDPR.*

*134. The EDPB agrees with the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs that there is a risk that the Draft Decision’s failure to establish Meta IE’s infringement of Article 6(1)(b) GDPR, pursuant to the IE SA’s interpretation of it, nullifies this provision and makes lawful theoretically any collection and reuse of personal data in connection with the performance of a contract with a data subject . Meta IE currently leaves the complainant and other users of the Instagram service with a single choice. They may either contract away their right to freely determine the processing of their personal data and submit to its processing for the obscure, and intrusive purpose of behavioural advertising, which they can neither expect, nor fully understand based on the insufficient information Meta IE provides to them. Or, they may decline accepting Instagram Terms of Use and thus be excluded from a service that enables them to communicate, share content with and receive content from millions of users and for which there are currently few realistic alternatives. This exclusion would thus also adversely affect their freedom of expression and information.*



135. *This precedent could encourage other economic operators to use the contractual performance legal basis of Article 6(1)(b) GDPR for all their processing of personal data. There*

would be the risk that some controllers argue some connection between the processing of the personal data of their consumers and the contract to collect, retain and process as much personal data from their users as possible and advance their economic interests at the expense of the safeguards for data subjects. Some of the safeguards from which data subjects would be deprived due to an inappropriate use of Article 6(1)(b) GDPR as legal basis, instead of others such as consent (Article 6(1)(a) GDPR) and legitimate interest (Article 6(1)(f) GDPR), are the possibility to specifically consent to certain processing operations and not to others and to the further processing of their personal data (Article 6(4) GDPR); their freedom to withdraw consent (Article 7 GDPR); their right to be forgotten (Article 17 GDPR); and the balancing exercise of the legitimate interests of the controller against their interests or fundamental rights and freedoms (Article 6(1)(f) GDPR). As a result, owing to the number of users of the Instagram service, the market power, and influence of Meta IE and its economically attractive business model, the risks derived from the current findings of the Draft Decision could go beyond the Complainant and the millions of users of Instagram service in the EEA and affect the protection of the hundreds of millions of people covered by the GDPR .

136. The EDPB thus concurs with the objections of the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs to Finding 2 of the Draft Decision in that the behavioural advertising performed by Meta IE in the context of the Instagram service is objectively not necessary for the performance of Meta IE's alleged contract with data users for the Instagram service and is not an essential or core element of it.

137. In conclusion, the EDPB decides that the Meta IE has inappropriately relied on Article 6(1)(b) GDPR to process the complainant's personal data in the context of Instagram Terms of Use and therefore lacks a legal basis to process these data for the purposes of behavioural advertising. Meta IE has not relied on any other legal basis to process personal data in the context of the Instagram Terms of Use for the purposes of behavioural advertising. Meta IE has consequently infringed Article 6(1) GDPR by unlawfully processing personal data. The EDPB instructs the IE SA to alter its Finding 2 of its Draft Decision which concludes that Meta IE may rely on Article 6(1)(b) GDPR in the context of its offering of the Instagram Terms of Use and to include an infringement of Article 6 (1) GDPR based on the shortcomings that the EDPB has identified.

#### Finding 2:

On the basis of the above, and as directed by the EDPB further to the Article 65 Decision, I find that Meta Ireland was not entitled to rely on Article 6(1)(b) GDPR to process the Complainant's personal data for the purpose of behavioural advertising in the context of the Instagram Terms of Use.

5 ISSUE 3 – WHETHER META IRELAND PROVIDED THE REQUISITE INFORMATION ON THE LEGAL BASIS FOR PROCESSING ON FOOT OF ARTICLE 6(1)(B) GDPR AND WHETHER IT DID SO IN A TRANSPARENT MANNER

#### Introduction

119. Having considered the legal basis of processing in connection with the Instagram service – in particular, processing for the purposes of delivering behavioural advertising – I will now consider whether Meta Ireland provided the requisite information as to the legal basis for processing on foot of Article 6(1)(b) GDPR and whether it did so in a transparent manner, such as to comply with its transparency obligations under the GDPR.

#### *Relevant Provisions*

120. As I stated above, Article 5(1)(a) outlines the principles underpinning data processing and provides that “[p]ersonal data shall be ... processed lawfully, fairly and in a transparent manner in relation to the data subject”. Pursuant to Article 5(2), responsibility for demonstrating compliance with Article 5(1) rests with the controller.

121. Recital 39 provides further details as regard the principle of transparency. It states that processing:

*“should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. Natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing. In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data”.*

122. The precise meaning of “transparency” for the purposes of the GDPR is delineated in Recital 58 GDPR. In essence, a controller complies with the transparency principle when the information it provides to data subject, or indeed the public more generally, is *“concise, easily accessible and easy to understand, and ... clear and plain language and, additionally, where appropriate, visualisation be used.”*

123. As detailed in Recital 60 GDPR, there is a strong nexus between the principle of transparency and the provision of information to data subjects. Indeed, Recital 60 states that:

*“The principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes. The controller*

*should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed. Furthermore, the data subject should be informed of the existence of profiling and the consequences of such profiling. Where the personal data are collected from the data subject, the data subject should also be informed whether he or she is obliged to provide the personal data and of the consequences, where he or she does not provide such data.”*

124. Article 13 GDPR outlines the information which must be provided to data subjects where personal data are collected from those data subjects. In particular, Article 13(1)(c) provides that information as to *“the purposes of the processing for which the personal data are intended as well as the legal basis for the processing”* must be provided to the data subject(s) at the time personal data is obtained.

125. The nature of the extent of information to be provided to data subjects is further described in Article 12 GDPR. In this regard, Article 12(1) provides that such information must be in a *“concise, transparent, intelligible and easily accessible form, using clear and plain language”* but need not necessarily be in writing.<sup>132</sup> Indeed, pursuant to Article 12(7) GDPR, information provided in accordance with the controller’s obligations under Article 13 and 14 may be accompanied by *“standardised icons”* so as to give an overview of the relevant processing in *“an easily visible, intelligible and clearly legible manner”*.

126. There are limited exceptions to the provision of such information. Indeed, Recital 62 GDPR provides that

*“it is not necessary to impose the obligation to provide information where the data subject already possesses the information, where the recording or disclosure of the personal data is expressly laid down by law or where the provision of information to the data subject proves to be impossible or would involve a disproportionate effort”*.

127. For completeness, I note that Article 14 GDPR provides detail as to the information to be provided where personal data has not been obtained from the data subjects themselves. In essence, this concerns information to be provided to non-users. As the scope of the Complaint was limited to registered users of the Instagram service, the substantive obligations which arise under Article 14 will not be considered further for the purposes of this Decision except insofar as the text of Article 14 may be relevant to the interpretation of the obligations under Articles 12 and 13 GDPR.

#### *Transparency Obligations – General Comments*

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<sup>132</sup> In this regard, Article 12(1) notes the possibility that the information may be provided orally or by other electronic means.

128. In considering transparency obligations, I think it necessary to draw a distinction between the principles of transparency which are contained in the Article 5 GDPR and the information requirements contained in Article 12 to 14 GDPR. While the information requirements set out in Articles 12 to 14 GDPR go towards transparency, and indeed may assist my assessment of whether the principle of transparency has been discharged by the controller, non-compliance with Article 12 to 14 GDPR does not necessarily imply an infringement of Article 5.

129. Accordingly, I will first consider whether the obligations set out in Article 12 and 13 GDPR have been complied with. As Article 13 sets out the information that ought to be provided to data subjects and Article 12 concerns the manner and/or means by which this information is to be provided, I will first consider whether sufficient information has been provided and then assess whether any information has been provided in the appropriate manner and/or form. I will subsequently consider whether the broader transparency principle set out in Article 5 GDPR has been complied with.

#### The “Layered” Approach

130. When considering the issues to be considered in the course of this Decision, I set out my reasons for my disagreement with the Investigator’s distinction between the issue of whether the Named Data Subject was misled and whether the Instagram Terms of Use and/or Data Policy complies with the transparency requirements of the GDPR. As I outlined above, it is my view that a failure by a controller to adhere to the transparency requirements is likely to have the direct result that the data subject is misled.

131. In considering whether the transparency requirements had been complied with in the context of the Instagram service, the Investigator adopted a “layered approach” whereby he considered each “layer” of information in isolation on the basis that each layer must independently comply with Article 12(1).<sup>133</sup> Meta Ireland did not agree with this approach taken by the Investigator and submitted that the information provided should be assessed “holistically” as opposed to a “layerby-layer basis”.<sup>134</sup> According to Meta Ireland, this would otherwise have the effect that it is required to “provide a disproportionate level of detail within each layer of information”.<sup>148</sup>

132. The Investigator did not agree with Meta Ireland’s submissions. In this respect, he formed the view that:

*“Article 13(1)(c) GDPR requires the provision of concrete and specific information, not merely the creation of an overall impression about the controller’s processing activities.*

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<sup>133</sup> Final Inquiry Report dated 18 January 2021, at para. 319.

<sup>134</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.5.

<sup>148</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.4.

*Accordingly, in order to assess the layered provision of information by a controller, it is necessary to consider discrete sources of information independently, in order to arrive at an overall view as to compliance. There can be no “holistic” conclusion on Facebook’s compliance with Article 13(1)(c) which is not fundamentally based on an examination of the actual information provided to the data subject. ...*

...

*The investigator also considers that each distinct layer of information must comply independently with the requirement of Article 12(1) GDPR regarding the provision of information “in a concise, transparent, intelligible and easily accessible form, using clear and plain language”.*<sup>135</sup>

For completeness, I note that Meta Ireland, in its submissions on the Preliminary Draft, reaffirmed its position that the “layered” approach, as adopted by the Investigator, was not envisaged in assessing compliance with the transparency obligations in the GDPR.<sup>136</sup> Rather it is Meta Ireland’s view that “*the sole question is whether cumulatively, the data subject has been provided with the information required under the GDPR*”.<sup>137</sup>

133. With respect, as I outlined in the Preliminary Draft, I do not agree that such a layer-by-layer approach should be adopted in considering whether an entity has complied with their transparency requirements. While Article 12(1) GDPR concerns the form in which information should be provided to data subjects, it is focussed on the addressing the potential barriers which may prevent the information being received and/or understood by the data subject. In this regard, I note that the reference to “*using clear and plain language*” in the provision of information ensures that the data subject is not hindered or otherwise impeded from receiving the requisite information as a result of an inability to understand technical jargon. Similarly, the requirement that the information be “concise” operates to prevent information fatigue by the data subject as a result of the information being contained in a lengthy text.

134. Moreover, Article 12(1) GDPR provides that a controller “*shall take appropriate measures to provide any information referred to in Articles 13 and 14*” [my emphasis]. It follows that a controller’s Article 12 obligations are not considered in isolation from its Articles 13 or 14 obligations; rather, there is an interrelationship between these obligations. Articles 13 and 14 require that certain material must be provided to data subjects and Article 12 sets out the manner and/or form in which this information is conveyed. There is no suggestion that the information required by Articles 13 and 14 must be provided in any particular “layer” of information; the obligation is that the information is provided and is set out in the manner set out in Article 12.

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<sup>135</sup> Final Inquiry Report dated 18 January 2021, at paras. 318 – 319.

<sup>136</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 11 - 12, at para. 7.2.

<sup>137</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at pp. 11 - 12, at para. 7.2.

While there is a certain discretion in how this information is provided, an individual “layer” of information cannot be assessed by reference to Article 12 GDPR in isolation of the information required by Articles 13 and/or 14 GDPR.

135. Indeed, it is my view that the appropriate manner in which to assess compliance with the transparency obligations is to first consider whether the requisite information has been provided before examining whether that information has been provided in the correct form. This does not mean that a controller’s “layered” approach necessarily complies with Articles 12 and 13; rather, it remains the case that the information required by Article 13 may not ultimately be set out in the manner required by Article 12(1) GDPR. It does not follow, however, that this necessitates or justifies an abstract or isolated assessment of each “layer” of information for compliance with Article 12(1) GDPR. Accordingly, I will examine the information in a more holistic manner for compliance with Articles 12 and 13 GDPR.

136. For completeness, I am not expressing any view or preference in respect of the merits of adopting a “layered” approach. In this regard, I note that the Article 29 Working Party Guidelines on Transparency (the “Transparency Guidelines”) explicitly recommend that controllers use a “layered” approach,<sup>138</sup> which was endorsed by the EDPB at its first plenary session. Rather, I am stating that while the approach taken by the Investigator in examining compliance in a “layer-by-layer” way was robust and comprehensive, it did not consider the information provided in a sufficiently holistic way. It is my view that it is not necessary to consider whether each individual layer is deficient or otherwise on the basis that there will be an infringement of Article 12 if the layers, viewed cumulatively, lack the information required by Article 13 GDPR.

137. As I noted above, the Investigator adopted a “layer-by-layer” approach in assessing compliance. While he formed the general view that Meta Ireland did not misled data subjects as to fact that the processing in connection with the Instagram service was not on the basis of consent, he was nonetheless of the view that the individual “layers”<sup>139</sup> of information did not comply with Article 12(1) and 13(1)(c) GDPR. While I note that Meta Ireland contended that the information provided complied with Article 12(1), 13(1)(c) and 5(1)(a) GDPR, much of the submissions on the Draft Inquiry Report focussed on Meta Ireland’s disagreement with the “layered” approach taken by the Investigator. For the reasons I have outlined above, I will not follow this “layered” approach but

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<sup>138</sup> See the Article 29 Working Party, Guidelines on transparency under Regulation 2016/679, as last revised and adopted on 11 April 2018.

<sup>139</sup> In this regard, the Investigator treated the “Data Policy”, the “What is our legal basis for processing data?” section of the Facebook Data Policy, the Legal Basis Notice published by Facebook Ireland Limited (accessible from the “Learn more” hyperlink in the “What is our legal basis for processing data?” section of the Facebook Data Policy), the “Instagram Service” section Instagram’s Terms of Use, the “additional informational resources” accessible from the Terms of Use, and the “How do we use this information?”, “How do we operate and transfer data as part of our global services?” and “How do the Facebook Companies work together?” sections of the Facebook Data Policy as distinct layers for the purposes of his analysis.

will consider the information more cumulatively and holistically, referring to the views of the Complainant, Meta Ireland and the Investigator, as appropriate.

#### *Information provided to the Data Subject in respect of the purposes and/or legal basis of processing*

138. As a preliminary point, I note that Meta Ireland confirmed, in submissions dated 28 September 2018, that personal data is collected directly from data subjects in the context of the Instagram service.<sup>140</sup> Accordingly, Article 13 is relevant. Given that the focus of the Complaint is on whether Meta Ireland has a lawful basis for processing of personal data in connection with the Instagram service, I am satisfied that Article 13(1)(c) GDPR – which concerns information in respect of “*the purposes of the processing for which the personal data are intended as well as the legal basis for the processing*” – is of particular relevance.

#### The Complaint and Meta Ireland’s Submissions and the Views of the Investigator

139. The Complainant alleged that Meta Ireland had “misled” Instagram users on the basis that a user could not identify “*what data is processed, for which exact purpose and on which legal basis*” and was therefore “*inherently non-transparent*”, contrary to the requirements of Article 13(c) GDPR.<sup>141</sup> The Complainant also stated that the manner in which the information was provided by “*the controller at least lead the data subject to belief [sic] that all these processing operations are (also) based on Article 6(1)(a) and/or 9(2)(a) of the GDPR*”.<sup>142</sup>

140. In the course of the Inquiry, Meta Ireland made extensive submissions in respect of compliance with Article 13 GDPR. In submissions dated 28 September 2018, Meta Ireland stated that, in its view, it complied with the information requirements in Article 13(1) and (2) by providing the relevant information at the time the personal data was collected.<sup>143</sup> Meta Ireland further stated that the information was provided by way of the user engagement flow and, on a continuous basis, in the Data Policy.<sup>144</sup>

141. In this regard, Meta Ireland further submitted that Article 13(1)(c) GDPR requires controllers to be transparent as regards the purposes of processing generally as opposed to information as to the purposes of specific processing operations.<sup>159</sup> Moreover, in submissions on the Draft Report, Meta Ireland emphasised its view that, when implementing the information requirements under Article

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<sup>140</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.47.

<sup>141</sup> Complaint dated 25 May 2018, at p. 17.

<sup>142</sup> Complaint dated 25 May 2018, at p. 3.

<sup>143</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.49.

<sup>144</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.51.

<sup>159</sup> Meta Ireland’s Submissions dated 22 February 2019, at para. 2.2.



12 to 14 GDPR, controllers have discretion as to the means and method of the provision of information.<sup>145</sup>

142. The Investigator emphasised that Article 13(1)(c) GDPR states that information concerning both the purposes of processing and the identification of the relevant legal basis must be provided to data subjects.<sup>146</sup> However, as the Complainant did not – or, as it submitted, could not - identify the types of processing which occurred as a result of accepting the Terms of Use, the Investigator was of the view that only the obligation to provide information as to legal basis for processing is within the scope of the Complaint.<sup>147</sup>

143. In this respect, the Investigator noted that “processing”, interpreted in line with Article 4(2) GDPR, referred to “operations, or sets of operations, carried out on personal data or sets of personal data”.<sup>148</sup> In his view, “processing” did not refer to specific processing operations but referred to the broader concept of a “set of processing operations”.<sup>149</sup> In essence, it was his view that Article 13(1)(c) has the objective of “ensuring the intelligible provision of information on the legal basis for separate and distinct types of processing”.<sup>150</sup> The provision of information in accordance with the requirements of Article 13(1)(c) obliges the controller to (1) “specify the legal basis in question” and (2) “identify the discrete ‘set of operations’ performed (i.e. the processing) in connection with that legal basis”.<sup>151</sup>

#### Consideration of the Information to be Provided

144. In considering the obligations under Article 13(1)(c) GDPR, I agree with the Investigator that the term “processing” should be construed in line with Article 4(2) GDPR. I have set out the full text of Article 4(2) above. Article 4(2) GDPR clearly provides that, “[f]or the purposes of the GDPR”, processing refers to “any operations or set of operations”. The clause, “[f]or the purposes of the GDPR”, clearly implies that where the term “processing” appears in the text of the GDPR, the definition contained in Article 4(2) is to be used. I further note that, while the text of the GDPR does not define the term “operation”, Article 4(2) contains a list of examples which illustrate the type of activities which may constitute an operation. I note that the inclusion of the phrase “such as” before the list indicates that these examples are not exhaustive. It follows, in my view, that any action carried out on personal data, including its collection, may constitute an operation.

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<sup>145</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.4.

<sup>146</sup> Final Inquiry Report dated 18 January 2021, at para. 308.

<sup>147</sup> Final Inquiry Report dated 18 January 2021, at para. 308.

<sup>148</sup> Final Inquiry Report dated 18 January 2021, at paras. 321, 327.

<sup>149</sup> Final Inquiry Report dated 18 January 2021, at para. 325.

<sup>150</sup> Final Inquiry Report dated 18 January 2021, at para. 326.

<sup>151</sup> Final Inquiry Report dated 18 January 2021, at para. 327.

145. In this regard, it is also illustrative to consider Recital 60 GDPR which states that “*principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes*” [my emphasis]. The Article 29 Working Group also referred to processing operations in this context, stating:

*“Transparency is intrinsically linked to fairness and the new principle of accountability under the GDPR. It also follows from Article 5.2 that the controller must always be able to demonstrate that personal data are processed in a transparent manner in relation to the data subject. Connected to this, the accountability principle requires transparency of processing operations in order that data controllers are able to demonstrate compliance with their obligations under the GDPR”* [my emphasis].<sup>152</sup>

146. As set out above, Meta Ireland’s position is that the term “processing” for the purposes of Article 13 GDPR does not encompass “processing operations” on the basis that Article 13 refers to “processing” as opposed to “processing operations”.<sup>153</sup> I did not agree with this position in the Preliminary Draft. As I outlined in the Preliminary Draft, the definition contained in Article 4(2) GDPR is that to be applied “[f]or the purposes of the GDPR”. It logically follows that, where the term processing is used throughout the GDPR, the definition set out in Article 4(2) applies, i.e. processing should be construed to mean “*processing operations or sets of operations*”. I would further add that I also disagree with Meta Ireland’s submission that, as “*the word ‘operation’ has been deliberately omitted from Article 13(1)(c) GDPR, it is not appropriate to read in language based on Recital 60 GDPR*”.<sup>169</sup> As I outlined in the Preliminary Draft, an ordinary reading of Article 4(2) GDPR is that the word processing – where it appears in the GDPR – should be construed to refer to processing as “operations or set of operations”; logically this is applicable to Article 13(1)(c).

147. In response to the Preliminary Draft, Meta Ireland expressed disagreement with my “literal interpretation” of Article 13(1)(c) GDPR and asserted that its own “*interpretation directly tracks the actual wording of the relevant GDPR provision which stipulates only that two items of information be provided about the processing (i.e. purposes and legal bases)*”.<sup>154</sup> In this regard, Meta Ireland further stated that it

*“disagrees with the Commission’s use of Article 4(2) GDPR to interpret Article 13(1)(c) GDPR to refer to processing operations, particularly where the term “processing operations” has in fact been used elsewhere in the GDPR but deliberately not used in Article 13(1)(c) GDPR. The Commission’s view does not adequately explain why the*

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<sup>152</sup> Article 29 Working Group, “Guidelines on transparency under Regulation 2016/679” (adopted on 29 November 2017, as last revised and adopted on 11 April 2018), at para. 2.

<sup>153</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.4(E).

<sup>169</sup> Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.4(F).

<sup>154</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 12, at para. 8.2(A).

*drafters of the GDPR made this distinction (if as the Commission alleges “purposes” and “processing operations” are one and the same) and justify why the Commission is entitled to make such a distinction despite the clear wording of the GDPR”.<sup>155</sup>*

148. In essence, Meta Ireland disagreed that Article 4(2) operates as an interpretive aid in this context.<sup>156</sup> In particular, Meta Ireland is of the view that “Article 13(1)(c) GDPR identifies only two specific features of the processing that need to be provided” and, as other subsections of Article 13 relate to other aspects of processing, it does not follow that the definition of processing provided for in Article 4(2) GDPR is applicable to any of the subsections of Article 13.<sup>173</sup> Meta Ireland further alleged that it was not the legislator’s intention that the provision be construed in the manner I proposed<sup>157</sup> and that my proposed interpretation of Article 13(1)(c) GDPR is “is not clear or obvious from the GDPR itself”.<sup>158</sup>

149. It appears to me that this argument is premised on the suggestion that, as the various subsections of Article 13 GDPR require the disclosure to data subjects of specific aspects of the broader activity or “processing” as defined by Article 4(2) GDPR, such as the identity of a recipient, the duration of the processing, this implies that the broader definition of “processing” in Article 4(2) cannot be applicable. I do not share this view. While I note that Article 13 does not specifically include the word “operation”, it remains my view that Meta Ireland’s position would render the definition in Article 4(2) meaningless. Indeed, it would be contrary to the express purpose of Article 4(2) GDPR if the understanding of processing could only include processing operations where the term “operation” was deliberately included. To consider otherwise would be contrary to the literal interpretation of Article 4(2) GDPR. I am therefore satisfied that the term “processing” in Article 13(1)(c) GDPR should be construed to include processing operations or sets of operations and this is clear from the text of the GDPR.

150. I further note Meta Ireland’s submissions that, as Article 13(1) GDPR includes the phrase “at the time data is first collected”, it therefore refers only to “prospective processing”. Indeed, Meta Ireland submitted that, on this basis, Article 13(1)(c) GDPR does not relate to ongoing processing operations, but is concerned solely with information on “intended processing”.<sup>176</sup> Given the fundamental role which transparency obligations plays in the exercise of data subjects rights, it cannot be the case that the legislator intended such a narrow approach to the concept of processing.

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<sup>155</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 12, at para. 8.2(A).

<sup>156</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(A).

<sup>173</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(C).

<sup>157</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(D) and (E).

<sup>158</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(G).

<sup>176</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(B).

151. In its submissions on the Preliminary Draft, Meta Ireland also disagreed that there is a requirement in Article 13(1)(c) to link purposes with individual legal bases or equally to processing operations or set of operations.<sup>159</sup> In this vein, Meta Ireland have alleged that my proposed approach does not further the objectives of the transparency obligations.<sup>160</sup> Indeed, it is Meta Ireland’s position that the “*applicable question is whether the actual obligation imposed by the GDPR has been complied with, not whether or not an additional category of information or linkage not referenced in GDPR has also been provided*”.<sup>161</sup>

152. As I have outlined above, the text of Article 13(1)(c) clearly states that there is a requirement to provide information as to “*the purposes of the processing for which the personal data are intended as well as the legal basis for the processing*”. Its literal meaning is to require controllers to provide information to data subjects concerning the purposes of the processing and the legal basis for that processing. In respect of the purposes of processing, I would further add that the inclusion of the phrase “*for which the personal data are intended*” in Article 13(1)(c) GDPR indicates that data controllers should also provide the information so as to enable the data subject(s) understand, in broad terms, which personal data is – or will be – undergoing processing, for which processing operations or set of operations and which legal basis is applicable. It is not the case that purposes and legal bases can simply be cited in the abstract and detached from the personal data processing they concern. Accordingly, there must be a link drawn between the purposes and the legal basis to ensure that the data subject has meaningful information.

153. It is my view that Meta Ireland’s position cannot be reconciled with a literal interpretation of Article 13(1)(c); nonetheless, for completeness, I have considered whether its position is nonetheless justified by a systemic reading based on the legislator’s objective and the contents of the GDPR as a whole. In relation to the argument I have just considered, it is important to note that transparency, both under the GDPR and in the Article 29 Working Party Guidelines considered below in this Decision, is directly linked to the principle of accountability under the GDPR. In order to ensure that actual or intended processing is carried out in an accountable and transparent manner, the interpretation proposed by Meta Ireland cannot be accepted. Indeed, the absence of any level of specificity as to what the data controller is doing with the data, and more fundamentally what data they are processing at all, would render information on the purposes of this unspecified processing almost useless to a data subject. In the absence of information on the nature of the data being used and the nature of the processing being carried out, it would be virtually impossible to exercise data subject rights in an informed manner. Such an absence of transparency and accountability could not be reconciled with a purposive or systematic reading of the GDPR.

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<sup>159</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3.

<sup>160</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3(B).

<sup>161</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3(C).

154. I further note that Meta Ireland cited some of the GDPR’s preparatory materials in support of its view that the legislator expressly decided to exclude particular information as to processing operations as part of Article 13.<sup>162</sup> In particular, Meta Ireland sought to rely on the exclusion of the following: *“the existence of certain processing activities and operations for which a personal data impact assessment has indicated that there may be a high risk”*.<sup>163</sup> The decision of the legislator to not include a requirement to provide such information has no impact on the applicability of the clear definition of “processing” in Article 4(2) GDPR, and therefore does not affect the appropriate literal interpretation of Article 13(1)(c) GDPR. In any purposive or systematic approach to interpreting the provision, the decision not to require information on processing which the controller itself has found to be high risk does not suggest that the controller would not otherwise be required to disclose the existence of that processing. It would simply require a controller to disclose that a data protection impact assessment indicated the presence of a high risk. This therefore provides no evidence that the legislator excluded in any way the interpretation of Article 13(1)(c) GDPR being proposed.

155. In considering what constitutes the purposes of processing, it is illustrative to consider the six interconnected principles which underpin the data protection framework, as set out in Article 5 GDPR. These core principles contained in Article 5 focus on the purpose(s) of the relevant processing; this is evident as Article 5(1) mandates that personal data are:

*“(a) processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’);*

*(b) collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes... (‘purpose limitation’);*

*(c) adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed (‘data minimisation’);*

*(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay (‘accuracy’);*

*(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed... (‘storage limitation’);*

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<sup>162</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(E).

<sup>163</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.2(E).

*(f) processed in a manner that ensures appropriate security of the personal data, including protection against unauthorised or unlawful processing... (‘integrity and confidentiality’)* [my emphasis].

156. As set out above, Article 5(1)(b) GDPR sets out the purpose limitation principle. The language used - in particular, the references to data “collection” and “further processing” – is reflective of the language used in Article 13(1)(c) GDPR as the introductory passage to Article 13 GDPR contains a reference to “collection”, and Article 13(1)(c) GDPR itself refers to “*the purposes of the processing for which the personal data are intended*”. It therefore can be said that Article 13 GDPR also considers “collection” and “further” processing. For this reason, it is useful to examine further the requirements and function of the purpose limitation principle enshrined in Article 5(1)(b) GDPR.

157. The Article 29 Working Party has also considered the purpose limitation principle. In this regard, it has stated:

*“When setting out the requirement of compatibility, the Directive does not specifically refer to processing for the ‘originally specified purposes’ and processing for ‘purposes defined subsequently’. Rather, it differentiates between the very first processing operation, which is collection, and all other subsequent processing operations (including for instance the very first typical processing operation following collection – the storage of data).*

*In other words: any processing following collection, whether for the purposes initially specified or for any additional purposes, must be considered ‘further processing’ and must thus meet the requirement of compatibility”*.<sup>164</sup>

158. The effect of this position is to create a distinction between “purpose specification” and “compatible use”. In respect of “purpose specification”, the Article 29 Working Party stated that:

*“[P]ersonal data should only be collected for ‘specified, explicit and legitimate’ purposes. Data are collected for certain aims; these aims are the ‘raison d’être’ of the processing operations. As a prerequisite for other data quality requirements, purpose specification will determine the relevant data to be collected, retention periods, and all other key aspects of how personal data will be processed for the chosen purpose/s”*.<sup>165</sup>

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<sup>164</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at p. 21.

<sup>165</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at pp. 11 – 12.

159. In considering the interrelationship between the purpose limitation principle and other significant principles in the data protection framework, the Article 29 Working Group took the view that:

*“There is a strong connection between transparency and purpose specification. When the specified purpose is visible and shared with stakeholders such as data protection authorities and data subjects, safeguards can be fully effective. Transparency ensures predictability and enables user control”*.<sup>166</sup>

160. The following position of the Article 29 Working Group is also relevant:

*“In terms of accountability, specification of the purpose in writing and production of adequate documentation will help to demonstrate that the controller has complied with the requirement of Article 6(1)(b). It would allow data subjects to exercise their rights more effectively – for example, it would provide proof of the original purpose and allow comparison with subsequent processing purposes”*.<sup>167</sup>

161. The Article 29 Working Group also considered the benefits that transparency and accountability offered to data subjects, in particular, the fact that it enabled data subjects to make more informed choices.<sup>168</sup> In particular, it is worth noting that:

*“processing of personal data has an impact on individuals' fundamental rights in terms of privacy and data protection. This impact on the rights of individuals must necessarily be accompanied by a limitation of the use that can be made of the data, and therefore by a limitation of purpose. An erosion of the purpose limitation principle would consequently result in the erosion of all related data protection principles”*[my emphasis].<sup>169</sup>

162. Although I note that, strictly speaking, the guidance of the Article 29 Working Party is not binding on the Commission, it is nonetheless instructive in understanding the substance of the transparency obligations set out in the GDPR and their interrelationship with the core principles contained in Article 5 GDPR. It is clear to me from the above that the purpose limitation principle has an important role to play, both in relation to the empowerment of the data subject, but also

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<sup>166</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at p. 13.

<sup>167</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at p. 18.

<sup>168</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at p. 17.

<sup>169</sup> Article 29 Working Group, “Opinion 03/2013 on Purpose Limitation” (00569/13/EN WP 203) (adopted on 2 April 2013), at pp. 14 – 15.

in relation to underpinning and supporting the objectives of the data protection framework as a whole under the GDPR.

163. Therefore, when considering what information must be provided in respect of the “purposes” of any processing operation – for example, as required by Article 13(1)(c) - it seems clear to me that it is important to consider, among another things, how the quality of information provided may potentially impact the effective operation of the other data protection principles. This is particularly the case where the wording of Article 13(1)(c) GDPR maps the approach of Article 5(1)(b) GDPR, i.e. by describing the obligation arising by reference to “collection” and “further” processing.
164. Given that the data controller must identify the categories of personal data that will be collected so as to ensure compliance with the requirement to specify “purpose” in accordance with the purpose limitation principle, it is my view that data subjects must have access to the information required by Article 13(1)(c) GDPR in conjunction with the category/categories of personal data being processed. This is necessary to ensure that the data subject is empowered to hold the controller accountable for compliance with the purpose limitation principle set out in Article 5(1)(b) GDPR. This view is reflected in the Article 29 Working Party guidelines on transparency:

*“Transparency, when adhered to by data controllers, empowers data subjects to hold data controllers and processors accountable and to exercise control over their personal data by, for example, providing or withdrawing informed consent and actioning their data subject rights. The concept of transparency in the GDPR is user-centric rather than legalistic and is realised by way of specific practical requirements on data controllers and processors in a number of articles”.<sup>170</sup>*

#### My View on the Information to be Provided

165. It was on the basis of the above analysis that I expressed the provisional view in the Preliminary Draft that Article 13(1)(c) GDPR requires that information which specifies and relates to the purpose(s) of the processing operation(s) or set(s) of operations for which the (specified category/categories of) personal data are intended is to be provided to data subjects. It was also my provisional view that this information should be provided in such a way as to ensure that there is a clear link from:

- a. the specified category/categories of personal data to
- b. the purpose(s) of the specified processing operation(s)/set(s) of operations to

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<sup>170</sup> Article 29 Working Group, “Guidelines on transparency under Regulation 2016/679” (adopted on 29 November 2017, as last revised and adopted on 11 April 2018), at para. 4.



- c. the legal basis which is being relied on to support the specified processing operation(s)/set(s) of operations.

166. The Complainant agreed with this approach and, in its submissions on the Preliminary Draft, stated that “[w]ithout such linking, we would simply see generic lists of all data, all purposes and all legal bases under Article 6(1) GDPR without any indication of the relationships between them.”<sup>171</sup>

167. Meta Ireland disagreed with this proposed approach and asserted that it was only obliged to provide specific information on (1) the purposes for the processing it carries out and (2) the legal bases upon which it relies.<sup>172</sup> In essence, this amounts to a restatement of its position that it is only required to provide (discrete) information as to the purposes and legal basis of any processing. Meta Ireland further alleged that my reference to “processing operations” was “extraneous” as “[b]oth the intended purpose and the legal basis are, conceptually, capable of being explained and understood without any reference to the practicalities of the processing operations which will be applied to the personal data”.<sup>173</sup> Moreover, it is Meta Ireland’s position that my approach does not further the objectives of the transparency obligations nor would it provide information in “a concise, transparent, intelligible and easily accessible form”.<sup>174</sup>

168. As is evident from the assessment below, my view is that the Data Policy and related material sometimes, on the contrary, demonstrate an oversupply of very high level, generalised information at the expense of a more concise and meaningful delivery of the essential information necessary for the data subject to understand the processing being undertaken and to exercise his/her rights in a meaningful way. Furthermore, while Meta Ireland has chosen to provide its transparency information by way of pieces of text, there are other options available, such as the possible incorporation of tables, which might enable Meta Ireland to provide the information required in a clear and concise manner, particularly in the case of an information requirement comprising a number of linked elements. The importance of concision cannot nonetheless be overstated. It is, I think, important to emphasise that while a controller may provide (additional) information which goes beyond what is required by Article 13(1)(c) GDPR, that controller must first satisfy the information obligations set out in the GDPR and, second, ensure that any such additional information does not have the effect of creating information fatigue or otherwise diluting the effective delivery of the statutorily required information.

169. In the Preliminary Draft, I noted that while Article 13 GDPR – unlike Article 14 – does not expressly refer to categories of data, it does not follow that there is no obligation to provide information

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<sup>171</sup> Complainant’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 20.

<sup>172</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3.

<sup>173</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3(B).

<sup>174</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.3(B).

<sup>193</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.4.

as to the category/categories of personal data undergoing processing. Indeed, I expressed the view that information as to the categories of personal data must also be provided in ensuring compliance with Article 13 GDPR. Meta Ireland disagreed and asserted that as Article 13 – unlike Article 14 – did not expressly refer to “*categories of personal data and accordingly should not be read into Article 13(1)(c) GDPR*”.<sup>193</sup> In this vein, it was Meta Ireland’s position that as:

*“Article 14(1)(d) GDPR expressly requires a controller to provide information to the data subject on the categories of personal data (in circumstances where Article 14 applies) [it] further reinforces this point - i.e. it is clear from the fact that the concept is referred to in Article 14(1)(d) GDPR, that the legislators made a deliberate choice not to include this concept in Article 13(1)(c) GDPR. Indeed, if the Commission’s interpretation was correct there would have been no need for Article 14(1)(d) GDPR, as Article 14(1)(c) GDPR would in any event have to be approached on the basis that categories of data needed to be identified. As such, the Commission’s approach appears to conflict with the statutory interpretation principle *expressio unis est exclusio alterius*”.*<sup>175</sup>

170. I do not agree; rather, it remains my view that that there is an implicit obligation in Article 13 to provide such information. In support of this position, it is important to first distinguish Article 13 from Article 14. Article 13 concerns circumstances wherein personal data are collected (directly) from the data subject whereas Article 14 is applicable where the personal data have not been obtained from the data subject. It logically follows that, as the data subject has provided the personal data to the controller, that data subject may already know the categories of personal data and the source of this information where the personal data is collected from that data subject. However, it is not necessarily the case that, in such circumstances, the categories are known by the data subject, in particular where metadata or device data is collected from them. Nonetheless, where personal data are not obtained from the data subject, that data subject will likely never have knowledge of the categories of personal data.

171. It appears to me to be clear that both Articles 13 and 14 GDPR envisage that, in all circumstances, the data subject will have information as to the categories of personal data undergoing processing. As Article 14 GDPR concerns circumstances wherein the personal data has not been obtained by the data subject and thus the categories are likely to never be known by the data subject, it explicitly specifies that such information should be provided. On the other hand, Article 13 does not include this as an explicit requirement as it may be the case that the data subject who has provided the data may already know this information. In my view, this is the distinction between the provisions and the clear motivation of the legislator in including the reference to categories of information in Article 14 GDPR alone.

172. I would further add that the fundamental difference in how the personal data is collected gives rise to other variations in the information required to be provided. For example, Article 13(2)(e)

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<sup>175</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.4(C).

GDPR requires the controller to inform the data subject as to “*whether the provision of personal data is a statutory or contractual requirement, or a requirement necessary to enter into a contract, as well as whether the data subject is obliged to provide the personal data and of the possible consequences of failure to provide such data.*” Article 14 GDPR, on the other hand, contains no such requirement. The rationale for this difference is clear. When this information is provided prior to the collection of personal data, the data subject is empowered to exercise control over their personal data. It avoids them being placed in a position where they provide personal data to the controller on a mistaken understanding as to either the necessity for its collection, or of the potential consequences of failure to provide it. The provision of such information would have no purpose if provided to the data subject after the personal data has been collected, hence its omission from Article 14 GDPR.

173. It is also unclear why a data subject would only be entitled to information concerning the categories of personal data if the controller has acquired their personal data from another source. It is further difficult to understand how such a difference in treatment, between two categories of data subject, could be consistent with the GDPR, particularly where the difference in treatment concerns a core data subject right. If this were true, a data subject would only be entitled to this information if the personal data were obtained from a source other than themselves, but would not if it was obtained from them directly. This entirely arbitrary distinction is inconsistent with the clear aims of the GDPR to provide a series of universal rights to all data subjects, grounded on the universal right to data protection in Article 8 of the Charter. Therefore even if the interpretation advanced in the preceding paragraph were incorrect, Meta Ireland’s submissions would nonetheless not be supported by a purposive or systematic reading of the GDPR.

174. Accordingly, I am of the view that Article 13(1)(c) GDPR requires data controllers to provide information concerning the individual purpose(s) and legal basis by reference to a specified category/categories of personal data. This is supported by both a literal interpretation of Article 13(1)(c) GDPR, which refers to the purposes for which *the personal data* are intended, and a more purposive interpretation as I have considered above. When the purposes and legal basis for processing are identified, they must be identified by reference to *the personal data* being processed or, at a minimum, the broad personal data processing operations to which they relate. The purposes and legal basis of processing personal data can only be understood by reference to the processing operations being undertaken. In order for information in this regard to be meaningful, and to provide data subjects with meaningful information as to whether they wish to exercise data subject rights, data subjects must be provided with this information. This goes to the essence of transparency in relation to the processing of personal data. In providing information on “*the purposes of the processing for which the personal data are intended as well as the legal basis for the processing*” for the purposes of Article 13(1)(c) GDPR, the data controller must do so by reference to the personal data being processed or, at least, the broad personal data processing operations involved.

175. For completeness, I should note that a controller’s transparency obligations are particularly pertinent where Article 6(1)(b) GDPR is being relied on as a legal basis for the processing of personal data. Indeed, in respect of the transparency requirements, I note that the EDPB Guidelines on Article 6(1)(b) GDPR state “[i]n line with their transparency obligations, controllers should make sure to avoid any confusion as to what the applicable legal basis is[,] ... particularly ... where the appropriate legal basis is Article 6(1)(b)”.<sup>176</sup> I agree with the EDPB’s view that transparency obligations are particularly pertinent in this context so as to ensure that data subjects freely exercise their freedom to enter into contracts. In this regard, I also note that the EDPB provides an example similar to the facts at issue, namely where “data subjects may erroneously get the impression that they are giving their consent in line with Article 6(1)(a) when signing a contract or accepting terms of service”.<sup>177</sup>

*Information provided by Meta Ireland in relation to Processing in accordance with Article 6(1)(b)*

176. In considering the information which Meta Ireland provided to users of the Instagram service in respect of processing in accordance with Article 6(1)(b), the starting point is the Instagram Data Policy. Section V of the Data Policy specifically concerns the legal basis of processing in connection with the Instagram service and is entitled “What is our legal basis for processing data?” In Section V, Meta Ireland specifically sets out its position in respect of contractual necessity, stating:

*“We collect, use and share the data that we have in the ways described above:*

- *as necessary to fulfill our Facebook Terms of Service or Instagram Terms of Use; ...*

*Learn more about these legal bases and how they relate to the ways in which we process data”.*

For completeness, I note that both the Meta Ireland Terms of Service and the Instagram Terms of Use are accessible by hyperlink. The clause which invites users to “learn more” also contains a hyperlink which directs users to an unnamed page which the Investigator termed the “Legal Basis Notice”. For clarity, I will retain that description of the page. This page is not specific to the Instagram service but applies across various Meta services. According to the Legal Basis Notice:

*“For all people who have legal capacity to enter into an enforceable contract, we process data as necessary to perform our contracts with you (the Facebook Terms and Instagram Terms, together, 'the Terms'). We describe the contractual services for which this data processing is necessary in the “Our Services” section of the Terms, and in the additional*

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<sup>176</sup> EDPB Guidelines on Article 6(1)(b), at para. 20.

<sup>177</sup> EDPB Guidelines on Article 6(1)(b), at para. 20.

*informational resources accessible from the Terms. The core data uses necessary to provide our contractual services are:*

- *To provide, personalize, and improve our Facebook Products;*
- *To promote safety, integrity, and security;*
- *To transfer, transmit, store, or process your data outside the EEA, including to within the United States and other countries;*
- *To communicate with you, for example, on Product-related issues; and*
- *To provide consistent and seamless experiences across the Facebook Company Products.*

*These uses are explained in more detail in our Data Policy, under “How do we use this information?” and “How do we operate and transfer data as part of our global services?” and “How do the Facebook Companies work together?” We’ll use the data we have to provide these services; if you choose not to provide certain data, the quality of your experience using the Facebook Products may be impacted”.*<sup>178</sup>

177. As with the Instagram Data Policy, the Legal Basis Notice contained hyperlinks to both the Facebook Terms of Service and the Instagram Terms of Use. It follows that users were invited to receive further information from these hyperlinks. As the Instagram Terms of Use stated that it is those Terms of Use which comprise the agreement between the user and Meta Ireland (then Facebook), the focus on my analysis is on the Instagram Terms of Use. While I note and agree with the Investigator’s position that the Facebook Terms of Service do not concern Instagram,<sup>179</sup> I would add that the version of the Instagram Terms of Use at the date of the Complaint was not explicit as regards the non-applicability of the Facebook Terms of Service to the Instagram service. This is in contrast with more recent versions of the Terms of Use which expressly state that “[w]hen you create an Instagram account or use Instagram, you agree to these terms. The Facebook Terms of Service do not apply to this Service”.<sup>180</sup> While I accept on balance that a data subject is likely to understand that the Facebook Terms of Service were not applicable in this context, it nonetheless may have been unclear given the hyperlinks to the Facebook Terms of Service in the Data Policy and Legal Basis Notice; this in turn is relevant for my assessment of the form in which the information was provided.

178. I also note that users were directed to the “Our Services” section of the Instagram Terms of Use. While there is no section expressly titled “Our Services” in the Terms of Use, there is a section for “The Instagram Service”. Taking a broad reading, it appears to me that this is likely the section

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<sup>178</sup> See the Legal Basis Notice.

<sup>179</sup> Final Inquiry Report dated 18 January 2021, at para. 288.

<sup>180</sup> See the Instagram Terms of Use, last revised 20 December 2020 <https://help.instagram.com/581066165581870?ref=dp> last accessed 20 September 2021. <sup>200</sup> Final Inquiry Report dated 18 January 2021, at para. 358.

that the Legal Notice Basis directs users to. Nonetheless, it should be noted that this is not explicitly made clear and I agree with the Investigator's view that "[w]hile it is perhaps possible to discern the controller's intention in this sentence, the terminology used here is inaccurate, and could confuse the reader as to the correct source of relevant information".<sup>200</sup> "The Instagram Service" section of the Terms of Use provides the following information:

*"We agree to provide you with the Instagram Service. The Service includes all of the Instagram products, features, applications, services, technologies, and software that we provide to advance Instagram's mission: To bring you closer to the people and things you love. The Service is made up of the following aspects (the Service):*

- Offering personalized opportunities to create, connect, communicate, discover, and share.  
*People are different. We want to strengthen your relationships through shared experiences you actually care about. So we build systems that try to understand who and what you and others care about, and use that information to help you create, find, join, and share in experiences that matter to you. Part of that is highlighting content, features, offers, and accounts you might be interested in, and offering ways for you to experience Instagram, based on things you and others do on and off Instagram.*
- Fostering a positive, inclusive, and safe environment.  
*We develop and use tools and offer resources to our community members that help to make their experiences positive and inclusive, including when we think they might need help. We also have teams and systems that work to combat abuse and violations of our Terms and policies, as well as harmful and deceptive behavior. We use all the information we have-including your information-to try to keep our platform secure. We also may share information about misuse or harmful content with other Facebook Companies or law enforcement. Learn more in the Data Policy [hyperlinked].*
- Developing and using technologies that help us consistently serve our growing community.  
*Organizing and analyzing information for our growing community is central to our Service. A big part of our Service is creating and using cutting-edge technologies that help us personalize, protect, and improve our Service on an incredibly large scale for a broad global community. Technologies like artificial intelligence and machine learning give us the power to apply complex processes across our Service. Automated technologies also help us ensure the functionality and integrity of our Service.*
- Providing consistent and seamless experiences across other Facebook Company Products.  
*Instagram is part of the Facebook Companies, which share technology, systems, insights, and information-including the information we have about you (learn more in*

*the Data Policy [hyperlinked])-in order to provide services that are better, safer, and more secure. We also provide ways to interact across the Facebook Company Products that you use, and designed systems to achieve a seamless and consistent experience across the Facebook Company Products.*

- Ensuring a stable global infrastructure for our Service.  
*To provide our global Service, we must store and transfer data across our systems around the world, including outside of your country of residence. This infrastructure may be owned or operated by Facebook Inc., Facebook Ireland Limited, or their affiliates.*
- Connecting you with brands, products, and services in ways you care about.  
*We use data from Instagram and other Facebook Company Products, as well as from third-party partners, to show you ads, offers, and other sponsored content that we believe will be meaningful to you. And we try to make that content as relevant as all your other experiences on Instagram.*
- Research and innovation.  
*We use the information we have to study our Service and collaborate with others on research to make our Service better and contribute to the wellbeing of our community”.*

179. The Terms of Use also stated that providing the Instagram service “requires collecting and using your information” and, accordingly, directed users to the Data Policy for information as to how Meta Ireland “collect, use, and share information across the Facebook Products [hyperlinked]”. The Data Policy outlined how the information was used in Section II entitled “How do we use this information?” It should be noted that the Legal Basis Notice also directs users towards this section of the Data Policy. Section II provides the following information:

*“We use the information we have (subject to choices you make) as described below and to provide and support the Facebook Products and related services described in the Facebook Terms and Instagram Terms. Here's how:*

*Provide, personalize and improve our Products.*

*We use the information we have to deliver our Products, including to personalize features and content (including your News Feed, Instagram Feed, Instagram Stories and ads) and make suggestions for you (such as groups or events you may be interested in or topics you may want to follow) on and off our Products. To create personalized Products that are unique and relevant to you, we use your connections, preferences, interests and activities based on the data we collect and learn from you and others (including any data with special protections you choose to provide where you have given your explicit consent); how you use and interact with our Products; and the people, places, or things you're connected*

*to and interested in on and off our Products. Learn more about how we use information about you to personalize your Facebook and Instagram experience, including features, content and recommendations in Facebook Products; you can also learn more about how we choose the ads that you see.*

- *Information across Facebook Products and devices: We connect information about your activities on different Facebook Products and devices to provide a more tailored and consistent experience on all Facebook Products you use, wherever you use them. For example, we can suggest that you join a group on Facebook that includes people you follow on Instagram or communicate with using Messenger. We can also make your experience more seamless, for example, by automatically filling in your registration information (such as your phone number) from one Facebook Product when you sign up for an account on a different Product.*
- *Location-related information: We use location-related information-such as your current location, where you live, the places you like to go, and the businesses and people you're near-to provide, personalize and improve our Products, including ads, for you and others. Location-related information can be based on things like precise device location (if you've allowed us to collect it), IP addresses, and information from your and others' use of Facebook Products (such as check-ins or events you attend).*
- *Product research and development: We use the information we have to develop, test and improve our Products, including by conducting surveys and research, and testing and troubleshooting new products and features. Face recognition: If you have it turned on, we use face recognition technology to recognize you in photos, videos and camera experiences. The face-recognition templates we create are data with special protections under EU law. Learn more about how we use face recognition technology, or control our use of this technology in Facebook Settings. If we introduce facerecognition technology to your Instagram experience, we will let you know first, and you will have control over whether we use this technology for you.*
- *Ads and other sponsored content: We use the information we have about you-including information about your interests, actions and connections-to select and personalize ads, offers and other sponsored content that we show you. Learn more about how we select and personalize ads, and your choices over the data we use to select ads and other sponsored content for you in the Facebook Settings and Instagram Settings.”.*

Provide measurement, analytics, and other business services.

*We use the information we have (including your activity off our Products, such as the websites you visit and ads you see) to help advertisers and other partners measure the effectiveness and distribution of their ads and services, and understand the types of people who use their services and how people interact with their websites, apps, and services. Learn how we share information with these partners.*



Promote safety, integrity and security.

*We use the information we have to verify accounts and activity, combat harmful conduct, detect and prevent spam and other bad experiences, maintain the integrity of our Products, and promote safety and security on and off of Facebook Products. For example, we use data we have to investigate suspicious activity or violations of our terms or policies, or to detect when someone needs help. To learn more, visit the Facebook Security Help Center and Instagram Security Tips.*

Communicate with you.

*We use the information we have to send you marketing communications, communicate with you about our Products, and let you know about our policies and terms. We also use your information to respond to you when you contact us.*

Research and innovate for social good.

*We use the information we have to conduct and support research and innovation on topics of general social welfare, technological advancement, public interest, health and wellbeing. For example, we analyze information we have about migration patterns during crises to aid relief efforts. Learn more about our research programs”.*

Further information is made available to users by way of hyperlinks throughout Section II of the Terms of Use.

180. As noted above, the Legal Basis Notice outlines the five core data uses which Meta Ireland considers necessary to provides its contractual services. The Legal Basis Notice advises that additional information in respect of these uses can be found under the following sections of the Data Policy:

- *“How do we use this information?” (as outlined above);*
- *“How do we operate and transfer data as part of our global services?”; and* - *“How do the Facebook Companies work together?”*

181. Section IX of the Data Policy considers “How do we operate and transfer data as part of our global services?” and states that:

*“We share information globally, both internally within the Facebook Companies and externally with our partners and with those you connect and share with around the world in accordance with this policy. Information controlled by Facebook Ireland will be transferred or transmitted to, or stored and processed in, the United States or other countries outside of where you live for the purposes as described in this policy. These data transfers are necessary to provide the services set forth in the Facebook Terms and Instagram Terms and to globally operate and provide our Products to you. We utilize standard contractual clauses approved by the European Commission and rely on the*

*European Commission's adequacy decisions about certain countries, as applicable, for data transfers from the EEA to the United States and other countries".*

182. Section IV of the Data Policy concerns "How do the Facebook Companies work together?" and it states:

*"Facebook and Instagram share infrastructure, systems and technology with other Facebook Companies (which include WhatsApp and Oculus) to provide an innovative, relevant, consistent and safe experience across all Facebook Company Products you use. We also process information about you across the Facebook Companies for these purposes, as permitted by applicable law and in accordance with their terms and policies. For example, we process information from WhatsApp about accounts sending spam on its service so we can take appropriate action against those accounts on Facebook, Instagram or Messenger. We also work to understand how people use and interact with Facebook Company Products, such as understanding the number of unique users on different Facebook Company Products."*

Further information as to the entities comprising the "Facebook Company" or "Facebook Company Products" is accessible by way of hyperlinks.

#### *Whether Meta Ireland Complies with Article 5(1)(a), 12(1) and 13(1)(c) GDPR*

183. In the preceding section of this Draft Decision, I have outlined the various sources and documents by which a data subject may obtain information as to the purposes of the processing and the legal basis of same. This information is provided in the (i) Instagram Data Policy, (ii) Legal Basis Notice, (iii) Instagram Terms of Use and (iv) other relevant hyperlinked pages. Moreover, the information in these sources is rather general in nature. As a preliminary matter, I restate my position that the information should be considered holistically and not individually "layer-by-layer". Accordingly, I will assess the information provided in *all* such documents/sources. Nonetheless, the precise means by which the information is accessible in respect of the Instagram service is disjointed and circular in nature. For example, the Data Policy directs users to the Legal Basis Notice, which in turn direct users to both the Data Policy and Terms of Use. Furthermore, as I have noted above, the language used in directing users is confusing and misleading in parts, in particular where it appears that the Facebook Terms of Service has been conflated with the Instagram Terms of Use (for example, users are directed to sections which only appear in the former and not the latter), despite the fact that the former is not applicable to the Instagram service.

184. In its response to the Preliminary Draft, the Complainant agreed with my approach taken on this issue, and emphasised that "*the most relevant change in Facebook's position*", in the Complainant's view, was the decision to rely on Article 6(1)(b) GDPR for the processing in question

and not consent, following the GDPR taking legal effect, which was contained in the last layer of information and not displayed more prominently.<sup>181</sup>

185. On the other hand, in its response to the Preliminary Draft which provisionally found that the information was provided in a disjointed manner and that the texts were variations of each other, Meta Ireland reaffirmed its position that it had provided the requisite information to data subjects in line with its construction of Article 13(1)(c) GDPR.<sup>182</sup> In particular, Meta Ireland’s view was that users were “*clearly and prominently told that Meta Ireland relies on Article 6(1)(b) GDPR*” and extensive information was provided in the Terms of Use, Data Policy and Legal Basis Notice.<sup>183</sup> Meta Ireland criticised my view on the basis that such overlap was necessary and inevitable and also highlighted its use of hyperlinks and summaries to make the information more accessible to users.<sup>184</sup> Indeed, Meta Ireland asserted that my proposed approach did not “*appreciate the positive benefit to users of providing a range of easily accessible tools and explanations, supplemented by additional detail, with easily-navigable hyperlinks connecting those layers*”<sup>185</sup> and precludes users from being overwhelmed with information.<sup>206</sup> In this regard, Meta Ireland also asserted that it provided “*user-facing information in as simple a manner as possible, and [Meta Ireland] has sought to ensure that it can be understood by the average user*”.<sup>186</sup> I further note Meta Ireland’s assertion that my proposed approach was “*excessively prescriptive*”.<sup>187</sup>

186. First of all, while it remains the case that it is for Meta Ireland to provide accessible information that is clear and concise for users regardless of their “sophistication”, that does not detract from the core of the criticism that the disjointed information set out in generalised terms is divorced from specific processing operations. It is not that the presence of variations of the same information in several documents is in itself non-compliant, but rather that it is not compliant when it amounts, in practice, to statements about services and objectives that are not linked to specified processing operations and which do not provide meaningful information to the data subject on the core issues identified in Article 13 GDPR. The fact that this disjointed information is generalised and does not contain the required information (as has been set out when I addressed the correct interpretation of Article 13(1)(c) GDPR), renders the information as a whole unhelpful and ultimately inconsistent with Article 13 GDPR.

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<sup>181</sup> Complainant’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 19.

<sup>182</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 8.6 – 8.7.

<sup>183</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.8.

<sup>184</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 8.11 and 9.7.

<sup>185</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.12.

<sup>206</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 9.6.

<sup>186</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.10.

<sup>187</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 9.1 – 9.4.

187. While I accept that the Legal Basis Notice provides some information as to the purposes and legal basis of processing under Article 6(1)(b) GDPR, I am not satisfied that sufficient information is provided. In particular, I emphasise that the Legal Basis Notice provides a short statement of the five “core data uses” using “summary bullet points”<sup>188</sup> and describes these using generalised language. Furthermore, it does not link these core data uses with any specific and/or specified processing operation(s) or set(s) of operations. While users are directed to specific sections of the Data Policy (i.e. sections on “How do we use this information?” and “How do we operate and transfer data as part of our global services?” and “How do the Facebook Companies work together?”), it does not appear to me that any substantial additional detail and/or information is provided. It seems that these various sources largely recycle similar generalised information which focusses on reiterating the aims/goals of the Meta Platforms group in its data processing activities more broadly, such as personalisation, security, communication and product development etc. I am not convinced that this necessarily provides sufficient detail as to the purposes and legal basis of the processing. Indeed, it appears impossible to identify what processing operations will be carried out in order to fulfil the objectives that are repeated throughout these documents and the legal basis for such operations. In the absence of such information, the user is left to guess as to what processing is carried out on what data, on foot of the specified lawful bases, in order to fulfil these objectives. For the reasons set out above in relation to the correct interpretation of Article 13(1)(c) GDPR, this is insufficient information.

188. More critical, however, is the fact that these various sources of information do not provide meaningful additional information on the various processing operation(s) or set(s) of operations relied on to provide these services. This generalised, repetitive information, in combination with the circular manner in which the information is made accessible to users, has the effect that Meta Ireland’s approach lacks clarity and concision, which in turn means it is difficult for users to identify or have meaningful information as to the processing operation(s) or set(s) of operations that are or will be grounded on Article 6(1)(b) GDPR or on other legal bases. On this basis, it is my view that Meta Ireland has not provided meaningful information as to the processing operation(s) and/or set(s) of operations that occur in the context of the Instagram service, either on the basis of Article 6(1)(b) GDPR or any other legal basis. Indeed, I would go so far as to say that it is impossible for the user to identify with any degree of specificity what processing is carried out on what data, on foot of the specified lawful bases, in order to fulfil these objectives. While I note that *some* information is provided in respect of IP addresses and location information, this is prefaced by qualifiers including “*such as*” and “*things like*” which indicates that the information provided is illustrative rather than concrete in nature. Accordingly, I consider that users have been deprived of meaningful information which creates further risks of significant confusion as to what legal basis will be relied upon to ground a specific processing operation or set(s) of operations. It is on this basis that I am not satisfied that the Data Policy and Legal Basis Information Page satisfy

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<sup>188</sup> As described by Meta Ireland; see, Meta Ireland’s Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 8.3.

the requirements of Article 13(1)(c) GDPR either individually or cumulatively. Indeed, it could be said that there is a significant deficit of information made available to data subjects.

189. In assessing whether the information provided is transparent, it is necessary to consider the form in which the information is provided. In particular, Article 12(1) GDPR requires information to be provided in a “*concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.*” Meta Ireland have maintained the position that the “*Data Policy is drafted in a way that is both comprehensive and easy-to-read for our users*” and includes links to relevant information.<sup>189</sup> In further submissions, Meta Ireland reasserted its position that the information was sufficiently accessible and comprehensive and alleged that:

*“A reduction of information or removing convenient hyperlinks to relevant information would have the effect of reducing overall user understanding and control of the Instagram service to the detriment of users. Furthermore, it is Facebook Ireland’s view that the use of examples actually increases the ease of comprehension by contextualising information. ... [A] controller is not prohibited from providing more than the information required by Article 13(1)(c) GDPR to data subjects. The fact that Facebook Ireland has chosen to do so should not be held against Facebook Ireland when assessing its compliance (as seems to be the case in this instance)”.*<sup>190</sup>

Meta Ireland also alleged that the various sources of information were designed in such a manner as to enable data subjects to access the information as she/he wished. In this regard, Meta Ireland stated that “*these documents also serve as a key central resource to which data subjects can quickly and easily return to find more specific information relevant to their needs*”.<sup>191</sup> In addition, Meta Ireland asserted that it “*makes appropriate use of a layered format and links and clear references within the Data Policy, including the Legal Basis Notice*”.<sup>192</sup>

190. While I accept that a controller has a certain degree of discretion as to the precise manner in which the information is provided, I am not persuaded by Meta Ireland’s submissions that the form of information complied with Article 12(1) GDPR. As I outlined above, the information was not provided in a concise manner but over the course of several documents which cross-reference each other in a circular manner. As I have stated above, I do not dispute Meta Ireland’s assertion that a layered approach *may* be an appropriate means by which to convey information for the purposes of discharging transparency obligations under the GDPR.<sup>193</sup> However, it does not follow that *all* layered approaches are compliant with those obligations. Taking into account the circular,

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<sup>189</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.64.

<sup>190</sup> Meta Ireland’s Submission on the Draft Inquiry Report dated 22 June 2020, at para. 9.6.

<sup>191</sup> Meta Ireland’s Submission on the Draft Inquiry Report dated 22 June 2020, at para. 9.7.

<sup>192</sup> Meta Ireland’s Submission on the Draft Inquiry Report dated 22 June 2020, at para. 10.3.

<sup>193</sup> See, for example, Meta Ireland’s Submission on the Draft Inquiry Report dated 22 June 2020, at para. 6.6.

disjointed nature of the information provided by Meta Ireland and the generalised, high-level overview it provided, I am not satisfied that the information was clear and concise. Moreover, I would add that the language used was not clear or easy to understand as it referred to abstract objectives and purposes without any connection to specific categories of personal data or processing operations being undertaken.

191. At this juncture, I also note that I expressed a provisional view in the Preliminary Draft that the information was also misleading in that the Facebook Terms of Service appear to be conflated with the Instagram Terms of Use as references to the former in the Legal Basis Notice arguably (incorrectly) implied that the Facebook Terms of Service were applicable in the context of the Instagram service. In response, Meta Ireland stated that, in its view,:

*“no such implication arises, particularly considering the expression ‘Terms’ is explicitly defined in the Legal Basis Notice as referring to ‘the Meta Terms and Instagram Terms, together, ‘the Terms’. The definition also provides the user with a link to the Terms of Use (as well as a link to the Meta Terms of Service), which clearly inform the user that ‘[t]he Meta Terms of Service do not apply to this Service’.”<sup>194</sup>*

While I note Meta Ireland’s position, I do not agree with this position on the basis that “and”, in contrast to “or” – when used as a connecting word – does not imply alternatives. While Meta Ireland have stated that the data subject is informed via the Terms of Use that the Facebook Terms of Service did not apply, this is not, strictly speaking, correct. Indeed, as I outlined above, there is no reference to the Meta (or Facebook as it was then) Terms of Service in the Terms of Use at the date of the Complaint. It is only the more recent versions of the Terms of Use which expressly state that “[w]hen you create an Instagram account or use Instagram, you agree to these terms. The Facebook Terms of Service do not apply to this Service”.<sup>195</sup> Indeed, in the Terms of Use applicable at the date of the Complaint, the clause read as follows: “[w]hen you create an Instagram account or use Instagram, you agree to these terms”.<sup>217</sup> I further add that data subjects were not informed in either the Legal Basis Notice or the Facebook Terms of Service that the latter did not apply in the context of the Instagram service. Therefore, I remain of the view that the information was misleading in this manner at the time of the Complaint.

192. I am also concerned by the fact that the layered approach adopted by Meta Ireland crossreferenced the same small number of documents in a circular manner (e.g. the Data Policy referring the user to the Legal Basis Notice which in turn redirected the user back to the Data Policy) as opposed to presenting the user with additional and more detailed information to as to

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<sup>194</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 9.8.

<sup>195</sup> See the Instagram Terms of Use which was last revised on 4 January 2022: <https://help.instagram.com/581066165581870?ref=dp> last accessed 29 March 2022. <sup>217</sup> See the Instagram Terms of Use last revised on 19 April 2018.

enable them to better understand the relevant processing. In addition, the substance of the documents overlapped significantly – including, for example, the five core data uses in the Legal Basis Notice and “The Instagram Service” section of the Instagram Terms of Use. Given the similarity of the content and the means by which it is presented, it is difficult to identify whether additional or more detailed information has been provided when a user moves between documents. This lack of clarity is further affected by the lack of identification of specific processing operation(s) or set(s) of operations by Meta Ireland. Indeed, the lack of a single composite text or clearly layered path does not enable data subjects to quickly and easily understand the full extent of processing operations that will take place as regards their personal data arising from their acceptance of the Terms of Use. Given this ambiguity, I agree with the Complainant that there is a real risk that data subjects may be misled as to the legal basis and/or purpose(s) of the relevant processing operation(s) and/or set(s) of operations. The alleged “forced consent” and the dispute surrounding the processing operations being carried out, and the legal bases underpinning them, are reflective of a broader lack of clarity as regards the link between the purposes of processing, the lawful bases of processing and the processing operations involved.

193. As a final point, I note Meta Ireland’s submission that the Commission should refrain from considering Article 13(1)(c) until such time that the statutory appeal in respect of IN-18-2-2 concerning WhatsApp has been resolved.<sup>196</sup> Meta Ireland has not provided any legal basis or identified any authority for this submission. As this submission has not been substantiated, there is no basis for which to take such approach.

#### *Article 5(1)(a) GDPR – Principle of Transparency*

194. Article 5(1)(a) GDPR concerns the broader principle of transparency. However, it is important to emphasise that, a finding of non-compliance with Articles 12 – 14 GDPR (or parts thereof) does not necessarily or automatically imply that there has been an infringement of Article 5(1)(a). Nonetheless, there is a significant link between these principles. Indeed, transparency is an expression of the principles of fairness and accountability under the GDPR. In this regard, I note that transparency is an “*overarching obligation under the GDPR*”<sup>197</sup> and is a broader expression of transparency than the specific obligations provided for in Article 12 – 14 GDPR. Accordingly, while non-compliance with Article 12 – 14 GDPR (or parts thereof) do not necessitate a finding of non-compliance with Article 5(1)(a), in certain circumstances it is appropriate to find that there has been an infringement of both the specific transparency obligations and the broader principles of transparency where the extent of non-compliance with the former is sufficiently extensive to amount to an overarching infringement of the transparency principle.

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<sup>196</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 8.5.

<sup>197</sup> Article 29 Working Party, Guidelines on transparency under Regulation 2016/679 (last revised and adopted on 11 April 2018), at para. 1.

195. In the context of this Decision, there was an assumption on the part of the Complainant that Meta Ireland – which had primarily relied on consent as its lawful basis for processing prior to the coming into effect of the GDPR on 25 May 2018 – was relying on GDPR consent, provided by the means of accepting the updated Terms of Use following the coming into effect of the GDPR, as its legal basis for processing in the context of the Instagram service. This assumption was premised on the user engagement flow presented to users which provided them with a number of opportunities to consent before selecting the final “Agree to Terms” button.

196. While there is no particularised requirement under the GDPR to provide data subjects with information on an alteration of a legal basis, or to provide information in a particular part of any such user engagement flow, the lack of clarity on such a fundamental issue underlines the inherent lack of transparency in the information provided to the data subject. As I noted above, Article 5(1)(a) links transparency to the overall fairness of the activities of a controller by requiring that personal data shall be “*processed lawfully, fairly and in a transparent manner in relation to the data subject*”.

197. In the Preliminary Draft, I expressed a provisional view that Meta Ireland had also infringed Article 5(1)(a) GDPR in the circumstances of this case. Meta Ireland disagreed with this approach.<sup>198</sup> In particular, Meta Ireland submitted that (without prejudice to its position that there was no infringement of the transparency obligations in Articles 12 and 13) it does “*not consider that the circumstances in issue can properly be characterised as ‘sufficiently extensive’ to demonstrate an infringement of the overarching principle of transparency in Article 5(1)(a) GDPR*”.<sup>199</sup> In support of this position, Meta Ireland noted the Commission’s statement that the act of acceptance clearly related to the Terms of Use (and not the provision of consent).<sup>200</sup> Meta Ireland also noted that, were Article 5(1)(a) GDPR to refer to additional obligations other than those set out in Articles 12 and 14, “*it would be a more expansive principle, holistically encapsulating transparency, fairness and lawfulness... [and] would arguably be concerned with matters other than the technical question of whether prescribed items of information have been provided*”.<sup>201</sup>

198. In this respect, I follow the EDPB’s interpretation of this matter which arose following the EDPB’s adoption of a binding decision (“the EDPB Decision”)<sup>202</sup> relating to IN 18-12-2, an inquiry conducted by the Commission into WhatsApp Ireland Limited’s compliance with Articles 12, 13 and 14 GDPR. The EDPB Decision states as follows:

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<sup>198</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 10.1.

<sup>199</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 10.4.

<sup>200</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 10.4.

<sup>201</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 10.6.

<sup>202</sup>

[https://edpb.europa.eu/system/files/2021-09/edpb\\_bindingdecision\\_202101\\_ie\\_sa\\_whatsapp\\_redacted\\_en.pdf](https://edpb.europa.eu/system/files/2021-09/edpb_bindingdecision_202101_ie_sa_whatsapp_redacted_en.pdf).



a. *“The EDPB notes that the concept of transparency is not defined as such in the GDPR. However, Recital 39 GDPR provides some elements as to its meaning and effect in the context of processing personal data. As stated in the Transparency Guidelines, this concept in the GDPR “is user-centric rather than legalistic and is realised by way of specific practical requirements on data controllers and processors in a number of articles”<sup>203</sup>. The key provisions concretising the specific practical requirements of transparency are in Chapter III GDPR. However, there are other provisions that also realise the transparency principle, for example, Article 35 (data protection impact assessment) and Article 25 GDPR (data protection by design and by default), to ensure that data subjects are aware of the risks, rules and safeguards in relation to the processing, as stated in Recital 39 GDPR<sup>204</sup>.*

b. *The EDPB also notes that transparency is an expression of the principle of fairness in relation to the processing of personal data and is also intrinsically linked to the principle of accountability under the GDPR<sup>205</sup>. In fact, as noted in the Transparency Guidelines, a central consideration of the principles of transparency and fairness is that “the data subject should be able to determine in advance what the scope and consequences of the processing entails” and should not be taken by surprise about the ways in which their personal data has been used<sup>206</sup>.*

c. *Thus, it is apparent that, under the GDPR, transparency is envisaged as an overarching concept that governs several provisions and specific obligations. As stated in the Transparency Guidelines, “[t]ransparency is an overarching obligation under the GDPR applying to three central areas: (1) the provision of information to data subjects related to fair processing; (2) how data controllers communicate with data subjects in relation to their rights under the GDPR; and (3) how data controllers facilitate the exercise by data subjects of their rights”<sup>207</sup>.*

d. *This being said, it is important to differentiate between obligations stemming from the principle of transparency and the principle itself. The text of the GDPR makes this distinction, by enshrining transparency as one of the core principles under Article 5(1)(a) GDPR on the one hand, and assigning specific and concrete obligations linked to this principle, on the other one. The concretisation of a broad principle in specific rights and obligations is not a novelty in EU law. For example, with regard to the principle of effective judicial protection, that CJEU has stated that it is reaffirmed in the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter<sup>208</sup>. Nonetheless, that does not imply that principles as such cannot be infringed. In fact, under the GDPR the infringement of the basic*

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<sup>203</sup> Footnote from the Article 65 Decision: Transparency Guidelines, paragraph 4.

<sup>204</sup> Footnote from the Article 65 Decision: Transparency Guidelines, paragraph 42.

<sup>205</sup> Footnote from the Article 65 Decision: Transparency Guidelines, paragraph 2.

<sup>206</sup> Footnote from the Article 65 Decision: Transparency Guidelines, paragraph 10.

<sup>207</sup> Footnote from the Article 65 Decision: Transparency Guidelines, paragraph 1.

<sup>208</sup> Footnote from the Article 65 Decision: Peter Puškár v. Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy, (Case C-73/16, judgment delivered 27 September 2017) ECLI:EU:C:2017:725, at para. 59.

*principles for processing is subject to the highest fines of up to 20.000.000€ or 4% of the annual turnover, as per Article 83(5)(a) GDPR.*

*e. On the basis of the above considerations, the EDPB underlines that the principle of transparency is not circumscribed by the obligations under Articles 12-14 GDPR, although the latter are a concretisation of the former. Indeed, the principle of transparency is an overarching principle that not only reinforces other principles (i.e. fairness, accountability), but from which many other provisions of the GDPR derive. In addition, as stated above, Article 83(5) GDPR includes the possibility to find an infringement of transparency obligations independently from the infringement of transparency principle. Thus, the GDPR distinguishes the broader dimension of the principle from the more specific obligations. In other words, the transparency obligations do not define the full scope of the transparency principle.*

*f. That being said, the EDPB is of the view that an infringement of the transparency obligations under Articles 12-14 GDPR can, depending on the circumstances of the case, amount to an infringement of the transparency principle.*

199. As I have outlined in this Issue 3, the deficiencies in the transparency obligations affect and/or relate to all processing carried out on the basis of Article 6(1)(b) GDPR in the context of the Instagram service (notwithstanding that I have focussed on processing relating to behavioural advertising). The deficiencies were such that the Named Data Subject was under the impression that the relevant processing (including the relevant processing operations and/or set of processing operations) was based on consent, as had been the case prior to the coming into effect of the GDPR. As I have further outlined above, this impression and associated assumption was premised on the user engagement flow presented to users which provided them with a number of opportunities to consent before selecting the final “Agree to Terms” button. I am of the view that these deficiencies amount to a significant level of non-compliance by Meta Ireland such that the Named Data Subject was under the impression that the relevant processing was based on consent and it is my view that the infringement with the transparency principle is sufficiently extensive to amount to an overarching infringement of the transparency.

#### Finding 3:

In relation to processing for which Meta Ireland indicated reliance upon Article 6(1)(b) GDPR, Articles 5(1)(a), 12(1) and 13(1)(c) GDPR have been infringed.

6 WHETHER META IRELAND INFRINGED THE ARTICLE 5(1)(A) PRINCIPLE OF FAIRNESS

200. During the course of the Article 60 consultation period, the Italian SA raised an objection, requiring the amendment of the Draft Decision to include a finding of the Article 5(1)(a) principle of fairness. The Commission decided not to follow the objection in circumstances where compliance with the Article 5(1)(a) principle of fairness was not examined during the course of this inquiry and, consequently, Meta Ireland was never afforded the opportunity to be heard in response to a particularised allegation of wrongdoing, as required by Irish and EU law. Accordingly the Commission referred the objection to the EDPB for determination pursuant to Article 65(1)(a) GDPR. Having considered the matter, the EDPB determined as follows:

220. *In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters which are the subject of the relevant and reasoned objections, in particular whether there is an infringement of the GDPR. The EDPB considers that the objection found to be relevant and reasoned in this subsection requires an assessment of whether the Draft Decision needs to be changed insofar as it contains no finding of infringement of the fairness principle under Article 5(1)(a) GDPR. When assessing the merits of the objection raised, the EDPB also takes into account Meta IE's position on the objection and its submissions.*
221. *The EDPB takes note of Meta IE's view that the IT SA objection lacks merit as it goes beyond the scope of the inquiry . The EDPB also notes that Meta IE links the issue of the potential infringement of the principle of fairness, raised in the IT SA objection, with the question of the competence of CSAs or the EDPB to assess the validity of contracts in the context of Article 6(1)(b) GDPR and, when responding to the merits of the IT SA objection, Meta IE refers to its submissions on application of Article 6(1)(b) GDPR with respect to standard form contracts . While taking note of Meta IE's view on this matter, the EDPB considers the question of Meta IE's compliance with the principle of fairness under Article 5(1)(a) GDPR to be distinct from the question of the choice of the appropriate legal basis (although a connected one, as explained below) and proceeds with its respective assessment below.*
222. *Firstly, the EDPB recalls that the basic principles relating to processing listed in Article 5 GDPR can, as such, be infringed . This is apparent from the text of Article 83(5)(a) GDPR which subjects the infringement of the basic principles for processing to administrative fines of up to 20 million euros, or in the case of undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.*
223. *The EDPB underlines that the principles of fairness, lawfulness and transparency, all three enshrined in Article 5(1)(a) GDPR, are three distinct but intrinsically linked and interdependent principles that every controller should respect when processing personal data. The link between these principles is evident from a number of GDPR provisions: Recitals 39 and 42, Article 6(2) and Article 6(3)(b) GDPR refer to lawful and*

*fair processing, while Recitals 60 and 71 GDPR, as well as Article 13(2), Article 14(2) and Article 40(2)(a) GDPR refer to fair and transparent processing.*

224. *On the basis of the above consideration, the EDPB agrees with the IE SA's view that "Article 5(1)(a) links transparency to the overall fairness of the activities of a controller" but*

*considers that the principle of fairness has an independent meaning and stresses that an assessment of Meta IE's compliance with the principle of transparency does not automatically rule out the need for an assessment of Meta IE's compliance with the principle of fairness too.*

*225. The EDPB recalls that, in data protection law, the concept of fairness stems from the EU Charter of Fundamental Rights . The EDPB has already provided some elements as to the meaning and effect of the principle of fairness in the context of processing personal data. For example, the EDPB has previously opined in its Guidelines on Data Protection by Design and by Default that "[f]airness is an overarching principle which requires that personal data should not be processed in a way that is unjustifiably detrimental, unlawfully discriminatory, unexpected or misleading to the data subject" .*

*226. Among the key fairness elements that controllers should consider in this regard, the EDPB has mentioned autonomy of the data subjects, data subjects' expectation, power balance, avoidance of deception, ethical and truthful processing . These elements are particularly relevant in the case at hand. The principle of fairness under Article 5(1)(a) GDPR underpins the entire data protection framework and seeks to address power asymmetries between the data controllers and the data subjects in order to cancel out the negative effects of such asymmetries and ensure the effective exercise of the data subjects' rights. The EDPB has previously explained that "the principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller"*

*227. The EDPB recalls that a fair balance must be struck between, on the one hand, the commercial interests of the controllers and, on the other hand, the rights and expectations of the data subjects under the GDPR . A key aspect of compliance with the principle of fairness under Article 5(1)(a) GDPR refers to pursuing "power balance" as a "key objective of the controller-data subject relationship" , especially in the context of online services provided without monetary payment, where users are often not aware of the ways and extent to which their personal data is being processed . Consequently, lack of transparency can make it almost impossible in practice for the data subjects to exercise an informed choice over the use of their data which is in contrast with the element of "autonomy" of data subjects as to the processing of their personal data .*

*228. Considering the constantly increasing economic value of personal data in the digital environment, it is particularly important to ensure that data subjects are protected from any form of abuse and deception, intentional or not, which would result in the unjustified loss of control over their personal data. Compliance by providers of online services acting as controllers with all three of the cumulative requirements under Article 5(1)(a) GDPR, taking into account the particular service that is being provided and the characteristics of their users, serves as a shield from the danger of abuse and deception, especially in situations of power asymmetries.*

*229. The EDPB has previously emphasised that the identification of the appropriate lawful basis is tied to the principles of fairness and purpose limitation . In this regard, the IT SA rightly*

*observes that while finding a breach of transparency relates to the way in which information has been provided to users via the Instagram Terms of Use and Data Policy, compliance with the*



*principle of fairness also relates to “how the controller addressed the lawfulness of the processing activities in connection with its social networking service” . Thus the EDPB considers that an assessment of compliance by Meta IE with the principle of fairness requires also an assessment of the consequences that the choice and presentation of the legal basis entail for the users of the Instagram service. In addition, that assessment cannot be made in the abstract, but has to take into account the specificities of the particular social networking service and of the processing of personal data carried out, namely for the purpose of online behavioural advertising*

*230. The EDPB notes that in this particular case the breach of Meta IE’s transparency obligations is of such gravity that it clearly impacts the reasonable expectations of the Instagram users by confusing them on whether clicking the “Agree to Terms” button results in giving their consent to the processing of their personal data. The EDPB notes in this regard that one of the elements of compliance with the principle of fairness is avoiding deception i.e. providing information “in an objective and neutral way, avoiding any deceptive or manipulative language or design” .*

*231. As outlined in the Draft Decision, the Complainant argues that Meta IE relied on “forced consent” as a result of being led to believe that the legal basis for processing the controller was relying upon was consent . The Complaint demonstrates the confusion suffered by the Complainant both due to the (lack of) information presented to Instagram users in the context of their “agreement” and the circumstances of how the act of “agreement” was sought by Meta IE . The EDPB considers that the LSA should have taken into account such Meta IE’s practices in relation to the principle of fairness, regardless of its finding that Meta IE has not sought to rely on consent in order to process personal data to deliver the Terms of Use .*

*232. In addition, and as recognised by the LSA itself, further to its assessment of the information provided concerning processing being carried out in reliance on Article 6(1)(b) GDPR, “it is impossible for the user to identify with any degree of specificity what processing is carried out on what data, on foot of the specified lawful bases” . Considering this, in the EDPB’s view, there are clear indications that Instagram users’ expectations with regard to the applicable legal basis have not been fulfilled . Therefore, the EDPB shares the IT SA’s concern that Instagram users are left “in the dark” and considers that the processing by Meta IE cannot be regarded as ethical and truthful because it is confusing with regard to the type of data processed, the legal basis and the purpose of the processing, which ultimately restricts the Instagram users’ possibility to exercise their data subjects’ rights.*

*233. Furthermore, the EDPB considers that the extensive analysis by the IE SA with regard to the issue of legal basis and transparency in relation to the processing being carried out in reliance on Article 6(1)(b) GDPR is closely linked to the issue of compliance by Meta IE with the principle of fairness. Considering the seriousness of the infringements of the transparency obligations by Meta IE already identified in the Draft Decision and the related misrepresentation of the legal basis relied on, the EDPB agrees with the IT SA that Meta IE has presented its service to the Instagram users in a misleading manner , which adversely affects*



*their control over the processing of their personal data and the exercise of their data subjects' rights. Therefore, the EDPB is of the opinion that the IE SA's finding of breach of Article 5(1)(a) GDPR with regard to the principle of transparency should extend to the principle of fairness too.*

234. *This is all the more supported by the fact that, in the circumstances of the present case as demonstrated above, the overall effect of the infringements by Meta IE of the transparency obligations under Article 5(1)(a), Article 12(1), Article 13(1)(c) GDPR and the infringement of Article 6(1)(b) GDPR further intensifies the imbalanced nature of the relationship between Meta IE and the Instagram users brought up by the IT SA objection. The combination of factors, such as the asymmetry of the information created by Meta IE with regard to the Instagram service users, combined with the “take it or leave it” situation that they are faced with due to the lack of alternative services in the market and the lack of options allowing them to adjust or opt out from a particular processing under the contract with Meta IE, systematically disadvantages the Instagram service users, limits their control over the processing of their personal data and undermines the exercise of their rights under Chapter III of the GDPR.*

235. *Therefore, the EDPB instructs the IE SA to include a finding of an infringement of the principle of fairness under Article 5(1)(a) GDPR by Meta IE, in addition to the infringement of the principle of transparency under the same provision, and to adopt the appropriate corrective measures, by addressing, but without being limited to, the question of an administrative fine for this infringement as provided for in Section 9 of this Binding Decision.*

201. Accordingly, and as directed by the EDPB further to the Article 65 Decision, I find that Meta Ireland has infringed the principle of fairness pursuant to Article 5(1)(a) GDPR.

Finding 4:

Meta Ireland has infringed the principle of fairness pursuant to Article 5(1)(a) GDPR.

## 7 SUMMARY OF FINDINGS

ISSUE	FINDING
Reliance on Article 6(1)(b) GDPR as the Legal Basis for processing for the purposes of behavioural advertising in respect of the Instagram service.	I find that Meta Ireland infringed Article 6(1) GDPR when it relied when it relied on Article 6(1)(b) GDPR to process the Complainant’s personal data for the purpose of behavioural advertising in the context of its offering of Terms of Use.

<p>Whether Meta Ireland failed to provide necessary information regarding its legal basis for processing pursuant to acceptance of the Terms of Use and whether the information set out was set out in a transparent manner</p>	<p>I find that Meta Ireland has infringed Articles 5(1)(a), 12(1) and 13(1)(c) GDPR.</p>
<p>As raised by the Italian SA by way of its objection, whether Meta Ireland infringed the Article 5(1)(a) principle of fairness in the context of its approach to the provision of information as part of the presentation of its Terms of Use to the Complainant.</p>	<p>As directed by the EDPB pursuant to the Article 65 Decision, I find that Meta Ireland has infringed the Article 5(1)(a) principle of fairness.</p>

## 8 DECISION ON CORRECTIVE POWERS

202. I have set out above in sections 3 to 6, pursuant to Section 111(1)(a) of the 2018 Act, the findings set out above (recording my views and those of the EDPB by way of the Article 65 Decision) that Meta Ireland has infringed Articles 5(1)(a), 12(1) and 13(1)(c) GDPR. As required by the EDPB pursuant to the Article 65 Decision, I have also found that Meta Ireland has infringed Article 6(1) GDPR as well as the Article 5(1)(a) principle of fairness.

203. Under Section 111(2) of the 2018 Act, where the Commission makes a decision (in accordance with Section 111(1)(a)), it must, in addition, make a decision as to whether a corrective power should be exercised in respect of the controller or processor concerned and, if so, the corrective power to be exercised. For the reasons set out above and those I will outline below, my view is that corrective measures should be exercised.

## 9. ORDER TO BRING PROCESSING INTO COMPLIANCE

205. Article 58(2) GDPR sets out the corrective powers which supervisory authorities may employ in respect of non-compliance of the GDPR by a controller or processor.

206. My view is that the corrective power provided for in Article 58(2)(d) GDPR, i.e. an order to bring processing into compliance (the “Order”), should be imposed. This order would, firstly, require Meta Ireland to bring the Instagram Data Policy and Terms of Use into compliance with Articles 5(1)(a), 12(1) and 13(1)(c) GDPR as regards information provided on: (i) data processed pursuant to Article 6(1)(b) GDPR as well as (ii) data processed for the purpose of behavioural advertising in context of the Instagram service, in accordance with the principles set out in this Decision.

Meta Ireland has argued that it is neither necessary nor proportionate to make this order.<sup>209</sup> For the reasons set out above and below, I have concluded that it is necessary and proportionate to do so.

207. It was proposed in the Preliminary Draft that this should be done within three months of the date of notification of any final decision. Meta Ireland was of the view that this was not a reasonable period of time within which to make the necessary changes, as the changes would be resourceintensive and would require “*sufficient lead in time for preparing, drafting, designing and engineering the relevant changes, conducting and taking account of user testing of the proposed changes, internal cross-functional engagement as well as of course engagement with the Commission, and localisation and translation of the information for countries in the European Region*”.<sup>232</sup>

208. In this respect, I emphasise that Meta Ireland is a large multinational organisation with significant financial, technological and human resources at its disposal. Moreover, the interim period, prior to any such rectification to the current lack of information being provided to data subjects, will involve a serious ongoing deprivation of their rights (as outlined below in Section 10). Moreover, the Commission has provided specific analysis to Meta Ireland in relation to the correct interpretation of the provisions in question and the requisite information that is absent from the relevant user-facing documents. This specificity should negate any need for extensive engagement with the Commission during the period of implementation, and provides clarity for Meta Ireland as to what objective its very significant resources should be directed towards in order to comply with this order. As such, I am not satisfied that it would be impossible or indeed disproportionate to make an order in these terms, having regard to the importance of the data subject rights involved, the specificity of the order and Meta Ireland’s resources.

209. I therefore order that the Terms of Use and Data Policy be brought into compliance within three months commencing on the day following the date of service of the Commission’s final decision.

210. I consider that this order is necessary to ensure that full effect is given to Meta Ireland’s obligations under Articles 5(1)(a), 12(1), and 13(1)(c) GDPR in light of the infringements outlined above. The substance of this proposed order is the only way in which the defects pointed out in this Decision can be rectified, which is essential to the protecting of the rights of data subjects. It is on this basis that I am of the view that this power should be exercised. I note Meta Ireland’s disagreement with this position on the basis that it is already voluntarily attempting to alter the documents to express the views set out in the Preliminary Draft, and would therefore like to continue using “*less onerous means*” to ensure compliance.<sup>210</sup>

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<sup>209</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 12.1 -12.2.

<sup>232</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 12.4.

<sup>210</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 12.2 – 12.3.

<sup>234</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 2.4 (and footnote 6).

211. Having regard to the non-compliance in this Decision, in my view, such an order is proportionate and is the minimum order required in order to guarantee that compliance will take place in the future. The fact that Meta Ireland is already taking steps to bring its information into compliance suggest that there would be nothing practically onerous about an order to carry out something that Meta Ireland already intends to carry out. On that basis, I see nothing in these arguments to suggest a lack of proportionality arises in relation to such an order.
212. As instructed by the EDPB, in paragraph 290 of the Article 65 Decision, this Order would, secondly, require Meta Ireland to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Instagram Terms of Use, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraph 137 of the Article 65 Decision within a period of three months, commencing on the day following the date of service of the Commission’s final decision. More specifically, in this regard, Meta Ireland is required to take the necessary action to address the EDPB’s finding that Meta Ireland is not entitled to carry out the Processing on the basis of Article 6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of the Article 65 Decision. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.
213. In its Final Submissions, Meta Ireland submitted as follows:
- a. Firstly<sup>234</sup>, in relation to the matters covered by the term “the Processing” (as defined in paragraph 212, above, it understood the Commission to refer “*specifically to the processing for the purpose of behavioural advertising carried out by Meta Ireland to-date on the basis of Article 6(1)(b) GDPR in the context of the Instagram Terms of Use as considered in the Inquiry.*” Meta Ireland noted that, as previously explained in its Article 65 Submissions, it carries out certain other types of processing for behavioural advertising purposes on the basis of Article 6(1)(a) GDPR. For the avoidance of doubt, I confirm Meta Ireland’s understanding as to the processing covered by the second limb of the above Order. The term “the Processing”, as defined in paragraph 212, above, means any processing for behavioural advertising purposes which was previously carried out in reliance on Article 6(1)(b) GDPR.
  - b. Secondly, Meta Ireland has submitted<sup>211</sup> that the Commission has discretion as regards the date of commencement of the compliance period that, as noted above, was determined by the EDPB. In this regard, Meta Ireland noted that the Article 65 Decision does not require the Commission to provide that the Order must take effect “*on the day following the date of service of the [Commission’s] final decision*”, as suggested. Furthermore, Meta Ireland has

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<sup>211</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 4.3 and Section 5.

submitted<sup>212</sup> that the timeline for compliance, as regards the action required to be taken pursuant to both limbs of the Order, should run consecutively rather than concurrently.

- c. In support of the above submissions, Meta Ireland has estimated that it “*will take at least [REDACTED] [REDACTED] ent both compliance orders*” by reference to the work that will be required to give effect to the terms of the Order. This work includes (but is not limited to) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Meta Ireland has further identified that, once this work is completed, it will then need to develop and/or update user-facing materials, to the extent needed to explain these changes to users, including updates to the Data Policy and other transparency notices.
- d. Meta Ireland has further submitted that, if the Order is made in the terms proposed, this would require it to dedicate its resources to attempting to comply with the Order immediately and “*certainly before the period within which Meta Ireland is entitled to appeal from the final decision has elapsed.*” This, according to Meta Ireland, would seriously “*impair and prejudice*” its right to an effective appeal.

214. Having considered the above matters in light of the Article 65 Decision, I do not agree with Meta Ireland’s submission that the Commission has discretion to delay the activation of any aspect of the Order. It is clear, from paragraph 290 of the Article 65 Decision that the EDPB considered it necessary for Meta Ireland to take the remedial action required to address the relevant infringements “within three months”. While Meta Ireland has correctly identified that the EDPB has not expressly identified the starting point, the Commission’s view is that it goes without saying that the starting point has to be the adoption and notification of the Commission’s final decision, given that this is the earliest date on which the applicable timeline for compliance can start to run.

Any contrary suggestion would be inconsistent with the need for urgent action that was clearly indicated to be required in paragraphs 288, 290, 291 of the Article 65 Decision. It would further render meaningless the EDPB’s consideration of the compliance period in terms of a fixed number of months (in this case, three).

215. Insofar as Meta Ireland appears to consider it significant that the Commission itself amended the terms of the existing Order such that the timeline for compliance is now stated to run from the day following the date of service of the Commission’s final decision, the Commission does not consider this to be a material amendment of the existing text. The Commission considered it necessary to add this clarification to address a position whereby there might be any delay between the date of adoption of this Decision and the date on which this Decision is formally notified to/served upon Meta Ireland (as has occurred in at least one previous inquiry). The

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<sup>212</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 4.3 and Section 6.

clarification ensures legal certainty, as regards the timelines associated with the Order and Meta Ireland's right to a judicial remedy.

216. Finally, as regards the resources that Meta Ireland will need to devote to the matters covered by the terms of the Order, I note that I have already had regard to the significant financial, technological and human resources at Meta Ireland's disposal. Furthermore, I do not agree that Meta Ireland will need to await the outcome of its efforts to achieve compliance with the second limb of the Order before it might address the first limb. I note, in this regard, that the first limb of the Order was present in the Draft Decision (dated 1 April 2022). Meta Ireland was already aware of the likelihood that it would have to take action to address the shortcomings identified as part of the analysis that underpinned the findings of infringement of the transparency provisions (namely Articles 5(1)(a), 12(1) and 13(1)(c) GDPR). In the circumstances, Meta Ireland has already had time to begin the groundwork required to achieve compliance with its transparency obligations.
217. For the avoidance of doubt, I am not persuaded by Meta Ireland's submission that envisaged date of commencement of the timeline for compliance would "*seriously impair and prejudice*" its right to an effective appeal. I note, in this regard, that Meta Ireland has not explained how such a risk would arise from the timely implementation of the deadline for compliance with the Order. I further note that matters pertaining to the possible filing of any appeal will likely be dealt with by Meta Ireland's internal and external legal advisors as opposed to the "stakeholders" whose input will be required as part of Meta Ireland's efforts to achieve compliance with the terms of the Order. While I anticipate that there will, of course, be overlap in terms of the resources that might need to devote time to both the required remedial action and matters pertaining to the possible filing of any appeal, I do not envisage how such overlap would be anywhere near total such as to give rise to a risk to Meta Ireland's ability to exercise its right to an effective appeal. I further note that the compliance deadline extends beyond the limitation periods prescribed for any application for judicial redress under Irish law. In these circumstances, I am satisfied that Meta Ireland's right to pursue judicial redress will not be impaired by the compliance periods outlined above.

#### 10. ADMINISTRATIVE FINE

218. In accordance with Article 58(2)(i) GDPR, I am permitted to consider the imposition of an administrative fine, pursuant to Article 83 GDPR, "*in addition to, or instead of*" the other measures outlined in Article 58(2), depending on the circumstances of each individual case. Section 115 of the 2018 Act also provides for this as it permits the Commission to impose an administrative fine on its own or in combination with any other corrective power specified in Article 58(2) GDPR. I am therefore satisfied that I am permitted to impose an administrative fine in addition to a compliance order.

219. However, in this regard, I emphasise that I am guided by Article 83(1) GDPR which provides that the imposition of fines “*shall in each individual case be effective, proportionate and dissuasive*”. I further note that, in making the decision as to whether to impose an administrative fine or indeed the amount of any such fine, I am obliged by Article 83(2) GDPR to have “*due regard*” to the eleven criteria set out in Article 83(2). I have considered each of these criteria and presented my corresponding assessment below. In response to Meta Ireland’s submission that the impact of each of the criteria in Article 83(2) was insufficiently clear,<sup>213</sup> I have specified whether I consider each relevant factor to be aggravating, mitigating or neither.

220. I note, at this juncture, that Meta Ireland disagreed that an administrative fine – and indeed, the amount I have proposed<sup>214</sup> - would be appropriate, necessary and proportionate in this context.<sup>239</sup> I further note Meta Ireland’s position that a reprimand would be more appropriate in this instance.<sup>240</sup> I will address the arguments it has presented in the course of considering the criteria set out in Article 83(2) GDPR.

221. In the Draft Decision, I considered the imposition of an administrative fine in relation to the finding of infringement identified at Finding 3 above, namely the finding of infringement of Articles 5(1)(a), 12(1) and 13(1)(c) GDPR in the context of Meta Ireland’s approach to transparency. Following the circulation of the Draft Decision to the supervisory authorities concerned for the purpose of enabling them to share their views, in accordance with Article 60(3) GDPR, objections to the proposed administrative fines were raised by the supervisory authorities of Germany, France, Italy, the Netherlands and Norway. Having considered those objections, the EDPB determined as follows:

*344. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fine<sup>215</sup>. A fine should be effective, proportionate and dissuasive, as required by Article 83(1) GDPR, taking account of the facts of the case<sup>216</sup>. In addition, when deciding on the amount of the fine, the LSA shall take into consideration the criteria listed in Article 83(2) GDPR.*

*345. The EDPB responds to Meta IE’s argument that the LSA has sole discretion to determine the appropriate corrective measures in the event of a finding of infringement above (see Section 8.4.2, paragraphs 277 -279 as well as footnote 624).*

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<sup>213</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 14.5 – 14.6.

<sup>214</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.1.

<sup>239</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 13.1.

<sup>240</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 13.3.

<sup>215</sup> Recital 150 GDPR. EDPB Guidelines on RRO, paragraph 34; EDPB Guidelines on Administrative fines p. 7 (“*When the relevant and reasoned objection raises the issue of the compliance of the corrective measure with the GDPR, the decision of EDPB will also discuss how the principles of effectiveness, proportionality and deterrence are observed in the administrative fine proposed in the draft decision of the competent supervisory authority*”).

<sup>216</sup> EDPB Guidelines on Administrative fines, p. 7; EDPB Guidelines on calculation of fines, paragraphs 132-134.



346. *The finding in the Draft Decision of a transparency infringement for the processing concerned still stands. The EDPB recalls that, on substance, no objections were raised on this finding. Meta IE infringed its general transparency obligations by being unclear on the link between the purposes of processing, the lawful bases of processing and the processing operations involved<sup>217</sup>, irrespective of the validity of the legal basis relied on for the ‘processing concerned’. It remains the case that, for the transparency infringements, “the processing concerned” should be understood as meaning all of the processing operations that Meta IE carries out on the personal data under its controllership for which Meta IE indicated it relied on Article 6(1)(b) GDPR<sup>218</sup>, including for the purposes of behavioural advertising. This is without prejudice to the fact that Meta IE inappropriately relied on Article 6(1)(b) GDPR as a legal basis to process personal data for the purpose of behavioural advertising as part of the delivery of its Instagram service under the Terms of Use. Whether or not Meta IE appropriately chose its legal basis for processing, the transparency infringement as assessed in the Draft Decision still stands. Therefore, the IE SA must not modify this description retro-actively in light of the assessment of the validity of the legal basis, including for the purpose of carrying out any reassessment of the administrative fines originally proposed by the Draft Decision, as might be required by this Binding Decision.*

347. *In light of the objections found relevant and reasoned, the EDPB addresses whether the Draft Decision proposes a fine for the transparency infringements that is in accordance with the criteria established by Article 83(2) GDPR and the criteria provided for by Article 83(1) GDPR. In doing this, the EDPB will first assess the disputes arisen in respect of the analysis of specific criteria under Article 83(2) GDPR performed by the LSA, and then examine whether the proposed fine meets the requirements of effectiveness, dissuasiveness and proportionality set in Article 83(1) GDPR, including by affording adequate weight to the relevant factors and to the circumstances of the case.*

*On any relevant previous infringements by the controller or processor (Article 83(2)(e) GDPR)*

348. *Article 83(2)(e) GDPR requires supervisory authorities to give due regard to any previous relevant infringement of the GDPR by the controller or processor as one of the circumstances that justifies an increase in the basic amount of the fine. As similar reference can be found in Recital 148 GDPR.*

349. *For the purposes of Article 83(2)(e) GDPR, both previous infringements of the same subject matter and infringements of a different subject matter but committed in a manner similar to that under investigation, should be considered as relevant. Furthermore, the EDPB recalls that the scope of assessment of infringements may include not only previous decisions by the investigating supervisory authority, but also infringements found by other authorities, provided that they are relevant to the case under investigation<sup>219</sup>.*

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<sup>217</sup> Draft Decision, paragraph 189.

<sup>218</sup> Draft Decision, paragraph 210.

<sup>219</sup> EDPB Guidelines on Administrative Fines, paragraph 93.

350. The EDPB first notes that, contrary to Meta IE's views<sup>220</sup>, substantial similarities exist in the infringements found by the LSA in its draft decision and in its decision IN-18-12-2 in relation to WhatsApp Ireland Limited and in which breach of GDPR obligations were established. As rightly pointed out by the IT SA, the LSA indeed considered in both decisions that the controller had not provided transparent information on the legal basis and purposes of the processing operations or sets of processing operations carried out, thereby infringing Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR<sup>221</sup>.

351. The IT SA contends that, to the extent that Meta IE and WhatsApp Ireland Limited are part of the same corporate group, the previous decision concerning WhatsApp Ireland Limited "sets a key precedent in assessing a controller's repetitive conduct", as "not only did the controller in question clearly stick to the same business model in offering its different social networking services, it also did not change its assessment as to how to manage users' data with particular regard to its information and transparency obligations"<sup>222</sup> The IE SA disagrees with this objection, considering that Article 83(2)(e) GDPR cannot apply in the circumstances of this case insofar as its decision against WhatsApp Ireland Limited was addressed to a different controller<sup>223</sup>.

352. In this respect, the EDPB notes that Meta IE and WhatsApp Ireland Limited are both subsidiaries of Meta Platforms, Inc.<sup>224</sup>. Nonetheless, the EDPB recalls that the GDPR draws a distinction between on the one hand the "controller" or "processor"<sup>225</sup>, which are responsible for complying with the rules of the GDPR, and on the other hand the "undertaking"<sup>226</sup> to which the controller or processor is part of, and that may be found jointly and severally liable for the payment of the fine<sup>253</sup>. In this context, Article 83(2)(e) GDPR explicitly refers to the need to consider previous relevant infringements committed "by the controller or processor" (emphasis added).

353. Therefore, the EDPB considers that the Final Decision does not need to refer to the infringements by WhatsApp Ireland Limited, as established in Decision IN-18-12-2, as an aggravating factor under Article 83(2)(e) GDPR for the calculation of the fine.

*The effectiveness, proportionality and dissuasiveness of the administrative fine (Article 83(1) GDPR)*

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<sup>220</sup> Meta IE Article 65 Submissions, paragraph 10.3. According to Meta IE's the DPC Final Decision IN-18-12-2 against WhatsApp Ireland Limited concerns "wholly separate proceeding involving wholly separate allegations and claims".

<sup>221</sup> DPC Final Decision IN-18-12-2 concerning WhatsApp Ireland Limited, 20 August 2021, paragraphs 496, 591 and 595, available at: [https://edpb.europa.eu/system/files/2021-09/dpc\\_final\\_decision\\_redacted\\_for\\_issue\\_to\\_edpb\\_01-09-21\\_en.pdf](https://edpb.europa.eu/system/files/2021-09/dpc_final_decision_redacted_for_issue_to_edpb_01-09-21_en.pdf) ; Draft Decision, p. 71.

<sup>222</sup> IT SA Objection, p. 9.

<sup>223</sup> Composite Response, paragraph 125. According to the IE SA, this stems directly from the wording of Article 83(2)(e) GDPR, which "expressly states that only relevant previous infringements by the same controller or processor must be taken into consideration".

<sup>224</sup> DPC Final Decision IN-18-12-1 concerning WhatsApp Ireland Limited, 20 August 2021, paragraph 872; Draft Decision, paragraphs 5 and 288.

<sup>225</sup> See Art. 4(7)-(8) GDPR.

<sup>226</sup> According to Recital 150, "where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes". According to

354. With regard to effectiveness of the fines, the EDPB recalls that the objective pursued by the corrective measure chosen can be to re-establish compliance with the rules, or to punish unlawful behaviour, or both<sup>254</sup>. In addition, the EDPB notes that the CJEU has consistently held that a dissuasive penalty is one that has a genuine deterrent effect. In that respect, a distinction can be made between general deterrence (discouraging others from committing the same infringement in the future) and specific deterrence (discouraging the addressee of the fine from committing the same infringement again)<sup>255</sup>. Therefore, in order to ensure deterrence, the fine must be set at a level that discourages both the controller or processor concerned as well as other controllers or processors carrying out similar processing operations from repeating the same or a similar unlawful conduct. Proportionality of the fine needs also to be ensured as the measure must not go beyond what is necessary to attain that objective<sup>256</sup>. In this respect, the EDPB disagrees with Meta IE's views that there is no basis to conclude that the amount of the fine must have a general preventive effect<sup>257</sup>.

355. The EDPB reiterates that it is incumbent upon the supervisory authorities to verify whether the amount of the envisaged fines meets the requirements of effectiveness, proportionality and dissuasiveness, or whether further adjustments to the amount are necessary, considering the entirety of the fine imposed and all the circumstances of the case, including e.g. the accumulation of multiple infringements, increases and decreases for aggravating and mitigating circumstances and financial/socio-economic circumstances<sup>258</sup>. Further, the EDPB recalls that the setting of a fine is

settled case-law of the CJEU, the term 'undertaking' "encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed" (see, in this regard, EDPB Binding Decision 1/2021, paragraph 292).

<sup>253</sup> EDPB Binding Decision 1/2021, paragraph 290.

<sup>254</sup> EDPB Guidelines on Administrative Fines, p. 6.

<sup>255</sup> See, *inter alia*, C-511/11, Versalis, paragraph 94.

<sup>256</sup> See Judgement of the General Court of 14 October 2021, MT v Landespolizeidirektion Steiermark, C-231/20, , ECLI:EU:C:2021:845, paragraph 45 ("the severity of the penalties imposed must [...] be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while not going beyond what is necessary to attain that objective").

<sup>257</sup> Meta IE Article 65 Submissions, Annex 1, paragraphs, 2.22, 5.16, 7.16, 8.30 and 9.23.

<sup>258</sup> EDPB Guidelines on calculation of fines, paragraph 132, and EDPB Guidelines on Administrative Fines, p. 6, specifying that "administrative fines should adequately respond to the nature, gravity and consequences of the breach, and supervisory authorities must assess all the facts of the case in a manner that is consistent and objectively justified".

not an arithmetically precise exercise<sup>227</sup>, and supervisory authorities have a certain margin of discretion in this respect<sup>228</sup>.

356. The DE, FR, IT, NL, and NO SAs, object to the level of the fine envisaged in the Draft Decision as they consider the proposed fine not effective, proportionate and dissuasive (Article 83(1) GDPR)<sup>229</sup>.

357. These CSAs argue that the elements of Article 83(2) GDPR are not weighed correctly by the LSA when calculating the administrative fines in the present case, in light of the requirements of Article 83(1) GDPR<sup>230</sup>. Specifically, the DE, FR, IT, NL and NO SAs argue that the fine envisaged in the Draft Decision is not proportionate with IE SA's findings in relation to the nature and seriousness of the infringements and the number of data subjects concerned<sup>231</sup>.

358. In addition, these CSAs argue that the fine is not effective, proportionate and dissuasive taking into account the financial position of Meta Platform, Inc.<sup>232</sup>.

359. The EDPB takes note of Meta IE's disagreement with the fine proposed by the IE SA<sup>233</sup> and their view that the LSA already considers all factors it considered to be relevant to Article 83(2) GDPR and that "none of the CSAs have created any reasonable doubt as to the validity of the DPC's calculation"<sup>234</sup>.

360. The EDPB notes that in the Draft Decision the IE SA indicates being satisfied the proposed fines are effective, proportionate and dissuasive, taking into account all the circumstances of the IE SA's inquiry<sup>235</sup>. The IE SA assessed the different criteria of Article 83(2) GDPR in relation to the transparency infringements found<sup>236</sup>. The IE SA considered the infringements as serious in nature<sup>237</sup>, and in terms of gravity of the infringements found a significant level of non-

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<sup>227</sup> See Judgement of the General Court of 22 September 2021, Altice Europe NV v Commission, T 425/18, ECLI:EU:T:2021:607, paragraph 362; Judgement of the General Court of 5 October 2011, Romana Tabacchi v Commission, Case T-11/06, ECLI:EU:T:2011:560, paragraph 266.

<sup>228</sup> See, *inter alia*, judgement of the General Court of 16 June 2011, Caffaro Srl v Commission, T-192/06, ECLI:EU:T:2011:278, paragraph 38. See also EDPB Guidelines on calculation of fines, p. 2.

<sup>229</sup> DE SAs Objection, pp. 10-12; FR SA Objection, paragraphs 36-48; IT SA Objection pp. 7-10 ; NL SA Objection, paragraphs 39-53; NO SA Objection, pp. 9-13;

<sup>230</sup> DE SAs Objection, p. 11 ; FR SA Objection, paragraph 47; IT SA Objection pp. 7-8 ; NL SA Objection, paragraph 50; NO SA Objection, pp. 11-12

<sup>231</sup> DE SAs Objection, p. 11; FR SA Objection, paragraph 38 ; IT SA Objection, p. 8 ; NL SA Objection, paragraph 42 and 48; NO SA Objection, p. 12.

<sup>232</sup> DE SAs Objection, p. 11 ; FR SA Objection, paragraph 38-40; IT SA Objection, pp. 8 ; NL SA Objection, paragraph 4849; NO SA Objection, pp. 11-12.

<sup>233</sup> Meta IE Article 65 Submissions, paragraph 9.1.

<sup>234</sup> Meta IE Article 65 Submissions, paragraph 9.3.

<sup>235</sup> Draft Decision, paragraphs 255 - 258.

<sup>236</sup> Draft Decision, paragraphs 209 - 252.

<sup>237</sup> Draft Decision, paragraphs 212 - 215 and 253.

compliance<sup>238</sup>. Furthermore, the EDPB underlines that, as established by the IE SA, the infringements affect a significant number of data subjects<sup>239</sup> and are extensive<sup>240</sup>. The EDPB also observes that the IE SA considered the negligent character of the infringement<sup>241</sup>, as well as the high level of responsibility of Meta IE for the lack of compliance with the GDPR<sup>242</sup> as aggravating factors under Article 83(2) GDPR. Further, the IE SA qualified the level of damage suffered by data subjects as significant<sup>243</sup>. In addition, the IE SA identified only one mitigating factor, without indicating, however, whether this should lead to a slight or substantial reduction of the fine range<sup>276</sup>.

361. Meta IE argues that reputation costs should also be taken into consideration, citing the IE SA's remark on "the significant publicity that a fine in this region will attract"<sup>244</sup>. On principle, the EDPB agrees that reputation costs could be taken into consideration to some extent, if credible arguments are put forward about the grave detriment that would ensue. Meta IE does not present such arguments<sup>245</sup>. The EDPB is of the view that in this case other incentives would offset any reputational costs. As far as advertisers are concerned, Meta IE puts forward that "The personalised nature of the Instagram Service is also the reason why it has been instrumental in the success of small and medium sized businesses ("SMBs") worldwide, including across the EU. Personalisation on social media and other digital technologies, including the Instagram Service, enables SMBs to compete for customers through "customizing [sic] products and services, [...] building a unique brand image, tailoring marketing to a specific audience and developing a strong one-to-one connection with a community of customers"<sup>246</sup>. As far as users of the Instagram service are concerned, there are network effects at play which leads to incentives to join - or not leave - the platform, so as not to be excluded from participating in discussions, corresponding with and receiving information from others<sup>247</sup>.

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<sup>238</sup> Draft Decision, paragraphs 216 - 217 and 253.

<sup>239</sup> Draft Decision, paragraphs 223 - 225 and 253.

<sup>240</sup> Draft Decision, paragraph 221.

<sup>241</sup> Draft Decision, paragraphs 230-233 and 253.

<sup>242</sup> Draft Decision, paragraph 240. The IE SA considers that "Meta Ireland should have been aware of the appropriate standards – albeit at a general level – and, having made a deliberate decision to present the information in a manner which fell significant below the standard required, has a high degree of responsibility for the lack of compliance with the GDPR".

<sup>243</sup> The IE SA finds it sufficiently shown that "rights have been damaged in a significant manner, given the lack of an opportunity to exercise data subject rights while being fully informed", Draft Decision, paragraph 229 <sup>276</sup> Draft Decision, paragraphs 234 - 236.

<sup>244</sup> Composite Response, paragraph 119. See Meta IE Article 65 Submissions, Annex 1, paragraphs 2.26, 5.24, 7.20, 8.31.

<sup>245</sup> Meta IE states that "even if Meta Ireland or other companies could ever consider that multi-million fines are negligible from a financial point of view (a statement that is unsubstantiated and disputed), such companies would obviously be concerned by the reputational cost of such fines." Meta IE Article 65 Submissions, Annex 1, paragraphs 2.26, 5.24, 7.20, and 8.31.

<sup>246</sup> Meta IE Article 65 Submissions, paragraph 6.23.

<sup>247</sup> NO SA Objection, p. 5. In the same vein, the FR SA describes Meta IE's position as quasi-monopolist (FR SA Objection, paragraph 38).

362. According to the DE, FR, and IT SAs, the proposed fine is not consistent with the fine of 225 million euros decided upon by the IE SA in its decision dated 20 August 2021 against WhatsApp Ireland Limited for the same transparency infringements (breaches of Articles 12 and 13 GDPR)<sup>248</sup>.

In particular, the DE SAs point out that “the facts and the seriousness of the infringements in the two cases are no sufficiently different to justify a difference of 85% in the fine imposed”<sup>249</sup>. The FR and IT SAs also compare with the fine of 746 million euros decided by the LU SA in its decision of 15 July 2021 against the company Amazon Europe Core for carrying out behavioural advertising without a valid legal basis and for transparency infringements (Articles 6, 12 and 13 GDPR)<sup>250</sup>. While the EDPB agrees with both the IE SA and Meta IE that imposing fines requires a case-by-case assessment under Article 83 GDPR<sup>251</sup>, the EDPB notes that the cases cited by the DE, FR and IT SAs do show marked similarities with the current case, as they both refer to large internet platforms run by data controllers with multi-national operations and significant resources available to them, including large, in-house, compliance teams. Moreover, there are similarities with regards to the nature and gravity of the infringements involved<sup>252</sup>. Thus, these cases can give an indication on the matter.

363. The DE, FR, IT and NO SAs calculate that the envisaged upper limit of the fine range is about 0.03 %<sup>253</sup> of the global annual turnover of Meta Platforms, Inc., which the DE SAs note is about 0.72% of the maximum ceiling provided for in Article 83(5) GDPR<sup>254</sup>. For illustrative purposes also, is the amount of time it would take Meta Platforms, Inc. on average to generate 23 million euros in turnover in 2020, which was about 2 hours and 33 minutes<sup>255</sup>.

364. The EDPB agrees with the objections raised that - if the proposed fine was to be imposed for the transparency infringements - there would be no sufficient special preventive effect towards the controller, nor a credible general preventive effect<sup>256</sup>. The proposed fine amount, even where a final amount at the upper limit of the range would be chosen, is not effective, proportionate and dissuasive, in the sense that this amount can simply be absorbed by the undertaking as an acceptable cost of doing business<sup>257</sup>. As behavioural advertising is at the core of Meta IE’s business

<sup>248</sup> DE SA Objection, p. 11-12 ; FR SA Objection, paragraph 42 ; IT SA Objection, p.8. The IE SA’s decision in this case (case IN-18-12-2) is under appeal before the Irish courts.

<sup>249</sup> DE SA Objection, p. 12.

<sup>250</sup> FR SA Objection, paragraph 43 ; IT SA Objection p.8.

<sup>251</sup> Draft Decision, paragraph 219-220 ; Meta IE Article 65 Submissions, paragraphs 2.23, 5.18, 7.17.

<sup>252</sup> In this regard, the DE SA points out that in both decisions the IE SA stated that the provisions infringed “go to the heart of the general principle of transparency and the fundamental right of the individual to protection of his/her personal data which stems from the free will and autonomy of the individual to share his/her personal data”. DE SA Objection, p. 11.

<sup>253</sup> DE SA Objection, p. 11; FR SA Objection, paragraph 40 ; IT SA Objection, p. 8 ; NO SA Objection, p. 12.

<sup>254</sup> DE SA Objection, p. 11.

<sup>255</sup> Based on the total annual turnover of 2020 being EUR 79 billion calculated by the NL SA in its objection (NL SA Objection, paragraph 49) on the basis of the turnover of Meta Platforms, Inc. referred to in the Draft Decision (86 billion dollars). Thus, a fine of EUR 23 million would have taken 2h33 to generate.

<sup>256</sup> DE SA Objection, p. 12; IT SA Objection, pp. 8-9 ; NO SA Objection, p. 12 ; FR SA Objection, paragraph 47.

<sup>257</sup> NO SA Objection, p. 11.

*model<sup>258</sup>, the risk of this occurring is all the greater<sup>292</sup>. By bearing the cost of the administrative fine, the undertaking can avoid bearing the cost of adjusting their business model to one that is compliant as well as any future losses that would follow from the adjustment.*

*365. Though the IE SA touches upon the notions of effectiveness, proportionality and dissuasiveness in relation to the proposed fine<sup>259</sup>, there is no justification based on elements specific to the case to explain the modest fine range chosen. Moreover, the EDPB notes that while the IE SA takes into consideration the turnover of the undertaking to ensure that the fine it proposed does not exceed the maximum amount of the fine provided for in Article 83(5) GDPR<sup>260</sup>, the IE SA does not articulate how and to what extent the turnover of this undertaking is considered to ascertain that the administrative fine meets the requirement of effectiveness, proportionality and dissuasiveness<sup>261</sup>. In this regard the EDPB recalls that, contrary to Meta IE's views<sup>262</sup>, the turnover of the undertaking concerned is not exclusively relevant for the determination of the maximum fine amount in accordance with Article 83(4)-(6) GDPR, but should also be considered for the calculation of the fine itself, where appropriate, to ensure the fine is effective, proportionate and dissuasive in accordance with Article 83(1) GDPR<sup>263</sup>. The EDPB therefore instructs the IE SA to modify its Draft Decision to elaborate on the manner in which the turnover of the undertaking concerned has been taken into account for the calculation of the fine.*

*366. In light of the above, the EDPB considers that the proposed fine does not adequately reflect the seriousness and severity of the infringements nor has a dissuasive effect on Meta IE. Therefore, the fine does not fulfil the requirement of being effective, proportionate and dissuasive in accordance with Article 83(1) and (2) GDPR. In light of this, the EDPB directs the IE SA to set out a significantly higher fine amount for the transparency infringements identified, in comparison with the upper limit for the administrative fine envisaged in the Draft Decision. In doing so, the IE SA must remain in line with the criteria of effectiveness, proportionality, and dissuasiveness enshrined in Article 83(1) GDPR in its overall reassessment of the amount of the administrative fine.”*

222. I have taken account of the above directions of the EDPB in the Article 83(2) assessments set out below.

223. As noted above, the EDPB, by way of the Article 65 Decision, has also directed me to find that Articles 6(1) and the Article 5(1)(a) principle of fairness have also been infringed. Pursuant to

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<sup>258</sup> Draft Decision, paragraphs 102, 221, 227 and 251.

<sup>292</sup> NO SA Objection, pp. 11-12.

<sup>259</sup> Draft Decision, paragraphs 255 - 258.

<sup>260</sup> Draft Decision, paragraph 295.

<sup>261</sup> EDPB Guidelines on calculation of fines, paragraph 120.

<sup>262</sup> Meta IE Article 65 Submissions, paragraphs 9.8-9.10. In addition, Meta IE's argument that “[turnover] is not a relevant consideration when determining the amount of the fine under Article 83(2) GDPR” is not within the scope of the dispute as no CSAs raised an objection on the consideration of turnover under this provision (Meta IE Article 65 Submissions, paragraphs 9.5-9.8).

<sup>263</sup> EDPB Binding Decision 1/2021, paragraphs 405-412.

those determinations, the EDPB made further directions, as regards the imposition of additional administrative fines. In relation to the finding of infringement of Article 6(1) GDPR, the EDPB directed, first, at paragraph 440 of the Article 65 Decision, as follows:

*“Taking into account the nature and gravity of the infringement as well as other aspects in accordance with Article 83(2) GDPR, the EDPB considers that the IE SA must exercise its power to impose an additional administrative fine”.*

224. At paragraph 468, the EDPB further directed that:

*“The EDPB instructs the IE SA to cover the additional infringement of Article 6(1) GDPR with an administrative fine which is effective, proportionate and dissuasive in accordance with Article 83(1) GDPR.”*

225. As regards the manner in which I should assess the new infringement of Article 6(1) GDPR, the EDPB instructed as follows:

410. The EDPB concurs that the decision to impose an administrative fine needs to be taken on a case-by-case basis in light of the circumstances and is not an automatic one. In the case at hand, however, the EDPB agrees with the reasoning put forward by the AT, DE, FR, NO and SE SAs in their objections. The EDPB reiterates that lawfulness of processing is one of the fundamental pillars of the data protection law and considers that processing of personal data without an appropriate legal basis is a clear and serious violation of the data subjects’ fundamental right to data protection.

411. Several of the factors listed in Article 83(2) GDPR speak strongly in favour of the imposition of an administrative fine for the infringement of Article 6(1) GDPR.

*The nature, gravity and duration of the infringement (Article 83(2)(a) GDPR)*

412. As mentioned above and outlined below, the nature and gravity of the infringement clearly tip the balance in favour of imposing an administrative fine.

413. With respect to the scope of processing, the EDPB notes the IE SA’s assessment that the personal data processing carried out by Meta IE on the basis of Article 6(1)(b) GDPR is extensive, adding that “Meta Ireland processes a variety of data in order to provide Instagram users with a ‘personalised’ experience, including by way of serving personalised advertisements. The processing is central to and essential to the business model offered [...]”.

414. In this respect, the EDPB also recalls that the infringement at issue relates to the processing of personal data of a significant number of people



415. Though the damage is very difficult to express in terms of a monetary value, it remains the case that data subjects have been faced with data processing that should not have occurred (by relying inappropriately on Article 6(1)(b) GDPR as a legal basis as established in Section 4.4.2). The data processing in question - behavioural advertising - entails decisions about information that data subjects are exposed to or excluded from receiving. The EDPB recalls that non-material damage is explicitly regarded as relevant in Recital 75 and that such damage may result from situations “*where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data*”. Given the nature and gravity of the infringement of Article 6(1)(b) GDPR,

a risk of damage caused to data subjects is, in such circumstances, consubstantial with the finding of the infringement itself and that the impact on them has to be considered.

*The intentional or negligent character of the infringement (Article 83(2)(b) GDPR)*

416. The SE SA argues the infringement of Article 6(1)(b) GDPR should be considered intentional on Meta IE's part, which is an aggravating factor.

417. The EDPB takes note of Meta IE's position that it did not act intentionally with the aim to infringe the GDPR, nor was negligent - but "*has relied on what it has consistently considered in good faith to be a valid legal basis for the purpose of processing of personal data for behavioural advertising and which now requires escalation to the EDPB for resolution*". Before addressing each of the elements of this claim, the EDPB first notes that establishing either intent or negligence is not a requirement for imposing a fine, but deserves "*due regard*". Second, contrary to what Meta IE implies, the mere circumstance that a dispute between the LSA and the CSAs has escalated to the EDPB does not serve as evidence that a controller acted in good faith with respect to the disputed issues. First, the dispute arises only (long) after the controller has decided on its course of action, and therefore cannot inform it. Second, a dispute may simply bring to light that an LSA has decided to challenge a position commonly held by (a majority of) the CSAs.

418. The EDPB Guidelines on calculation of fines confirm that there are two cumulative elements on the basis of which an infringement can be considered intentional: the knowledge of the breach and the willfulness in relation to such act. By contrast, an infringement is "*unintentional*" when there was a breach of the duty of care, without having intentionally caused the infringement.

419. The characterisation of an infringement as intentional or negligent shall be done on the basis of objective elements of conduct gathered from the facts of the case. It is worth noting the broad approach adopted with respect to the concept of negligence, since it also encompasses situations in which the controller or processor has failed to adopt the required policies, which presumes a certain degree of knowledge about a potential infringement. This provides an indication that noncompliance in situations in which the controller or processor should have been aware of the potential breach (in the example provided, due to the lack of the necessary policies) may amount to negligence.

420. The SE SA argues that Meta IE "*has continued to rely on Article 6(1)(b) for the processing, despite the aforementioned [EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR] – which clearly gives doubt to the legality of the processing – which were first adopted on 9 April 2019 and made final on 8 October 2019. The infringement must in all cases be considered intentional from that later date*".

421. The EDPB recalls that even prior to the adoption EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, there were clear indicators that spoke against relying on contract as legal basis. First, in WP29 Opinion 02/2010 on online behavioural advertising, only consent - as required by Article 5(3) of the ePrivacy Directive - is put forward as possible legal basis for this activity. As Article 6

GDPR resembles Article 7 of the Data Protection Directive to a large extent, WP29 Opinion 02/2010 remained a relevant source on this matter for controllers preparing for the GDPR to enter into application. Second, WP29 Opinion 06/2014 on the notion of legitimate interests explicitly states that *“the fact that some data processing is covered by a contract does not automatically mean that the processing*



*is necessary for its performance. For example, Article 7(b) is not a suitable legal ground for building a profile of the user's tastes and lifestyle choices based on his click-stream on a website and the items purchased. This is because the data controller has not been contracted to carry out profiling, but rather to deliver particular goods and services, for example. Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them 'necessary' for the performance of the contract".*

422. It stems from the above that Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR. However, this mere element is not sufficient to consider an infringement intentional, as stated above, since the *"aim"* or *"wilfulness"* of the action should be demonstrated.

423. The EDPB recalls that that having knowledge of a specific matter does not necessarily imply having the *"will"* to reach a specific outcome. This is in fact the approach adopted in the EDPB Guidelines on calculation of fines and WP29 Guidelines on Administrative Fines, where the knowledge and the *"wilfulness"* are considered two distinctive elements of the intentionality. While it may prove difficult to *demonstrate* a subjective element such as the *"will"* to act in a certain manner, there need to be some objective elements that *indicate* the existence of such intentionality.

424. The EDPB recalls that the CJEU has established a high threshold in order to consider an act intentional. In fact, even in criminal proceedings the CJEU has acknowledged the existence of *"serious negligence"*, rather than *"intentionality"* when *"the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation"*. In this regard, while the EDPB confirms that a company for whom the processing of personal data is at the core of its business activities is expected to have sufficient measures in place for the safeguard of personal data, this does not, however, per se change the nature of the infringement from negligent to intentional.

425. In this regard, the SE SA puts forward that Meta IE based its processing of personalised advertisement on consent until the GDPR came into force on 25 May 2018, and at this time switched to relying on Article 6(1)(b) GDPR for the processing in question instead. The timing and the logistics for this switch suggests this act was done with the intention of circumventing the new rights of users under Article 6(1)(a) GDPR. The SE SA adds that *"[the] proposed finding of infringement concerning information deficits about the processing, namely on what legal basis it is based, further supports this conclusion, since it goes to show that Meta Ireland was aware of the questionable legality of that basis and tried to conceal the infringement to avoid scrutiny by supervisory authorities and data subjects"*.

426. The EDPB considers the timing of the changes made by Meta IE to its Instagram Terms of Use as an objective element, however this alone does not indicate intention. Around this time period, many controllers updated their data protection policies. The objection suggests that the conclusion on intentionality is corroborated by the shortcomings to the transparency obligations. In the EDPB's view, the combination of the timing of the change of legal basis with the lack of transparency is not sufficient to indicate intention either.



427. Therefore, on the basis of the available information, the EDPB is not able to identify a will of Meta IE to act in breach of the law as it cannot be concluded that Meta IE intentionally acted to circumvent its legal obligations.

428. Therefore, the EDPB considers that the arguments put forward by the SE SA do not meet the threshold to demonstrate the intentionality of the behaviour of Meta IE. Accordingly, the EDPB is of the view that the Draft Decision does not need to include this element.

429. At the same time, the EDPB notes that, even establishing that the infringement was committed negligently, a company for whom the processing of personal data is at the core of its business activities should have in place sufficient procedures for ensuring compliance with the GDPR.

430. The EDPB does not accept Meta IE's claim of "*good faith*", but is of the view that Meta IE was certainly seriously negligent in not taking adequate action, within a reasonable time period, following the adoption of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR on 9 April 2019. Even before that date, the EDPB considers there was at the very least negligence on Meta IE's part considering the contents of WP29 Opinion 02/2010 on online behavioural advertising and WP29 Opinion 06/2014 on the notion of legitimate interests (see paragraph 421 of this Binding Decision), which means Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR, given the fact that processing of personal data is at the core of its business practices, and the resources available to Meta IE to adapt its practices so as to comply with data protection legislation.

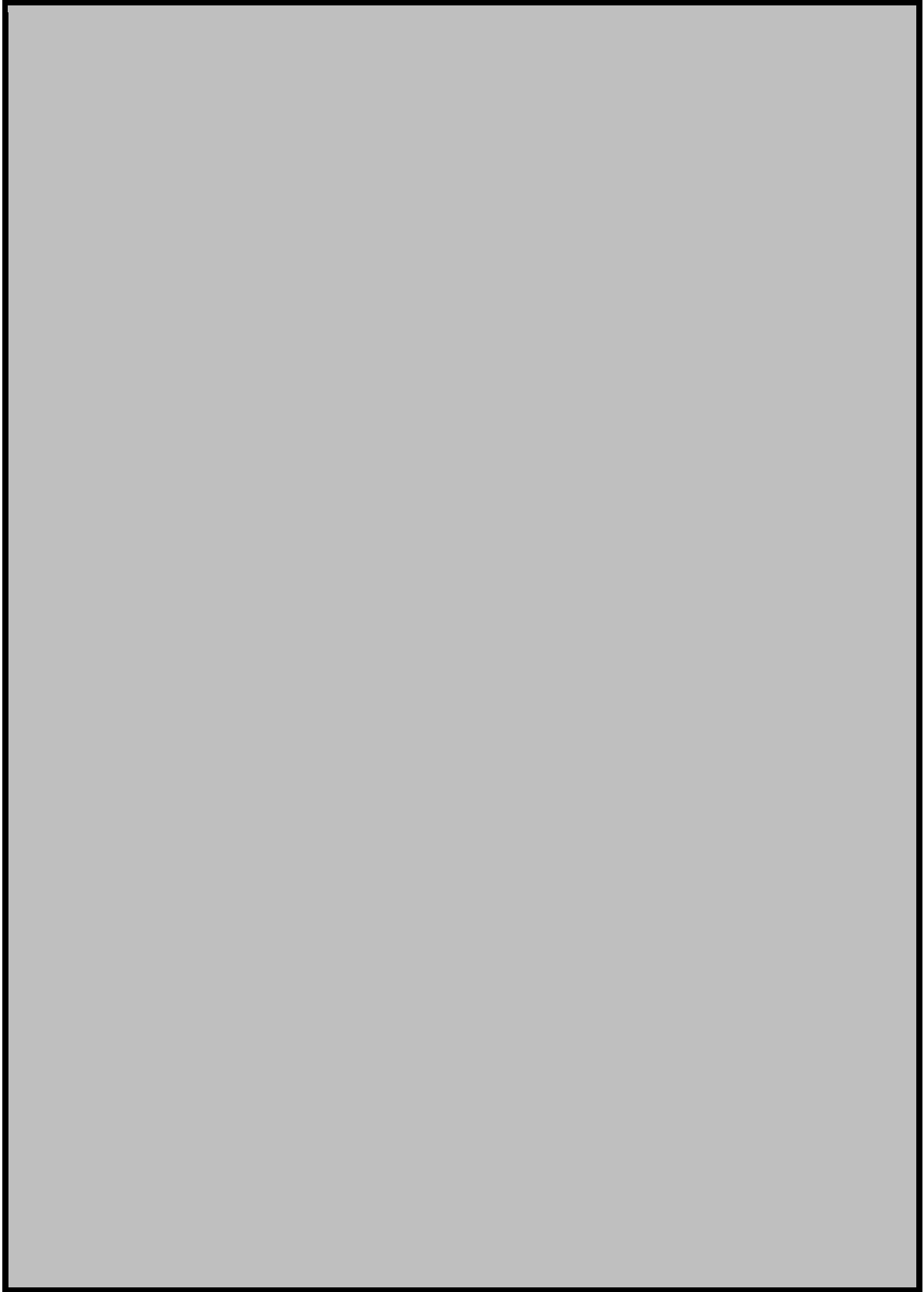
*The degree of responsibility of the controller taking into account technical and organisational measures implemented pursuant to Articles 25 and 32(Article 83(2)(d) GDPR)*

431. The EDPB considers the degree of responsibility of Meta IE's part to be of a high level, on the same grounds as set in the Draft Decision with regards to the transparency infringements.

*The financial benefit obtained from the infringement (Article 83(2)(k) GDPR)*

432. The SE SA argues Meta IE gained financial benefits from their decision to rely on contract as legal basis for behavioural advertising, rather than obtaining consent from the users of Instagram. While not providing an estimate of its size, the SE SA considers the existence of financial benefit sufficiently proven on the basis of "*the self-evident fact that Meta Ireland has made significant financial gain from being able to provide personal advertisement as part of a whole take it or leave it offer for its social media platform service, as opposed to establishing a separate legal basis for it. By also being unclear in the information to data subjects, it is a reasonable assumption that more data subjects have been misled into being subject to the processing, thus increasing the financial benefits gained by Meta Ireland pursuant to personal advertisement*".

433. As explicitly stated in Article 83(2)(k) GDPR, financial benefits gained directly or indirectly from the infringement can be considered an aggravating element for the calculation of the fine. The aim of Article 83(2)(k) GDPR is to ensure that the sanction applied is effective, proportionate and dissuasive in each individual case.







434. In particular, in view of ensuring fines that are effective, proportionate and deterrent, and in light of common accepted practice in the field of EU competition law, which inspired the fining framework under the GDPR, the EDPB is of the view that, when calculating the administrative fine, supervisory authorities could take account of the financial benefits obtained from the infringement, in order to impose a fine that aim at *“counterbalancing the gains from the infringement”*.

435. When applying this provision, the supervisory authorities must *“assess all the facts of the case in a manner that is consistent and objectively justified”*. Therefore, financial benefits from the infringement could be an aggravating circumstance if the case provides information about profit obtained as a result of the infringement of the GDPR.

436. In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the specific weight of the financial benefit obtained from the infringement.

437. Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionately low compared to the benefits obtained with the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the financial benefit from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed.

*Competitive advantage - other factor (Article 83(2)(k) GDPR)*

438. The NO SA identifies an aggravating factor in that *“that the unlawful processing of personal data in all likelihood has contributed to the development of algorithms which may be harmful on an individual or societal level, and which may have considerable commercial value to [Meta IE]. The algorithms may have contributed to giving [Meta IE] a competitive advantage vis-à-vis its competitors”*.

439. On principle, the EDPB agrees that a competitive advantage could be an aggravating factor if the case provides objective information that this was obtained as a result of the infringement of the GDPR. In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the existence of a competitive advantage resulting from the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the competitive advantage derived from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed.

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440. Taking into account the nature and gravity of the infringement as well as other aspects in accordance with Article 83(2) GDPR, the EDPB considers that the IE SA must exercise its power to impose an additional administrative fine. Also, covering this additional infringement with a fine would be in line with the IE SA’s (proposed) decision to impose administrative fines in this case for the transparency infringements relating to processing carried out in reliance on Article 6(1)(b) GDPR821. The EDPB underlines that, in order to be effective, proportionate and dissuasive, a fine

should reflect the circumstances of the case. Such circumstances not only refer to the specific elements of the infringement, but also those of the controller or processor who committed the infringement, namely its financial position.

226. I have taken account of the above directions of the EDPB in the Article 83(2) assessments set out below.

227. Finally, in relation to the new finding of infringement of the Article 5(1)(a) GDPR principle of fairness that was established by the EDPB, the EDPB further directed that:

444. As previously established, the principle of fairness under Article 5(1)(a) GDPR, although intrinsically linked to the principles of lawfulness and transparency under the same provision, has an independent meaning. It underpins the whole data protection framework and plays a key role for securing a balance of power in the controller-data subject relationship.

445. Considering the EDPB's findings in Section 6.4.2 that Meta IE has not complied with key requirements of the principle of fairness as defined by the EDPB, namely allowing for autonomy of the data subjects as to the processing of their personal data, fulfilling data subjects' reasonable expectation, ensuring power balance, avoiding deception and ensuring ethical and truthful processing, as well as the overall effect of the infringement by Meta IE of the transparency obligations and of Article 6(1) GDPR, the EDPB reiterates its view that Meta IE has infringed the principle of fairness under Article 5(1)(a) GDPR and agrees with the IT SA that this infringement should be adequately taken into account by the IE SA in the calculation of the amount of the administrative fine to be imposed following the conclusion of this inquiry.

446. Therefore, the EDPB instructs the IE SA to take into account the infringement by Meta IE of the fairness principle enshrined in Article 5(1)(a) GDPR as established above when re-assessing the administrative fines for the transparency infringements and the determination of the fine for the lack of legal basis. If, however, the IE SA considers an additional fine for the breach of the principle of fairness is an appropriate corrective measure, the EDPB requests the IE SA to include this in its final decision. In any case, the IE SA must take into account the criteria provided for by Article 83(2) GDPR and ensuring it is effective, proportionate and dissuasive in line with Article 83(1) GDPR.

228. For the avoidance of doubt, I do not consider an additional fine for the breach of the Article 5(1)(a) principle of fairness that was established by the Article 65 Decision to be an appropriate corrective measure. In this regard, I note that that the Board's finding of infringement of the Article 5(1)(a) fairness principle was largely based on the lack of transparency, as regards the information that was presented to the data subject concerning the processing that would be carried out further to the Terms of Use (see, for example, paragraphs 224, 225, 228 and 235 of the Article 65 Decision). The Draft Decision contained separate proposed findings of infringement of the transparency obligations set out in Articles 5(1)(a), 12(1) and 13(1)(c), together with corresponding proposals to exercise corrective powers in the form of an administrative fine and an order to bring processing into compliance. In the circumstances, it is my view that the imposition of a fine for the finding of infringement of the Article 5(1)(a) fairness principle would risk punishing Meta Ireland twice for the same wrongdoing.

229. From the above starting points, the required assessments, for the purpose of Article 83(2), of the infringements that were found to have occurred elsewhere in this Decision are set out immediately below.

*ARTICLE 83(2)(A): THE NATURE, GRAVITY AND DURATION OF THE INFRINGEMENT TAKING INTO ACCOUNT THE NATURE SCOPE OR PURPOSE OF THE PROCESSING CONCERNED AS WELL AS THE NUMBER OF DATA SUBJECTS AFFECTED AND THE LEVEL OF DAMAGE SUFFERED BY THEM*

230. As a preliminary matter, I note that Article 83(2)(a) refers to the “infringement” as well as the “processing concerned” and that this criterion requires an assessment by reference to both. In this regard, it is imperative to consider the meaning of both terms.

*The infringements of Articles 5(1)(a), 12(1) and 13(1)(c) GDPR in the context of transparency*

231. Read in conjunction with Article 83(3) – (5) GDPR, it is clear that the term “infringement” refers to an infringement of the GDPR. As outlined above, I have found that Meta Ireland has infringed Articles 5(1)(a), 12(1) and 13(1)(c) GDPR (the “Transparency Infringements”). Thus, “the infringement”, for the purpose of my corresponding assessment of the Article 83(2) GDPR criteria, should be understood (depending on the context in which the term is used) as meaning an infringement of Articles 5(1)(a), 12(1) and 13(1)(c) GDPR. While I emphasise that each is an individual and discrete “infringement” of the GDPR, I am proposing to assess all three infringements simultaneously as all concern transparency and, by reason of their common nature and purpose, are likely to generate the same, or similar, outcomes in the context of some of the Article 83(2) GDPR assessment criteria. I will reference the infringements collectively as the “Transparency Infringements”, unless otherwise indicated to the contrary.

232. The phrase “the processing concerned”, in the context of the Transparency Infringements, should be understood as meaning all of the processing operations that Meta Ireland carries out in the context of the Instagram service on the personal data under its controllership for which it indicated reliance on Article 6(1)(b) GDPR, including for the purposes of behavioural advertising<sup>264</sup>. The within Inquiry was based on an assessment of the extent to which Meta Ireland had complied with its transparency obligations in the context of a specific Complaint. The Inquiry examined, *inter alia* the extent of the information Meta Ireland provided to the Complainant about processing carried out pursuant to Article 6(1)(b) GDPR. Given the generality of the Complaint and therefore the Inquiry, the precise parameters of this processing were not directly relevant to the factual analysis carried out. The phrase “the processing concerned”, in the context of the Transparency Infringements, therefore refers simply to the processing

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<sup>264</sup> See para. 346 of the EDPB’s Binding Decision 04/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), adopted 5 December 2022.

addressed in the Decision i.e. the processing carried out by Meta Ireland for the purpose of delivering its Terms of Use, including processing personal data for behavioural advertising. Notwithstanding the EDPB's determination that Meta Ireland is not permitted to rely on Article 6(1)(b) GDPR when processing personal data for behavioural advertising purposes, I am required (by paragraph 346 of the Article 65 Decision) to retain the scope of the "processing concerned", as set out above.

*The infringement of Article 6(1) GDPR in the context of processing for behavioural advertising*

233. In the context of the infringement of Article 6(1) GDPR that was established by the EDPB in the Article 65 Decision, the phrase "the processing concerned" should be understood as meaning all of the processing operations that are carried out by Meta Ireland for the purpose of behavioural advertising.
234. Taking this as my starting point, I will now assess the Article 83(2)(a) criterion in light of the particular circumstances of the Inquiry. I note, in this regard, that Article 83(2)(a) comprises: the nature, gravity and duration of the infringement; the nature, scope or purpose of the processing concerned; the number of data subjects affected; and the level of damage suffered by them; as follows:

Nature, gravity and duration of the infringement

235. In considering the nature of the Transparency Infringements, it must first be highlighted that the proposed findings of infringement concern data subject rights. As set out in the analysis of Article 13(1)(c) GDPR above, my view is that the right concerned – the right to information – is a cornerstone of the rights of the data subject. Indeed, the provision of the information concerned goes to the very heart of the fundamental right of the individual to protection of personal data which stems from the free will and autonomy of the individual to share their personal data in a voluntary situation such as this. If the required information has not been provided, the data subject has been deprived of the ability to make a fully informed decision as to whether they wish to use a service that involves the processing of their personal data and engages their associated rights. Furthermore, the extent to which a data controller has complied with its transparency obligations has a direct impact on the effectiveness of the other data subject rights. If data subjects have not been provided with the prescribed information, they may be deprived of the knowledge they need in order to consider exercising one of the other data subject rights.
236. As regards the infringement of Article 5 GDPR, it should be noted that transparency "*is an overarching principle that not only reinforces other principles (i.e. fairness, accountability), but from which many other provisions of the GDPR derive.*" It is therefore clear that failure to comply with the transparency principle has the potential to undermine other fundamental data protection principles, including but not limited to the principles of fairness and accountability.

237. I further note, in this regard, that Articles 83(4) and (5) GDPR are directed to the maximum fine that may be imposed in a particular case. The maximum fine prescribed by Article 83(5) GDPR is twice that prescribed by Article 83(4) GDPR. The infringements covered by Article 83(5) GDPR include infringements of the data subject's rights pursuant to Article 12 to 22 GDPR and infringements of the principles in Article 5 GDPR. It is therefore clear that the legislator considered the data subject rights and the Article 5 GDPR principles to be particularly significant in the context of the data protection framework as a whole.

238. In this respect, Meta Ireland have argued that the nature of the Transparency Infringements amount to a good faith difference of opinion, and represent a new and subjective interpretation of the GDPR.<sup>265</sup> As part of my assessment of the Article 83(2)(c) GDPR criterion, which requires consideration of "*any action taken by the controller or processor to mitigate the damage suffered by data subjects*", I note that it would be unfair to criticise Meta Ireland for failing to take action to mitigate any damage suffered in circumstances where its position was that no infringement had occurred and, accordingly, no damage had been suffered by data subjects. This does not, however, do anything to alter the infringement's objectively serious character.

239. In terms of the nature of the Article 6(1) infringement that was established by the EDPB, paragraph 410 of the Article 65 Decision records that:

*"The EDPB reiterates that lawfulness of processing is one of the fundamental pillars of the data protection law and considers that processing of personal data without an appropriate legal basis is a clear and serious violation of the data subjects' fundamental right to data protection".*

240. In expressing this view, the Board referred to page 10 of the objection raised by the Norwegian SA, which states, in this regard, that:

*"OBA [online behavioural advertising] entails profiling, which inherently constitutes risks for the data subjects' integrity. The less transparent the profiling algorithms are, the higher the risk, and in this case, there is no meaningful, sufficiently detailed information about the functioning of MPIL's algorithms available to us.*

*Furthermore, on the Instagram platform, profiling is used to make decisions by way of automated means regarding what information the data subjects are exposed to. Important to note is that this equally means that decisions are taken as regards which information data subjects do not see and thus are excluded from receiving. The information may inter alia include commercial advertisements, political advertising, housing postings et cetera, and it may be of a manipulative nature".*

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<sup>265</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 13.2. See also para. 14.9.

241. In considering the nature and scope of the processing in the context of the analysis leading to the finding of infringement of Article 6(1) itself, the Board noted, at paragraphs 98 to 100 of the Article 65 Decision, that:

*“...Meta IE collects data on its individual users and their activities on and off its Facebook service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user’s computer or mobile device. According to the descriptions provided, Meta IE links these data with the user’s Facebook account to enable advertisers to tailor their advertising to Facebook’s individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user’s physical location to display content relevant to the user’s location. Meta IE offers its services to its users free of charge and generates revenue through this personalised advertising that targets them, in addition to static advertising that is displayed to every user in the same way.*

*The EDPB considers that these general descriptions signal by themselves the complexity, massive scale and intrusiveness of the behavioural advertising practice that Meta IE conducts through the Facebook service, as well as off the Facebook service itself, through third party websites and apps which are connected to Facebook.com via programming interfaces (“Facebook Business Tools”), including the Instagram service. Furthermore, among the aspects described in the Instagram Terms of Use is “Providing consistent and seamless experiences across other Facebook Company Products.” which involves “shar[ing] technology, systems, insights, and information-including the information we have about you.” It is therefore clear that personal data is shared between Facebook companies (“We use data from Instagram and other Facebook Company Products, as well as from third-party partners, to show you ads (...)”*

*These are relevant facts to consider to assess the appropriateness of Article 6(1)(b) GDPR as a legal basis for behavioural advertising and to what extent reasonable users may understand and expect behavioural advertising when they accept the Instagram Terms of Use and perceive it as necessary for Meta IE to deliver its service”.*

242. With specific reference to the scope of the processing, paragraph 413 of the Article 65 Decision records that:

*“With respect to the scope of processing, the EDPB notes the IE SA’s assessment that the personal data processing carried out by Meta IE on the basis of Article 6(1)(b) GDPR is extensive, adding that “Meta Ireland processes a variety of data in order to provide Instagram users with a ‘personalised’ experience, including by way of serving personalised advertisements. The processing is central to and essential to the business model offered [...]”*



**[REDACTED]**

243. It is therefore clear that the Board considers the Article 6(1) infringement to concern one of the “fundamental pillars” of the GDPR and the nature and scope of the processing to be extensive, complex, intrusive and on a massive scale. I further note, in this regard, that paragraph 412 of the Article 65 Decision indicates that the Board considered the nature of the infringement to be significant, in the context of its conclusion that an administrative fine ought to be imposed in relation to the infringement of Article 6(1) GDPR.

244. As regards the gravity of the Transparency Infringements, my findings are such that Meta Ireland has not provided the required information in the required manner under Article 13(1)(c) GDPR and has also infringed Articles 12(1) and 5(1)(a) GDPR. This, in my view, represents a significant level of non-compliance, taking into account the importance of the right to information, the consequent impact on the data subjects concerned and the number of data subjects potentially affected (each of which is considered further below). The clear inconsistencies between the transparency guidelines and the manner in which Meta Ireland attempted to comply with its obligations makes clear that the Commission’s interpretation is neither new nor subjective. I would add that I have set out (below) the risks to data subjects in being unable to effectively exercise their rights by being unable to discern what specific data processing is being done on what legal basis and for what objective. This is more than sufficient to show the negative impact that this has had on data subjects and specifically on the Named Data Subject.

245. Meta Ireland have alleged that the Transparency Infringements are “*marginal*” in their nature and gravity because the Commission’s interpretation amounts to new and subjective views being imposed on it.<sup>266</sup> I do not accept that these views are new or subjective. I set out at Section 5 the extent to which this level of compliance is expected by the transparency guidelines, which are a publicly available document. The clear inconsistencies between the transparency guidelines and the manner in which Meta Ireland have attempted to comply with its obligations makes clear that the Commission’s interpretation is neither new nor subjective. The Commission is carrying out its functions under the GDPR, by interpreting and applying the relevant provisions of the GDPR to the Complaint before it. I also note Meta Ireland’s argument that no evidence has been presented of the impact on data subjects from a lack of transparency.<sup>267</sup> In this respect, I emphasise that this entire Complaint arises from a failure to provide sufficiently transparent information such that the Named Data Subject could not understand the agreement to the Terms of Use was not consent in the sense meant in the GDPR. Moreover, I have already set out in Section 5, the risks to data subjects in being unable to effectively exercise their rights by being unable to discern what specific data processing is being done on what legal basis and for what

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<sup>266</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 14.9 – 14.10.

<sup>267</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.8.

objective. I disagree with Meta Ireland’s submission that this is “*purely hypothetical*”.<sup>268</sup> This is more than sufficient to show the negative impact that this has had on data subjects and specifically on the Named Data Subject.

Given this significant impact, as set out in this Decision, I cannot accept the suggestion from Meta Ireland that the administrative fine be replaced with a reprimand.<sup>269</sup>

246. In terms of the gravity of the Article 6(1) infringement that was established by the EDPB, the Article 65 Decision does not identify, with any particularisation, the EDPB’s position on the gravity of the Article 6(1) infringement. I note, however, that paragraph 412 of the Article 65 Decision indicates that the Board considered the gravity of the infringement to be significant, in the context of its conclusion that an administrative fine ought to be imposed in relation to the infringement of Article 6(1) GDPR, stating:

*“As mentioned above and outlined below, the nature and gravity of the infringement clearly tip the balance in favour of imposing an administrative fine”*

247. In this regard, I note that infringements of Article 6 are subject to the higher fining threshold set out in Article 83(5) GDPR. The maximum fine prescribed by Article 83(5) GDPR is twice that prescribed by Article 83(4) GDPR. This arrangement clearly indicates that the legislator considered the matters covered by Article 83(5) GDPR to be particularly significant in the context of the data protection framework as a whole.

248. In terms of the duration of the Transparency Infringements, this complaint-based Inquiry relates in part to a lack of information provided to the Complainant as regards the lawful basis relied on and the connection between Article 6(1)(b) GDPR and specific processing operation(s) or set(s) of operations. The Complaint therefore relates to the transparency of the relevant documents at the time the Complaint was lodged. In that sense, this Inquiry relates to specific alleged infringements at a specific point in time, because that is what the Complaint concerns. In imposing corrective powers however, the GDPR requires that the broader impact of infringements be considered (as I will set out below in relation to each individual criterion). To that extent, it is necessary at times to move from the specific to the general.

249. I should, at this juncture, note that the Commission is not required to apply the same approach across all inquiries, regardless of the differences between such inquiries. In this respect, I acknowledge Meta Ireland’s submissions on the Preliminary Draft in which Meta Ireland took issue with various alleged inconsistencies between the approach to factors considered in

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<sup>268</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.7.

<sup>269</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 13.3.

<sup>304</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.2.

administrative fines in the Preliminary Draft and in other decisions made by the Commission under the GDPR to date.<sup>304</sup> I do not agree that there is any inconsistency in the manner in which it has assessed the Article 83(2) GDPR criteria. The Commission is not required to apply the same approach across all inquiries, regardless of the differences between such inquiries.

250. The Commission's approach to the presence or absence of relevant previous infringements (for the purpose of the Article 83(2)(e) GDPR assessment) differs, depending *inter alia* on the contexts of different types of controllers, particularly as concerns the scale of the processing at issue. In this regard, the Commission is entitled to take account of whether data controllers or processors with multi-national operations have significant resources available to them, including large, in-house, compliance teams. Moreover, such entities are further likely to be engaged in business activities that are uniquely dependent on the large-scale processing of personal data. The Commission's view is that the size and scale of such entities, the level of dependency on data processing and the extensive resources that are available to them necessitate a different approach to the absence of previous relevant infringements. That approach has been reflected in the decisions that differ in their considerations of particular factors from this one. In the circumstances, the Commission does not accept that there has been an inconsistency in the Commission's approach to determining the quantum of any fine.

251. In relation to the infringement of Article 6(1) that was established by the EDPB, the Article 65 Decision does not contain any indication in relation to the manner in which the Board took account of the duration of the Article 6(1) infringement. In this respect, I note that the infringement has occurred since 25 May 2018 and remains ongoing.

Taking into account the nature, scope or purpose of the processing concerned

252. The personal data processing carried out by Meta Ireland in the context of the Instagram service pursuant to Article 6(1)(b) GDPR is extensive. Meta Ireland processes a variety of data in order to provide Instagram users with a "personalised" experience, including by way of serving personalised advertisements. The processing is central to and essential to the business model offered, and, for this reason, the provision of compliant information in relation to that processing becomes even more important. This, indeed, may include location and IP address data.

253. In response to my consideration of this matter in the Preliminary Draft, Meta Ireland alleged that its "*difficulty in striking the right balance between presenting sufficient information but in a way which remains concise, intelligible and accessible*" was illustrative of the marginal nature of non-compliance.<sup>270</sup> I do not consider this to be the case given the extent of non-compliance I have outlined in Section 5. Meta Ireland also expressed concern that I was considering "*a much wider range of processing*" than processing to facilitate behavioural advertising.<sup>271</sup> For the

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<sup>270</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.11.

<sup>271</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.12.

avoidance of doubt, I confirm that I have only taken account of processing to facilitate behavioural advertising.

254. The EDPB's views, as regards the scope of the processing concerned, in the context of the Article 6(1) infringement have already been recorded at paragraph 242 above.

#### The number of data subjects affected

255. In submissions dated 28 September 2018, Meta Ireland stated that it *"provides the Instagram service to hundreds of millions of users across the European region"*.<sup>272</sup>

256. In the context of the Transparency Infringements, I noted, in the Draft Decision, that Meta Ireland had confirmed that, as of the date of the commencement of the Inquiry, i.e. 31 August 2018, it had approximately [REDACTED] monthly active accounts and, as of December 2021, it had approximately [REDACTED] active users in the European Economic Area.<sup>273</sup> In the Draft Decision, I noted that, surprisingly, Meta Ireland excluded the number of UK active accounts in these calculations on the understanding that *"such accounts in that territory are not relevant to the Inquiry"*.<sup>274</sup> This understanding is not correct; as the GDPR was applicable in the UK at the date of the Complaint and it was my view that these accounts are in fact relevant to this Inquiry and must be taken account.

257. Eurostat, the statistical office of the European Union confirms that, as of 1 January 2020, the population of the "EU 27" was approximately 488 million, the population of the UK was approximately 67 million, the population of Norway was approximately 5 million, and the populations of Iceland and Liechtenstein were approximately 364,000 and 39,000 respectively.<sup>275</sup>

258. By reference to these figures, the total population of the EEA (including the UK) by reference to the latest available figures is approximately 520 million. While it is not possible, or indeed necessary, for me to identify the precise number of users affected by the Infringements, it is useful to have some point of reference in order to consider the extent of EEA data subjects that are potentially affected by the Transparency Infringements.

259. Paragraph 223 of the Draft Decision noted the confirmation, provided by Meta Ireland that, as at the date of the commencement of the Inquiry (i.e. 31 August 2018), it had approximately [REDACTED] monthly active users and, as of December 2021, it had approximately [REDACTED] monthly active users in the EEA, excluding the number of UK active accounts.

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<sup>272</sup> Meta Ireland's Submissions dated 28 September 2018, at para. 2.8.

<sup>273</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.13.

<sup>274</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at footnote 117.

<sup>275</sup> <https://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00001&plugin=1>.

260. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, paragraph 414 of the Article 65 Decision records that *“the EDPB also recalls that the infringement at issue relates to the processing of personal data of a significant number of people”*
261. In expressing the above view, the Board referred to paragraph 253 of the Draft Decision, which records that a *“significant portion of the population of the EEA seems to have been impacted by the Infringements”*.
262. In this regard, the Board referred to pages 9 and 11 of the objection raised by the German SAs which references the risks to *“hundreds of millions of data subjects within the EU”*. The Board also referred to pages 10 – 11 of the objection raised by the Norwegian SA which, referring to paragraph 223 of the Draft Decision, states that *“the number of data subjects affected in the EEA amounts to hundreds of millions”*.

The level of damage suffered by them

263. In relation to the Transparency Infringements, I note that Recital 75 (which acts as an aid to the interpretation of Article 24 GDPR, the provision that addresses the responsibility of the controller), describes the “damage” that can result where processing does not accord with the requirements of the GDPR:

*“The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or nonmaterial damage, in particular: ... where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data ...”*

264. As set out above, my findings are such that users have not been provided with the information in relation to processing pursuant to Article 6(1)(b) GDPR that they are entitled to receive. This represents, in my view, quite a significant information deficit and one which, by any assessment of matters, can equate to a significant inability to exercise control over personal data. I have also pointed out the centrality of the processing to Meta Ireland’s business model in respect of the Instagram service. This makes it all the more important that information on this processing be provided in a transparent manner, and makes the implications of it not being provided in such a manner all the more significant.
265. I further note that the failure to provide all of the prescribed information undermines the effectiveness of the data subject rights and, consequently, infringes the rights and freedoms of the data subjects concerned. A core element of transparency is empowering data subjects to make informed decisions about engaging with activities that cause their personal data to be processed, and making informed decisions about whether to exercise particular rights, and

whether they can do so. This right is undermined by a lack of transparency on the part of a data controller.

266. Meta Ireland have argued that the above amounts to mere “speculation”.<sup>276</sup> I have already set out in detail in this Decision the risks to data subject rights involved in the denial of transparency, and indeed provided the concrete example of the breach of the Named Data Subject’s right to transparency about the use of his personal data. This is more than sufficient to show that rights have been damaged in a significant manner, given the lack of an opportunity to exercise data subject rights while being fully informed.

267. In the context of the finding of the infringement of Article 6(1) GDPR that was established by the EDPB, paragraph 415 of the Article 65 Decision records that:

*“Though the damage is very difficult to express in terms of a monetary value, it remains the case that data subjects have been faced with data processing that should not have occurred (by relying inappropriately on Article 6(1)(b) GDPR as a legal basis as established in Section 4.4.2). The data processing in question - behavioural advertising - entails decisions about information that data subjects are exposed to or excluded from receiving. The EDPB recalls that non-material damage is explicitly regarded as relevant in Recital 75 and that such damage may result from situations “where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data”. Given the nature and gravity of the infringement of Article 6(1)(b) GDPR, a risk of damage caused to data subjects is, in such circumstances, consubstantial with the finding of the infringement itself.”*

268. Paragraph 133 of the Article 65 Decision considers the risks arising from the Article 6(1) infringement as follows:

*“Given that the main purpose for which a user uses Instagram service is to share and receive content, and communicate with others. The users’ lack of choice in this respect would rather indicate that Meta IE’s reliance on the contractual performance legal basis deprives users of their rights, among others, to withdraw their consent under Articles 6(1)(a) and 7 and/or to object to the processing of their data based on Article 6(1)(f) GDPR 237, and that Meta IE conditions their use to the user’s acceptance of a contract and the behavioural advertising they include, the EDPB cannot see how a user would have the option of opting out of a particular processing which is part of the contract as the IE SA seems to argue”.*

269. In paragraph 135 of the Article 65 Decision, the Board further considered that:

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<sup>276</sup> Facebook Submissions on Preliminary Draft, paragraph 4.13.

*“Some of the safeguards from which data subjects would be deprived due to an inappropriate use of Article 6(1)(b) GDPR as legal basis, instead of others such as consent (Article 6(1)(a) GDPR) and legitimate interest (Article 6(1)(f) GDPR), are the possibility to specifically consent to certain processing operations and not to others and to the further processing of their personal data (Article 6(4) GDPR); their freedom to withdraw consent (Article 7 GDPR); their right to be forgotten (Article 17 GDPR); and the balancing exercise of the legitimate interests of the controller against their interests or fundamental rights and freedoms (Article 6(1)(f) GDPR).”*

270. It therefore appears that the Board considered the infringement to give rise to a risk of loss of control over, and ability to exercise choice concerning, one’s personal data. This is consistent with the complainant’s position that the infringement had the effect of negating his consent/free will.<sup>277</sup>

271. I also consider that that the infringement of the Article 5(1)(a) fairness principle may be taken into account, as required by the Article 65 Decision, under this particular heading. I note, in this regard, paragraph 229 of the Article 65 Decision, which records the Board’s view that:

*“Considering the constantly increasing economic value of personal data in the digital environment, it is particularly important to ensure that data subjects are protected from any form of abuse and deception, intentional or not, which would result in the unjustified loss of control over their personal data. Compliance by providers of online services acting as controllers with all three of the cumulative requirements under Article 5(1)(a) GDPR, taking into account the particular service that is being provided and the characteristics of their users, serves as a shield from the danger of abuse and deception, especially in situations of power asymmetries.”*

272. The Board further notes, at paragraphs 233 and 234 of the Article 65 Decision, that:

*“the EDPB shares the IT SA’s concern that Instagram users are left “in the dark” and considers that the processing by Meta IE cannot be regarded as ethical and truthful because it is confusing with regard to the type of data processed, the legal basis and the purpose of the processing, which ultimately restricts the Instagram users’ possibility to exercise their data subjects’ rights.*

*...Considering the seriousness of the infringements of the transparency obligations by Meta IE already identified in the Draft Decision and the related misrepresentation of the legal basis relied on, the EDPB agrees with the IT SA that Meta IE has presented its service to the Instagram users*

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<sup>277</sup> See point ii, page 20 of the complaint

*in a misleading manner<sup>429</sup>, which adversely affects their control over the processing of their personal data and the exercise of their data subjects' rights."*

273. The Board's views highlight the same damage as already identified above, namely the loss of control over, and ability to exercise choice concerning, one's personal data.

274. On the basis of the views that have been expressed by the Board, as recorded above, I proposed to conclude that the infringement of Article 6(1) GDPR falls within the upper range of the scale, in terms of seriousness, for the purpose of the assessment of the Article 83(2)(a) criterion. In its Final Submissions, Meta Ireland expressed disagreement with the proposed conclusion and underlying assessments set out above.

Meta Ireland's Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

275. Following the amendment of the Draft Decision to take account of the EDPB's Article 65 Decision, Meta Ireland was invited to exercise its right to be heard in relation to those aspects of the Draft Decision in relation to which the Commission was required to make a final determination or, otherwise, to exercise its discretion. Meta Ireland furnished its submissions on these matters under cover of letter dated 19 December 2022 ("the Final Submissions").

276. In relation to the nature of the Article 6(1) infringement, Meta Ireland submitted that the EDPB's conclusion on this aspect of matters "*is not correct and not supported by the evidence, particularly where (i) the [Commission] itself found Meta Ireland's reliance on Article 6(1)(b) for the Behavioural Advertising Processing valid in principle, meaning the infringement found cannot be said to have been "clear"; and (ii) the Article 65 Decision acknowledges that legal bases are available under Article 6(1) for the Behavioural Advertising Processing and that there is no hierarchy between those legal bases*".<sup>278</sup> In this regard, Meta Ireland respectfully urged the Commission not to adopt the EDPB's flawed arguments with respect to Article 83(2)(a) in light of a number of "significant errors in the EDPB's reasoning" that it has identified in its Final Submissions.

277. In circumstances where the Article 65 Decision is binding upon the Commission, I am not in a position to act contrary to the views that have been so expressed the EDPB.

278. In relation to the gravity of the infringement, Meta Ireland, firstly, noted that the Article 65 Decision does not articulate any clear reasoning or position with respect to the gravity of the purported infringement, rendering the assessment of this element meaningless. Meta Ireland

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<sup>278</sup> Meta Ireland's Final Submissions dated 19 December 2022, at para. 9.5.



further submitted that a “*finding in respect of gravity cannot simply be extrapolated from the fact that the infringement found is subject to a particular fining cap in accordance with Article 83(5), with no reference to the facts*”.<sup>279</sup> Meta Ireland submitted that gravity should not be considered significant or an aggravating factor for the same reasons as those provided in response to the proposed assessment of the nature of the assessment, as summarised above.

279. As before, the Commission is not in a position to act contrary to the views that have been clearly expressed by the EDPB in its binding Article 65 Decision. As already acknowledged, the EDPB has not elaborated on the reasons why it considers the gravity of the Article 6(1) infringement to be one of the factors that tip the balance in favour of the imposition of a fine. This does not alter, however, the fact, however, that the EDPB clearly considered the gravity of the Article 6(1) infringement to be one of the factors that warranted the imposition of a fine. In these circumstances, it is not open to the Commission to conclude that the gravity of the infringement is not significant in terms of its impact on the overall assessment of the Article 83(2)(a) criterion.

280. In relation to the duration of the infringement, Meta Ireland submits that duration “should not be considered an aggravating factor in this particular case”.<sup>280</sup> In the absence of any specific direction from the EDPB, in this regard, the Commission has not treated this factor as being significant, in terms of its impact on the overall assessment of the Article 83(2)(a) criterion.

281. In relation to the number of data subjects and the level of damage suffered by them, Meta Ireland submitted that:

- *“the only data subject who is relevant for the purpose of Article 83(2)(a) is the data subject represented by the Complainant and any consideration of the level of damage suffered is confined to a consideration of any damage the Complainant may have suffered. No evidence of any such damage has been adduced in the Inquiry”;*
- *“even if it is open to the [Commission] to consider whether other data subjects have been affected and to have regard to any damage suffered by them, there is no evidence whatsoever in this Inquiry that any other data subjects have suffered any damage”;*
- *“the [Commission’s] assessment of whether damage has been suffered for the purposes of Article 83(2)(a) must be based on evidence of damage stemming from the specific infringement in question (here, the Article 6(1) GDPR infringement). It is not permissible for the DPC to assume that the Complainant has suffered damage or to base the calculation of the proposed Article 6(1) fine on “the same damage as already identified” as the basis for the proposed Article 5(1)(a) fine”;*

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<sup>279</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.10.

<sup>280</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at paras. 9.14-9.19.

- *“an alleged “loss of control” should not be equated with damage within the meaning of Article 83(2)(a) GDPR”; and*
- *“there is no evidence to support the assertion that users experienced a “loss of control”; nor is there any factual or evidential basis for such a claim. This is especially true considering that everyone has a choice as to whether they wish to use the Instagram Service in the first place, and can always deactivate their accounts”.*<sup>281</sup>

282. In response to the above submissions, it is, firstly, important to note that the Commission is subject to a binding decision of the EDPB, which includes an assessment of the damage suffered by data subjects, at paragraph 415 thereof. In the circumstances, it is not open to the Commission to find that no damage has been suffered. Secondly, the Complainant himself identified the damage that he alleges he suffered in connection with the matters which formed the basis for the EDPB’s findings of infringement of Article 6(1) and the Article 5(1)(a) principle of fairness. Thirdly, as regards the damage suffered by data subjects other than the Complainant, the matters covered by the findings of infringement are not matters on which any individual user of the Instagram Service has the power to exercise choice (other than, of course, the choice to use the Instagram Service or not). Where any individual data subject chooses to use the Instagram Service, the basic processing that takes place (the subject of the within Inquiry) is the same as that applied to the personal data of the Complainant. In these circumstances, it cannot be said that the identified damage suffered, i.e. loss of control over one’s personal data, is limited to the Complainant alone. For these reasons, it is appropriate for the Commission to take account of the damage suffered by all user data subjects as part of the Article 83(2) assessment.

283. Having taken account of the Final Submissions, I remain of the view that the infringement of Article 6(1) GDPR falls within the upper range of the scale, in terms of seriousness, for the purpose of the assessment of the Article 83(2)(a) criterion.

*ARTICLE 83(2)(B): THE INTENTIONAL OR NEGLIGENT CHARACTER OF THE INFRINGEMENT*

284. In respect of the character of the Transparency Infringements, I note that the GDPR does not identify the precise factors that need to be present in order for an infringement to be classified as either “intentional” or “negligent”. As the Article 29 Working Party considered the meaning of “character of the infringement” in its “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (the “Article 29 Working Group Fining Guidelines”),<sup>282</sup> I have had regard to this interpretation in my assessment, notwithstanding the

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<sup>281</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at paras. 9.20 – 9.27.

<sup>282</sup> Article 29 Working Party, “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (adopted on 3 October 2017).

fact that these guidelines are non-binding on me. The Article 29 Working Party took the view as follows:

*“In general, “intent” includes both knowledge and wilfulness in relation to the characteristics of an offence, whereas “unintentional” means that there was no intention to cause the infringement although the controller/processor breached the duty of care which is required in the law.*

...

*Circumstances indicative of intentional breaches might be unlawful processing authorised explicitly by the top management hierarchy of the controller, or in spite of advice from the data protection officer or in disregard for existing policies, for example obtaining and processing data about employees at a competitor with an intention to discredit that competitor in the market.*

...

*Other circumstances, such as failure to read and abide by existing policies, human error, failure to check for personal data in information published, failure to apply technical updates in a timely manner, failure to adopt policies (rather than simply failure to apply them) may be indicative of negligence”.*<sup>283</sup>

In this regard, I further note that, as a general point, an intentional infringement is more severe than an unintentional infringement.<sup>284</sup>

285. In the course of the Complainant’s submissions, the Complainant expressed the view that the infringements by Meta Ireland were intentional in character.<sup>285</sup> In this vein, the Complainant alleged that Meta Ireland made a deliberate and calculated decision to present the information in a particular manner such as to mislead data subjects. I do accept that Meta Ireland made a deliberate decision to present the information to data subjects in a particular way.

286. However, I am not satisfied, on the evidence available to me, that Meta Ireland made a particular decision to infringe the GDPR, in particular as regards its transparency obligations. It appears clear to me that the Article 29 Working Party Fining Guidelines referred to above explicitly recognise that an intentional breach generally only occurs when there is a deliberate act to infringe the GDPR. In this regard, I also emphasise that a finding of intentionality is predicated on knowledge and wilfulness as to the characteristics of an offence. There is no evidence that this is satisfied in respect of the infringements of Articles 5(1)(a), 12(1) and 13(1)(a) GDPR.

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<sup>283</sup> Article 29 Working Party, “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (adopted on 3 October 2017) at pp. 11 - 12.

<sup>284</sup> Article 29 Working Party, “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (adopted on 3 October 2017) at pp. 11 - 12.

<sup>285</sup> For example, see the Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020, at pp. 28 and 43.

287. Meta Ireland argued that where it was found to have a “*genuinely held belief*” that it was *adhering to its* [transparency] *obligations*”, it is “*unfair*” and contrary to the principle of legal certainty to find that it is negligent.<sup>286</sup> I do not agree; Meta Ireland should have been aware of its transparency requirements, especially in light of the transparency guidelines,<sup>287</sup> and should have provided clarity about the precise extent of the processing operations carried out pursuant to Article 6(1)(b) GDPR.

Meta Ireland further should have ensured that it adhered strictly to its transparency obligations when choosing the lawful bases on which they rely and should have used these obligations as a guide as to the information to be conveyed to data subjects. Accordingly, I am satisfied that the infringements are negligent in character.

288. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, paragraphs 418 to 430, inclusive, of the Article 65 Decision record as follows:

*“The EDPB Guidelines on calculation of fines confirm that there are two cumulative elements on the basis of which an infringement can be considered intentional: the knowledge of the breach and the willfulness in relation to such act. By contrast, an infringement is “unintentional” when there was a breach of the duty of care, without having intentionally caused the infringement.*

*The characterisation of an infringement as intentional or negligent shall be done on the basis of objective elements of conduct gathered from the facts of the case. It is worth noting the broader approach adopted with respect to the concept of negligence, since it also encompasses situations in which the controller or processor has failed to adopt the required policies, which presumes a certain degree of knowledge about a potential infringement. This provides an indication that noncompliance in situations in which the controller or processor should have been aware of the potential breach (in the example provided, due to the lack of the necessary policies) may amount to negligence.*

*The SE SA argues that Meta IE “has continued to rely on Article 6(1)(b) for the processing, despite the aforementioned [EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR] – which clearly gives doubt to the legality of the processing – which were first adopted on 9 April 2019 and made final on 8 October 2019. The infringement must in all cases be considered intentional from that later date”.*

*The EDPB recalls that even prior to the adoption EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, there were clear indicators that spoke against relying on contract as legal basis. First, in WP29 Opinion 02/2010 on online behavioural advertising, only consent - as required by*

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<sup>286</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 14.15 – 14.16.

<sup>287</sup> Article 29 Working Party, “Guidelines on transparency under Regulation 2016/679” (adopted on 29 November 2017; last revised and adopted on 11 April 2018).

*Article 5(3) of the ePrivacy Directive - is put forward as possible legal basis for this activity. As Article 6 GDPR resembles Article 7 of the Data Protection Directive to a large extent, WP29 Opinion 02/2010 remained a relevant source on this matter for controllers preparing for the GDPR to enter into application. Second, WP29 Opinion 06/2014 on the notion of legitimate interests explicitly states that “the fact that some data processing is covered by a contract does not automatically mean that the processing is necessary for its performance. For example, Article 7(b) is not a suitable legal ground for building a profile of the user’s tastes and lifestyle choices based on his click-stream on a website and the items purchased. This is because the data controller has not been contracted to carry out profiling, but rather to deliver particular goods and services, for example. Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them ‘necessary’ for the performance of the contract”.*

*It stems from the above that Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR. However, this mere element is not sufficient to consider an infringement intentional, as stated above, since the “aim” or “wilfulness” of the action should be demonstrated.*

*The EDPB recalls that that having knowledge of a specific matter does not necessarily imply having the “will” to reach a specific outcome. This is in fact the approach adopted in the EDPB Guidelines on calculation of fines and WP29 Guidelines on Administrative Fines, where the knowledge and the “wilfulness” are considered two distinctive elements of the intentionality. While it may prove difficult to demonstrate a subjective element such as the “will” to act in a certain manner, there need to be some objective elements that indicate the existence of such intentionality.*

*The EDPB recalls that the CJEU has established a high threshold in order to consider an act intentional. In fact, even in criminal proceedings the CJEU has acknowledged the existence of “serious negligence”, rather than “intentionality” when “the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation”. In this regard, while the EDPB confirms that a company for whom the processing of personal data is at the core of its business activities is expected to have sufficient measures in place for the safeguard of personal data, this does not, however, per se change the nature of the infringement from negligent to intentional.*

*In this regard, the SE SA puts forward that Meta IE based its processing of personalised advertisement on consent until the GDPR came into force on 25 May 2018, and at this time switched to relying on Article 6(1)(b) GDPR for the processing in question instead. The timing and the logistics for this switch suggests this act was done with the intention of circumventing the new rights of users under Article 6(1)(a) GDPR. The SE SA adds that “[the] proposed finding of infringement concerning information deficits about the processing, namely on what legal basis it is based, further supports this conclusion, since it goes to show that Meta Ireland was aware of the questionable legality of that basis and tried to conceal the infringement to avoid scrutiny by supervisory authorities and data subjects”*

*The EDPB considers the timing of the changes made by Meta IE to its Instagram Terms of Use as an objective element, however this alone does not indicate intention. Around this time period, many controllers updated their data protection policies. The objection suggests that the conclusion on intentionality is corroborated by the shortcomings to the transparency obligations. In the EDPB’s view, the combination of the timing of the change of legal basis with the lack of transparency is not sufficient to indicate intention either.*

*Therefore, on the basis of the available information, the EDPB is not able to identify a will of Meta IE to act in breach of the law as it cannot be concluded that Meta IE intentionally acted to circumvent its legal obligations.*

*Therefore, the EDPB considers that the arguments put forward by the SE SA do not meet the threshold to demonstrate the intentionality of the behaviour of Meta IE. Accordingly, the EDPB is of the view that the Draft Decision does not need to include this element.*

*At the same time, the EDPB notes that, even establishing that the infringement was committed negligently, a company for whom the processing of personal data is at the core of its business activities should have in place sufficient procedures for ensuring compliance with the GDPR.*

*The EDPB does not accept Meta IE's claim of "good faith", but is of the view that Meta IE was certainly seriously negligent in not taking adequate action, within a reasonable time period,*

*following the adoption of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR on 9 April 2019. Even before that date, the EDPB considers there was at the very least negligence on Meta IE's part considering the contents of WP29 Opinion 02/2010 on online behavioural advertising and WP29 Opinion 06/2014 on the notion of legitimate interests (see paragraph 421 of this Binding Decision), which means Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR, given the fact that processing of personal data is at the core of its business practices, and the resources available to Meta IE to adapt its practices so as to comply with data protection legislation”.*

289. Paragraph 468 of the Article 65 Decision records the Board's instruction for the Commission to have due regard to the “seriously negligent character of the infringement” in determining the amount of the fine. On the basis of the views that have been expressed by the EDPB, as recorded above, I proposed to treat this factor as an aggravating factor of significant weight.

Meta Ireland's Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

290. In its Final Submissions, Meta Ireland disagreed with the above conclusion on the basis of a range of submissions, all of which challenge the basis for the EDPB's conclusion.<sup>288</sup> Meta Ireland submitted that the finding of infringement of Article 6(1) GDPR can “*at most be considered inadvertent, such that this should not be treated as an aggravating factor for the purpose of Article 83(2).*” In the alternative, Meta Ireland submitted that the Commission should not afford any material weight to this factor in light of its “*good faith reliance on what it considered to be a valid legal basis, (b) the errors in the reasoning of the EDPB [as identified]; and (c) the lack of legal certainty in the interpretation of Article 6(1)(b) GDPR.*”

291. Meta Ireland, in its Final Submissions, also sought clarification as to whether I proposed to characterise this infringement as intentional due to a typographical error in the material furnished to Meta Ireland to enable it to make its Final Submissions.<sup>324</sup> For the avoidance of doubt, I confirm that this was a typographical error.

292. As already noted, above, the Article 65 Decision is binding upon the Commission. In the circumstances, it is not open to the Commission to disregard the views that have been clearly expressed by the EDPB, in relation to the character of the Article 6(1) infringement. In circumstances where the EDPB has determined the Article 6(1)(b) infringement to be “seriously negligent” in character, I remain of the view that this classification requires me to treat this factor

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<sup>288</sup> Meta Ireland's Final Submissions dated 19 December 2022, at paras. 9.31-9.39.

<sup>324</sup> Meta Ireland's Final Submissions dated 19 December 2022, at para. 9.30.



as an aggravating factor of significant weight, notwithstanding Meta Ireland’s Final Submissions on this point.

*ARTICLE 83(2)(C): ANY ACTION TAKEN TO MITIGATE THE DAMAGE TO DATA SUBJECTS*

293. Meta Ireland’s position, in the context of the Transparency Infringements, is that it has discharged its transparency obligations in respect of the Instagram service and, accordingly, complies fully with the GDPR in this respect. Although, as I have outlined in the course of my findings, I do not agree with this position, I nonetheless accept on the facts available to me that this represents a genuinely held belief on Meta Ireland’s part. It follows therefore that there has not been an effort to mitigate the damage to data subjects as it was Meta Ireland’s position that data subjects were incurring no such damage. Nonetheless, I am not prepared to find that the lack of any mitigating action should necessarily be considered an aggravating factor.

294. Meta Ireland argued that my analysis is flawed because it takes no account of the effort made to comply with the GDPR.<sup>289</sup> However, it is my view that there is no reason why, on the basis of the transparency guidelines, Meta Ireland could not have taken steps to ensure compliance and thereby mitigate damage. I am not satisfied that there is any reason why day-to-day compliance related activities in a large multinational organisation, which is an important legal duty and commonplace business activity, could be considered a mitigating factor. Taking steps to attempt to comply with legal obligations is a duty, and has no mitigating impact on a sanction for a breach of those obligations. This is distinct from any act that might be taken to mitigate specific damage to data subjects. I am not of course treating this factor as aggravating given that, beyond simply complying with the GDPR, there are no obvious mitigating steps that could have been taken. It is on this basis that I treat this factor as neither mitigating nor aggravating.

295. I do, however, take account of and acknowledge Meta Ireland’s willingness to engage in steps to bring its processing into compliance on a voluntary basis pending the conclusion of this Inquiry.<sup>290</sup> I consider this to be a mitigating factor and have taken account of this.

296. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, this aspect of the Article 83(2) assessment was not addressed in the Article 65 Decision. I note that Meta Ireland’s position, throughout this Inquiry, has been one whereby it considered that it was entitled to process personal data for behavioural advertising purposes, insofar as that formed a core part of the Instagram Terms of Use, in reliance on Article 6(1)(b) GDPR. That being the case, it follows that Meta Ireland could not have been expected to take action “to mitigate the damage suffered by data subjects” in circumstances where Meta Ireland did not consider any infringement

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<sup>289</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.18.

<sup>290</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.19.

to have occurred or any damage to have been suffered by data subjects. In the circumstances, the Commission proposed to consider this factor to be neither aggravating nor mitigating.

Meta Ireland’s Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

297. In the Final Submissions, Meta Ireland urged me to take account of various mitigating matters such as the absence of evidence of harm and the fact that various voluntary steps have been taken to improve transparency for users since the Inquiry has commenced, including as recently as July 2022. I note that I have already addressed Meta Ireland’s submissions concerning the absence of evidence of harm, as part of the Article 83(2)(a) assessment. In relation to the voluntary changes that have been made since the date of circulation, to the CSAs, of the Draft Decision, the Commission is unable to give credit to these changes, as a mitigating factor, without an assessment of the changes themselves. Given that such an assessment is not possible within the temporal scope of the within Inquiry, the Commission is unable to treat this matter as a mitigating factor. Accordingly, I remain of the view that this factor ought to be treated as neither aggravating nor mitigating.

*ARTICLE 83(2)(D): THE DEGREE OF RESPONSIBILITY OF THE CONTROLLER OR PROCESSOR TAKING INTO ACCOUNT TECHNICAL AND ORGANISATIONAL MEASURES IMPLEMENTED BY THEM PURSUANT TO ARTICLES 25 AND 32*

298. In respect of this factor, the Article 29 Working Party Fining Guidelines advise that the following approach should be taken:

*“The question that the supervisory authority must then answer is to what extent the controller “did what it could be expected to do” given the nature, the purposes or the size of the processing, seen in light of the obligations imposed on them by the Regulation. In this assessment, due account should be taken of any “best practice” procedures or methods where these exist and apply. Industry standards, as well as codes of conduct in the respective field or profession are important to take into account. Codes of practice might give an indication as to what is common practice in the field and an indication of the level of knowledge about different means to address typical security issues associated with the processing”.*<sup>291</sup>

299. In this regard, I am satisfied that, on the facts available to me, Meta Ireland held a genuine belief that its provision of information in respect of processing under Article 6(1)(b) GDPR in the context of the Instagram service was in compliance with its transparency obligations. Indeed, as I have

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<sup>291</sup> Article 29 Working Party, “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (adopted on 3 October 2017) at p. 13.

outlined above in respect of my analysis of Article 83(2)(b), I am satisfied that Meta Ireland did not act in a deliberate or knowing manner to infringe the GDPR. In its response to the Preliminary Draft, Meta Ireland argued that *“it is inconsistent and illogical to find that a genuine effort to achieve compliance, based on a ‘genuine belief’, nevertheless amounts to ‘a high degree of responsibility’”*.<sup>292</sup>

300. Meta Ireland is correct that other actions, such as no genuine effort to comply, attract a higher degree of responsibility, however it does not follow that a genuine belief necessarily implies no or low responsibility. Indeed, I emphasise that Meta Ireland made a deliberate and knowing decision to present the information to users in a particular manner. As I have outlined in the course of my analysis in respect of Issue 3, the provision of information in this regard has fallen significantly below the standards that are expected of controllers. I note Meta Ireland’s submission that its compliance should have been assessed as against industry standards.<sup>293</sup> In this respect, I think it is sufficient to have assessed compliance by reference to the standards set in the GDPR and expounded on in the transparency guidance.

301. I note, in this regard, that guidance as to the substance of the transparency obligations under the GDPR was available to Meta Ireland at the date of the Complaint.<sup>294</sup> I am therefore satisfied that Meta Ireland should have been aware of the appropriate standards – albeit at a general level – and, having made a deliberate decision to present the information in a manner which fell significantly below the standard required, has a high degree of responsibility for the lack of compliance with the GDPR. Accordingly, I consider this to be an aggravating factor in the determination of any administrative fine.

302. In relation to the finding of infringement of Article 6(1) GDPR that was established by the EDPB, paragraph 431 of the Article 65 Decision records that:

*“The EDPB considers the degree of responsibility of Meta IE’s part to be of a high level, on the same grounds as set in the Draft Decision with regards to the transparency infringements.”*

303. In expressing this view, the Board referred to paragraph 240 of the Draft Decision which states:

*“I note, in this regard, that guidance as to the substance of the transparency obligations under the GDPR was available to Meta Ireland at the date of the Complaint. I am therefore satisfied that Meta Ireland should have been aware of the appropriate standards – albeit at a general level”*

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<sup>292</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.20.

<sup>293</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.21.

<sup>294</sup> Article 29 Working Party, “Guidelines on transparency under Regulation 2016/679” (adopted on 29 November 2017; last revised and adopted on 11 April 2018).

*– and, having made a deliberate decision to present the information in a manner which fell significant below the standard required, has a high degree of responsibility for the lack of compliance with the GDPR. Accordingly, I consider this to be an aggravating factor in the determination of any administrative fine.”*

304. Footnote 811 of the Article 65 Decision further records that:

*“the EDPB notes that the high degree of responsibility of Meta IE for the non-compliance with the GDPR was considered as an aggravating factor by LSA for the calculation of the fine.”*

305. In the circumstances, and based on the above, I proposed to consider this to be an aggravating factor, of moderately significant weight.

Meta Ireland’s Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

306. In its Final Submissions, Meta Ireland disagreed with the above assessment on the basis that *“the EDPB’s conclusion at para. 431 of the Article 65 Decision that Meta Ireland had a “high level” of responsibility pursuant to this factor is based on an incomplete analysis and the EDPB fails to consider any of the relevant subfactors set forth by the Article 29 Working Party Draft Administrative Fine Guidelines in reaching its conclusion.”*<sup>295</sup>

307. As already noted above, the EDPB’s Article 65 Decision is binding upon the Commission. Accordingly, the Commission is not permitted to look behind the EDPB’s views and determinations. In the circumstances, I remain of the view that this factor ought to be treated as an aggravating factor, of moderately significant weight.

*ARTICLE 83(2)(E): ANY RELEVANT PREVIOUS INFRINGEMENTS BY THE CONTROLLER OR PROCESSOR*

308. In the context of the Transparency Infringements, I noted that the Commission has not made any findings of infringements by Meta Ireland in the context of the Instagram service which could be considered relevant for my assessment.<sup>296</sup> I note Meta Ireland’s view that this should be considered a mitigating factor. I do not agree that a lack of any relevant previous infringements by a controller necessarily constitutes a mitigating factor for the purpose of this assessment. In

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<sup>295</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.48.

<sup>296</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.23.

this regard, I emphasise that the GDPR has only been in force for a relatively short period of time and, accordingly, it is not unusual or indeed unexpected that there may be no relevant previous infringements by the controller. It can therefore be said that a lack of relevant previous infringement does not necessarily signal a general level of good practice by controller and, on this basis, I am not prepared to find that a lack of previous relevant infringements is necessarily a mitigating factor.

309. Meta Ireland compared the lack of mitigation in this regard to a decision of the Commission on a domestic matter.<sup>297</sup> I have already set out my views on these arguments above. Further, the Article 83(2) GDPR criteria are matters that I must consider when deciding whether to impose an administrative fine and, if so, the amount of that fine. The Article 83(2) GDPR criteria are not binary in nature, such that, when assessed in the context of the circumstances of infringement, they must be found to be either a mitigating or an aggravating factor.

310. Although Meta Ireland has no previous relevant infringements in the context of the Instagram service, I do not think that this is either a mitigating or aggravating factor for the purposes of my assessment.

311. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision does not address this aspect of matters. As at the date of circulation of the Draft Decision, were there no relevant previous infringements by Meta Ireland that fell to be considered under this particular heading. In the circumstances, the Commission proposed to consider this factor to be neither mitigating nor aggravating.

Meta Ireland's Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

312. Meta Ireland, in its Final Submissions, disagreed with the above, instead, urged the Commission to treat this factor as mitigating, in line with the Commission's approach in other (named) inquiries.<sup>334</sup> I note, in this regard, that the named inquiries do not concern cross-border processing.

313. In response to the above, the Commission is not required to apply the same approach across all of its inquiries. The Commission's approach to the presence or absence of relevant previous infringements (for the purpose of the Article 83(2)(e) assessment) differs, depending *inter alia* on the contexts of different types of controllers and, in particular, the scale of the processing at issue. Unlike the position with the smaller-scale domestic inquiries that Meta Ireland has cited as examples, inquiries into larger internet platforms generally concern data controllers or processors

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<sup>297</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.24.

<sup>334</sup> Meta Ireland's Final Submissions dated 19 December 2022, at paras. 9.50-9.51.

with multi-national operations and significant resources available to them, including large, inhouse, compliance teams. Such entities are further likely to be engaged in business activities that are uniquely dependent on the large-scale processing of personal data. The Commission's view is that the size and scale of such entities, the level of dependency on data processing and the extensive resources that are available to them necessitate a different approach to the absence of previous relevant infringements. That approach has been reflected in the decisions that have been cited by Meta Ireland in support of its submission. I note, in this regard, that Meta Ireland's submissions do not reference the Commission's decision in the Twitter (breach notification) inquiry, nor the Commission's decision in the WhatsApp (own volition) transparency inquiry, nor the Facebook (12 breaches) inquiry. The Commission's approach to the Article 83(2) assessment, as recorded in these decisions (amongst others), is consistent with that applied to the within inquiry. Accordingly, I remain of the view that this factor ought to be treated as neither mitigating nor aggravating.

*ARTICLE 83(2)(F): THE DEGREE OF COOPERATION WITH THE SUPERVISORY AUTHORITY, IN ORDER TO REMEDY THE INFRINGEMENT AND MITIGATE THE POSSIBLE ADVERSE EFFECTS OF THE INFRINGEMENT*

314. In considering the degree of cooperation with the supervisory authority, I first note that there is a general duty on controllers to cooperate under Article 31 GDPR. It is therefore important to remember that controllers are legally obliged to cooperate in the course of an inquiry and cooperation is not necessarily a mitigating factor. Indeed, this is also the position set out in the Article 29 Working Party Fining Guidelines, which state that:

*“it would not be appropriate to give additional regard to cooperation that is already required by law for example, the entity is in any case required to allow the supervisory authority access to premises for audits/inspections”*.<sup>298</sup>

In this regard, I emphasise that to decide otherwise would mean that the activities of entities acting in the ordinary course of adhering to legal duties to cooperate would be considered a mitigating factor for the purposes of calculating a sanction. It would follow that all controllers adhering to their legal duties – with the exception of those who act in a deliberately uncooperative manner – would benefit from a mitigation in sanction. I cannot accept that this was the intention of the legislator.

315. In the context of the Transparency Infringements, it is Meta Ireland's position that cooperation in this matter should be treated as a mitigating factor, and again cites a decision of the Commission.<sup>299</sup> I once again refer to my analysis on that issue above. This position reflects the erroneous treatment of the Article 83(2) GDPR factors as binary choices between mitigation

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<sup>298</sup> Article 29 Working Party, “Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679” (adopted on 3 October 2017) at p. 14.

<sup>299</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.25.

and aggravation to which I have already referred. I note once again that Meta Ireland is seeking to voluntarily comply, and note that I have already taken this into account above as a mitigating factor.

316. In the course of this Inquiry, Meta Ireland have cooperated fully with the Commission as it is required to do in accordance with the law, Article 31 GDPR in particular. Given that all such cooperation was in accordance with its legal duties to cooperate, I do not consider such cooperation to constitute either a mitigating or aggravating factor for the purposes of my assessment.

317. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision has not addressed this aspect of matters. In the circumstances, I proposed to consider this factor to be neither mitigating nor aggravating for the same reasons set out in the Article 83(2)(c) assessment, above.

Meta Ireland’s Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

318. In its Final Submissions, Meta Ireland submitted that I should treat this as a mitigating factor in light of the fact that it has taken “*various voluntary steps to improve transparency for its users (which the EDPB considers underpins the alleged Article 6(1) infringement) throughout the course of the Inquiry ... and will undertake all efforts to comply with any order issued by the DPC, as required*”. Meta Ireland further submitted that it has “*cooperated fully with the DPC throughout the Inquiry*”.<sup>300</sup>

319. I have already addressed the reasons why I cannot take account, as a mitigating factor, of any voluntary steps taken by Meta Ireland following the date of circulation of the Draft Decision to the CSAs (the steps taken before that date having been deemed, by the EDPB, to be insufficient to be treated as a mitigating factor). While the Commission recognises that Meta Ireland has cooperated fully throughout the Inquiry, the Commission notes that Meta Ireland is obliged to do so by virtue of Article 31 GDPR. Furthermore, and while the Commission acknowledges Meta Ireland’s commitment to undertake “all efforts to comply with any order” that might be issued further to this Decision, I again note that Meta Ireland is subject to an obligation to comply with the terms of the relevant order. In the circumstances, I am unable to take account of such matters as mitigating factors.

320. Accordingly, I remain of the view that this factor ought to be treated as neither mitigating nor aggravating.

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<sup>300</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.53.

321. In the context of the Transparency Infringements, the lack of transparency concerned broad categories of personal data in respect of users who sign up to the Instagram service. I accept that this assessment of data processing in this Inquiry was rather generalised in nature. I further note that Meta Ireland’s lack of transparency did itself contribute to a lack of clarity as to the precise categories of personal data relevant for this Inquiry. Nonetheless, given that, on the facts available to me, there is no evidence that this concerned personal data of a particularly sensitive nature, I regard this factor as neither aggravating nor mitigating for the purposes of my assessment. While Meta Ireland have alleged it is unclear what weight has been attached to this in the calculation of the fine,<sup>301</sup> I think it is clear that in being neither aggravating nor mitigating, it did not increase or decrease the proposed fining range.

322. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision has not addressed this aspect of matters. I note, however, the “relevant facts” identified by the Board, in paragraphs 98 of the Article 65 Decision, including in relation to the personal data concerned, as follows:

*“Meta IE collects data on its individual users and their activities on and off its Facebook service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user’s computer or mobile device. According to the descriptions provided, Meta IE links these data with the user’s Facebook account to enable advertisers to tailor their advertising to Facebook’s individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user’s physical location to display content relevant to the user’s location.”*

323. While, as noted already in the Draft Decision, it was neither necessary for the purpose of the examination of the Complaint, nor possible from an examination of the relevant privacy policy, to identify the particular categories of personal data undergoing processing, it seems clear that the Board considered the processing to concern a broad range of categories of personal data. Given the nature of behavioural advertising, it appears to be beyond dispute that the processing of a broad range of personal data is required to be carried out to achieve the objectives of behavioural advertising. In the circumstances, I proposed to consider this to be an aggravating factor of moderately significant weight.

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<sup>301</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.26.



Meta Ireland’s Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

324. Meta Ireland, in its Final Submissions, submitted that this factor should be considered neutral in circumstances where the views of the EDPB that form the basis of the Commission’s assessment under this heading, in turn, rely on “*descriptions of processing that are inaccurate and outside the scope of the Inquiry*”.<sup>302</sup>

325. As already outlined above, the Article 65 Decision is binding upon the Commission. Accordingly, it is not open to the Commission to revisit or otherwise look behind the views expressed and determinations made by the EDPB. In the circumstances, I remain of the view that this factor ought to be treated as an aggravating factor of moderately significant weight.

*ARTICLE 83(2)(H): THE MANNER IN WHICH THE INFRINGEMENT BECAME KNOWN TO THE SUPERVISORY AUTHORITY, IN PARTICULAR WHETHER, AND IF SO TO WHAT EXTENT, THE CONTROLLER OR PROCESSOR NOTIFIED THE INFRINGEMENT*

326. In the context of the Transparency Infringements, I noted that the subject matter became known to the Commission due to an Inquiry conducted on foot of the Complaint. The subject matter did not give rise to any requirement of notification, and I have already acknowledged several times that the controller’s genuinely held belief is that no infringement is/was occurring.

327. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision has not addressed this particular aspect of matters. As noted above, the subject matter did not give rise to any requirement of notification, and I have already acknowledged several times that the controller’s genuinely held belief is that no infringement is/was occurring. Meta Ireland, by way of its Final Submissions has confirmed its agreement with the above approach.<sup>303</sup> In the circumstances, I conclude that this factor is neither mitigating nor aggravating.

*ARTICLE 83(2)(I): WHERE MEASURES REFERRED TO IN ARTICLE 58(2) HAVE PREVIOUSLY BEEN ORDERED AGAINST THE CONTROLLER OR PROCESSOR CONCERNED WITH REGARD TO THE SAME SUBJECT-MATTER, COMPLIANCE WITH THOSE MEASURES*

328. In the context of the Transparency Infringements, I concluded that this criterion is not applicable.

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<sup>302</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.57.

<sup>303</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.59.

329. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision has not addressed this particular aspect of matters. I note that measures have not previously been ordered against Meta Ireland with regard to the same subject matter. Meta Ireland, by way of its Final Submissions has confirmed its agreement with the above approach.<sup>304</sup> In the circumstances, I have conclude that this factor is neither mitigating nor aggravating.

*ARTICLE 83(2)(J): ADHERENCE TO APPROVED CODES OF CONDUCT PURSUANT TO ARTICLE 40 OR APPROVED CERTIFICATION MECHANISMS PURSUANT TO ARTICLE 42*

330. In the context of the Transparency Infringements, I concluded that this criterion is not applicable.

331. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, the Article 65 Decision has not addressed this particular aspect of matters. The Commission proposed to consider this factor as neither mitigating nor aggravating in circumstances where nothing arises for assessment under this heading. Meta Ireland, by way of its Final Submissions has confirmed its agreement with the above approach.<sup>305</sup> In the circumstances, I conclude that this factor is neither mitigating nor aggravating.

*ARTICLE 83(2)(K): ANY OTHER AGGRAVATING OR MITIGATING FACTOR APPLICABLE TO THE CIRCUMSTANCES OF THE CASE, SUCH AS FINANCIAL BENEFITS GAINED, OR LOSSES AVOIDED, DIRECTLY OR INDIRECTLY, FROM THE INFRINGEMENT*

332. In the Preliminary Draft Decision, I considered the following factors in the context of **the Transparency Infringements**:

- Meta Ireland does not charge for the Instagram service.
- The subject matter of the Infringements relates directly to the provision of information in relation to what is, by Meta Ireland’s own admission, its core business model i.e. personalised advertising provided pursuant to a contract with Instagram users.
- The question is therefore whether a more transparent approach to processing operations carried out on foot of that contract would represent a risk to Meta Ireland’s business model. In my view, it would, if existing or prospective users were dissuaded from using the Instagram service by clearer explanations of the processing operations carried out, and their purposes.
- In my view, the above risk is sufficiently high to justify the conclusion that this lack of transparency has the potential to have resulted in financial benefits for Meta Ireland.

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<sup>304</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.60.

<sup>305</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.61.

333. Meta Ireland however argued that this does not at all propose a financial risk, and argued that no evidence of same has been presented.<sup>306</sup> Neither I nor Meta Ireland can know, until the contingent event has happened, which one of us is correct in our belief as to the likely impact, on the continued growth of the user base. Given that any general consideration of this is ultimately involves an element of speculation on both Meta Ireland's and the Commission's part, I consider that this factor is neither aggravating nor mitigating.

334. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB, paragraphs 435 to 437 Article 65 Decision, record the EDPB's views that:

*"The EDPB recall that financial benefits from the infringement could be an aggravating circumstance if the case provides information about profit obtained as a result of the infringement of the GDPR.*

*In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the specific weight of the financial benefit obtained from the infringement.*

*Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionately low compared to the benefits obtained with the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the financial benefit from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed."*

335. In a similar view, paragraph 439 of the Article 65 Decision records that:

*"On principle, the EDPB agrees that a competitive advantage could be an aggravating factor if the case provides objective information that this was obtained as a result of the infringement of the GDPR. In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the existence of a competitive advantage resulting from the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the competitive advantage derived from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed."*

336. Despite specific requests made by the Commission, during the course of the Article 65 deliberations, no directions have been provided by the EDPB, in its Article 65 Decision, as to the manner in which the Commission might seek to ascertain an estimation of: (i) the financial benefit

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<sup>306</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.27.

gained from an infringement such as the one under assessment; or (ii) the competitive advantage derived from the infringement. I note, in this regard, the views previously expressed by the EDPB<sup>307</sup> that:

*“... when deciding on the imposition of corrective measures in general, and fines in particular, supervisory authorities must assess all the facts of the case in a manner that is consistent and objectively justified.”*

337. In the absence of directions, the Commission is unable to ascertain an estimation of the matters identified above. Accordingly, I am unable to take these matters into account for the purpose of this assessment.

338. As before, the Commission separately notes, under this heading, the Board’s view, as set out in the Board’s binding decision 1/2021 (paragraphs 409 to 412, inclusive), that the turnover of the undertaking concerned ought to be taken into account not just for the calculation of the applicable fining “cap” but also for the purpose of assessing the quantum of the administrative fine itself. This position is further reflected in the Fining Guidelines 04/2022 (see, for example, paragraph 49). The Commission’s assessment of the undertaking concerned and the applicable turnover figure is detailed elsewhere in the Draft Decision. While this is not a matter that can properly be classified as either mitigating or aggravating, by reference to the circumstances of the case, I proposed to take the significant turnover of the undertaking concerned into account when determining the quantum of the proposed fine, as set out below.

Meta Ireland’s Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

339. Meta Ireland, in its Final Submissions, disagreed with the Commission’s proposal to have regard to the turnover of the undertaking concerned in calculating the amount of the fine.<sup>308</sup> As already noted above, this requirement was previously determined by the EDPB in binding decision 1/2021 and reiterated in the Article 65 Decision. In the circumstances, it is not open to the Commission to disregard this requirement. Neither is it open to the Commission to treat “Meta Ireland alone” as being the relevant “undertaking” for these purposes.

*WHETHER TO IMPOSE AN ADMINISTRATIVE FINE*

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<sup>307</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted 28 July 2021, paragraph 403.

<sup>308</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at paras. 9.63-9.64.

## The Transparency Infringements

340. I proposed to impose an administrative fine in relation to the Transparency Infringements in circumstances where:

- The infringements are serious in nature. The lack of transparency goes to the heart of data subject rights and risks undermining their effectiveness by not providing transparent information in that regard. While the infringements considered here relate to one lawful basis, it nonetheless concerns vast swathes of personal data impacting millions of data subjects. When such factors are considered, it is clear that the infringements are serious in their gravity.

I have taken this into account when determining, for the purpose of Article 83(2)(a) GDPR, that the infringements are at the upper end of the scale, in terms of seriousness.

- A significant portion of the population of the EEA seems to have been impacted by the Infringements. I consider this to be an aggravating factor of significant weight.
- I note in particular the impact a lack of transparency has on a data subject's ability to be fully informed about their data protection rights, or indeed about whether in their view they should exercise those rights. I have taken this into account when determining, for the purpose of Article 83(2)(a) GDPR, that the infringements are at the upper end of the scale, in terms of seriousness.
- I have already found that the Infringements were negligent. While I am not calling into question Meta Ireland's right to come to a genuine view on this matter, I am taking into account the failure of an organisation of this size to provide sufficiently transparent materials in relation to the core of its business model. For the avoidance of doubt, and noting the views expressed by the EDPB in its Fining Guidelines 04/2022, that "(a)t best, negligence could be regarded as neutral", I have taken this into account as a neutral factor.
- I note that the Instagram Data Policy and Terms of Use have been amended, and because this is an Inquiry into a particular complaint, the documents being considered are no longer contemporary. Therefore, I am not attaching significant weight to the question of the duration of the infringement, in circumstances where more recent versions of the relevant documents are outside the scope of the Inquiry. In the circumstances, and for the avoidance of doubt, I have taken this into account as a neutral factor.
- The mitigating factor of Meta Ireland's decision to begin preparation for voluntary compliance on the basis of the views set out in the Preliminary Draft Decision, pending conclusion of the Inquiry.

341. On the basis of the analysis set out above in respect of the nature, gravity and duration of the infringements and the potential number of data subjects affected, I have proposed, by way of the Draft Decision, to impose the following administrative fines:

- In respect of the failure to provide sufficient information in relation to the processing operations carried out on foot of Article 6(1)(b) GDPR, thereby infringing Articles 5(1)(a) and 13(1)(c) GDPR, I proposed a fine of between €11.5 million and €14 million.
- In respect of the failure to provide the information that was provided on the processing operations carried out in foot of Article 6(1)(b) GDPR, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, thereby infringing Articles 5(1)(a) and 12(1) GDPR, I proposed a fine of between €6.5 million and €9 million.

342. In determining the quantum of the fines proposed above, I took account of the requirement, set out in Article 83(1) GDPR, for fines imposed to be “*effective, proportionate and dissuasive*” in each individual case. My view was that, in order for any fine to be “effective”, it must reflect the circumstances of the individual case. As already discussed above, the Transparency Infringements are serious, both in terms of the extremely large number of data subjects potentially affected, the categories of personal data involved, and the consequences that flow from the failure to comply with the transparency requirements for users.

343. In order for a fine to be “dissuasive”, it must dissuade both the controller/processor concerned as well as other controllers/processors carrying out similar processing operations from repeating the conduct concerned.

344. As regards the requirement for any fine to be “proportionate”, this requires the adjustment of the quantum of any proposed fine to the minimum amount necessary to achieve the objectives pursued by the GDPR. My view was that the fines proposed above did not exceed what was necessary to enforce compliance with the GDPR, taking into account the size of the Instagram user base, the impact of the Infringements on the effectiveness of the data subject rights enshrined in Chapter III of the GDPR and the importance of those rights in the context of the GDPR as a whole.

345. Accordingly, my view was that the fines proposed above would, if imposed on Meta Ireland, be effective, proportionate and dissuasive, taking into account all of the circumstances of the Inquiry.

346. Further to the circulation of the Draft Decision to the concerned supervisory authorities for the purpose of enabling them to express their views in accordance with Article 60(3) GDPR, objections were raised in relation to this aspect of matters by the supervisory authorities of Germany, France, Italy, the Netherlands and Norway. Having considered the merits of those objections, the EDPB determined as follows:

364. The EDPB agrees with the objections raised that - if the proposed fine was to be imposed for the transparency infringements - there would be no sufficient special preventive effect towards the controller, nor a credible general preventive effect. The proposed fine amount, even where a final amount at the upper limit of the range would be chosen, is not effective, proportionate and dissuasive, in the sense that this amount can simply be absorbed by the undertaking as an acceptable cost of doing business. As behavioural advertising is at the core of Meta IE's business model, the risk of this occurring is all the greater. By bearing the cost of the administrative fine, the undertaking can avoid bearing the cost of adjusting their business model to one that is compliant as well as any future losses that would follow from the adjustment. 365. Though the IE SA touches upon the notions of effectiveness, proportionality and dissuasiveness in relation to the proposed fine, there is no justification based on elements specific to the case to explain the modest fine range chosen. Moreover, the EDPB notes that while the IE SA takes into consideration the turnover of the undertaking to ensure that the fine it proposed does not exceed the maximum amount of the fine provided for in Article 83(5) GDPR, the IE SA does not articulate how and to what extent the turnover of this undertaking is considered to ascertain that the administrative fine meets the requirement of effectiveness, proportionality and dissuasiveness. In this regard the EDPB recalls that, contrary to Meta IE's views, the turnover of the undertaking concerned is not exclusively relevant for the determination of the maximum fine amount in accordance with Article 83(4)-(6) GDPR, but should also be considered for the calculation of the fine itself, where appropriate, to ensure the fine is effective, proportionate and dissuasive in accordance with Article 83(1) GDPR. The EDPB therefore instructs the IE SA to modify its Draft Decision to elaborate on the manner in which the turnover of the undertaking concerned has been taken into account for the calculation of the fine.

366. In light of the above, the EDPB considers that the proposed fine does not adequately reflect the seriousness and severity of the infringements nor has a dissuasive effect on Meta IE. Therefore, the fine does not fulfil the requirement of being effective, proportionate and dissuasive in accordance with Article 83(1) and (2) GDPR. In light of this, the EDPB directs the IE SA to set out a significantly higher fine amount for the transparency infringements identified, in comparison with the upper limit for the administrative fine envisaged in the Draft Decision. In doing so, the IE SA must remain in line with the criteria of effectiveness, proportionality, and dissuasiveness enshrined in Article 83(1) GDPR in its overall reassessment of the amount of the administrative fine.

347. I note that the EDPB agreed with the manner in which the Commission originally assessed the circumstances of the Transparency Infringement for the purposes of the Article 83(2) criteria. That being the case, it seems clear that the EDPB's instruction, above, concerns my view that the originally proposed fines were effective, proportionate and dissuasive for the purpose of Article 83(1) GDPR. In other words, the focus of the EDPB's instruction is the *quantum* of the fines that were originally proposed by the Article 60 Draft Decision. I note, in this regard, the EDPB's instruction that I set out a "significantly" higher fine, in comparison with the upper limit for the

originally proposed administrative fines. By way of guidance, the Article 65 Decision records as follows:

*362. According to the DE, FR, and IT SAs, the proposed fine is not consistent with the fine of 225 million euros decided upon by the IE SA in its decision dated 20 August 2021 against WhatsApp Ireland Limited for the same transparency infringements (breaches of Articles 12 and 13 GDPR). In particular, the DE SAs point out that “the facts and the seriousness of the infringements in the two cases are not sufficiently different to justify a difference of 85% in the fine imposed”. The FR and IT SAs also compare with the fine of 746 million euros decided by the LU SA in its decision of 15 July 2021 against the company Amazon Europe Core for carrying out behavioural advertising without a valid legal basis and for transparency infringements (Articles 6, 12 and 13 GDPR). While the EDPB agrees with both the IE SA and Meta IE that imposing fines requires a case-by-case assessment under Article 83 GDPR, the EDPB notes that the cases cited by the DE, FR and IT SAs do show marked similarities with the current case, as they both refer to large internet platforms run by data controllers with multi-national operations and significant resources available to them, including large, in-house, compliance teams. Moreover, there are similarities with regards to the nature and gravity of the infringements involved. Thus, these cases can give an indication on the matter.*

*363. The DE, FR, IT and NO SAs calculate that the envisaged upper limit of the fine range is about 0.03 % of the global annual turnover of Meta Platforms, Inc., which the DE SAs note is about 0.72% of the maximum ceiling provided for in Article 83(5) GDPR. For illustrative purposes also, is the amount of time it would take Meta Platforms, Inc. on average to generate 23 million euros in turnover in 2020, which was about 2 hours and 33 minutes.*

348. On the basis of the instruction and guidance set out above, I have decided to impose administrative fines as follows:

- In respect of the failure to provide sufficient information in relation to the processing operations carried out on foot of Article 6(1)(b) GDPR, thereby infringing Articles 5(1)(a) and 13(1)(c) GDPR, I propose a fine of between €70 million and €80 million.
- In respect of the failure to provide the information that was provided on the processing operations carried out in foot of Article 6(1)(b) GDPR, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, thereby infringing Articles 5(1)(a) and 12(1) GDPR, I propose a fine of between €60 million and €70 million.

349. I am of the (provisional) view that administrative fines within these ranges would satisfy the requirement, in Article 83(1) GDPR for any administrative fines imposed to be effective, proportionate and dissuasive in each individual case. In this regard, I have taken account of:



- a. The purpose of the fines, which is to sanction the infringements of (i) Articles 12(1), 13(1)(c), 5(1)(a) (and taking into account the infringement of the Article 5(1)(a) fairness principle) and (ii) Article 6(1) (and taking into account the infringement of the Article 5(1)(a) fairness principle) that were found to have occurred (by the EDPB in the Article 65 Decision);
- b. The requirement for any fine to be effective. In this regard, I note that the fines proposed above reflect the circumstances of the case, including both the specific elements of the infringement as well as those elements that relate to the controller which committed the infringement, namely its financial position (as required by paragraph 414 of the EDPB's binding decision 1/2021);
- c. The requirement for a genuinely deterrent effect, in terms of discouraging both Meta Ireland and others from committing the same infringement in the future;
- d. The requirement for any fine to be proportionate and to not exceed what is necessary to achieve the stated objective (as recorded at a., above). I consider that the fines proposed is proportionate to the circumstances of the case, taking into account the gravity of the infringements and all of the elements that may lead to an increase (aggravating factors) or decrease (mitigating factors) of the initial assessment as well as the significant turnover of the undertaking concerned. It also takes account of the views, assessments and instructions of the EDPB, as set out in the Article 65 Decision (and incorporated into this Decision, above). It also takes account of the fact that the fines will be imposed in addition to an order requiring Meta Ireland to take action to bring its processing into compliance.

Meta Ireland's Final Submissions in response to the re-assessment of the administrative fines originally proposed by the Draft Decision, in relation to the Transparency Infringements

350. Meta Ireland, by way of its Final Submissions, has challenged the proposed reassessment of the fines corresponding to the Transparency Infringements.<sup>309</sup>
351. Insofar as the relevant submissions express disagreement with matters that have been determined by the EDPB or, otherwise, upon which the EDPB has expressed a view, in the Article 65 Decision, that decision is binding upon the Commission. Accordingly, it is not open to the Commission to disregard or otherwise look behind any views expressed or instructions given by the EDPB in the Article 65 Decision.
352. Furthermore, insofar as the relevant submissions restate matters that have already been considered by the Commission (such as Meta Ireland's view that the Transparency Infringements are "technical in nature"), I do not propose to engage further with such matters.

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<sup>309</sup> Meta Ireland's Final Submissions dated 19 December 2022, at paras. 13.1-14.26.

353. Meta Ireland further submitted that the proposed increase is incompatible with Article 83(1) GDPR. It also notes the inconsistency between the increased fining ranges being proposed and the Commission’s previously expressed view that the lower fining ranges proposed by the Draft Decision were effective, proportionate and dissuasive. It is important to bear in mind that the Commission’s previous view that the proposed fining ranges were effective, proportionate and dissuasive, has been overtaken by the Article 65 Decision. The EDPB, in that decision, expressed a range of views and it is not open to the Commission to look behind those views, as appears to be suggested by Meta Ireland.

354. As regards Meta Ireland’s submissions directed to challenging how the increased fining ranges might be said to be “effective, proportionate and dissuasive”,<sup>310</sup> I note that these submissions share a range of common arguments, including:

- Submissions that it is not appropriate for the Commission to take account of Meta Ireland’s “financial position” and questioning the difference between “financial position” and “turnover” in circumstances where the Commission previously indicated that it had taken Meta Ireland’s turnover into account when assessing the quantum of the originally proposed fining ranges;
- Submissions concerning the level of the increase proposed by the Commission. Meta Ireland has submitted, in this regard, that the Commission “has proposed an increase well in excess of the purported instruction of the EDPB “to set out a significantly higher fine amount” in respect of these alleged infringements”. Meta Ireland has further suggested that: “*[i]t appears (although this is not clear) that the [Commission] was influenced in this regard by the EDPB’s comments regarding fines imposed by other supervisory authorities in respect of transparency infringements, namely the WhatsApp and Amazon Decisions. Without engaging in any factual assessment of these decisions, the EDPB asserts that these cases “show marked similarities with the current case, as they both refer to large internet platforms run by data controllers with multi-national operations and significant resources available to them, including large, in-house, compliance teams. Moreover, there are similarities with regard to the infringements involved”.*

355. As already noted above, the Commission is required, by the Article 65 Decision and Binding Decision 1/2021, to take account of the turnover of the undertaking concerned when quantifying the amount of the proposed administrative fine. The Commission did so as part of its original assessment, however the EDPB, by way of the Article 65 Decision, instructed the Commission to re-assess quantum on the basis that the proposed amounts were insufficient to satisfy the requirements of Article 83(1) GDPR. The Article 65 Decision provides at paragraph 364, for example, that:

*“The EDPB agrees with the objections raised that - if the proposed fine was to be imposed for the transparency infringements - there would be no sufficient special preventive effect towards the*

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<sup>310</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at paras. 14.5-14.26.

*controller, nor a credible general preventive effect. The proposed fine amount, even where a final amount at the upper limit of the range would be chosen, is not effective, proportionate and dissuasive, in the sense that this amount can simply be absorbed by the undertaking as an acceptable cost of doing business. As behavioural advertising is at the core of Meta IE's business model, the risk of this occurring is all the greater. By bearing the cost of the administrative fine, the undertaking can avoid bearing the cost of adjusting their business model to one that is compliant as well as any future losses that would follow from the adjustment."* [emphasis added]

356. In the circumstances, it was incumbent on the Commission to re-assess the manner in which account was previously taken of the turnover of the undertaking concerned. The Commission notes, in this regard, the very significant turnover of the Meta Platforms, Inc. group of companies and considers that the increased fining ranges take appropriate account of that significant level of turnover, as required by the Article 65 Decision. For the avoidance of doubt, however, the Commission has, first and foremost, addressed its mind to the Article 83 framework when assessing the questions of whether an administrative fine ought to be imposed and, if so, the amount of any such fine. That ought to be clear from the detailed analysis of the individual circumstances of this Inquiry set out in this Section 9. Otherwise, the Commission has re-assessed the quantum of its originally proposed fines by reference to the instructions and directions provided by the EDPB in the Article 65 Decision. Any suggestions of comparison with the Amazon or WhatsApp decisions are without foundation.

357. Having taken account of the Final Submissions, I remain of the views set out in paragraphs 348 and 349, above.

#### Proposed quantum of fining range - the Article 6(1) GDPR infringement

358. In relation to the infringement of Article 6(1) GDPR that was established by the EDPB in the Article 65 Decision, my conclusions, further to the Article 83(2) assessment recorded above, are that:

- The infringement of Article 6(1) GDPR (and taking into account the infringement of the Article 5(1)(a) fairness principle) has been assessed as falling at the upper end of the scale, in terms of seriousness, for the purpose of Article 83(2)(a).
- The seriously negligent character of the Article 6(1) GDPR infringement ought, in the particular circumstances of this inquiry, to be taken into account as an aggravating factor of significant weight.
- The degree of responsibility of the controller is to be treated as an aggravating factor, of moderately significant weight.

- The broad range of categories of personal data affected by the infringement ought to be taken into account as an aggravating factor of moderately significant weight.
- Otherwise, the assessments of the Article 83(2)(c), 83(2)(e), 83(2)(f), 83(2)(h), 83(2)(i), 83(2)(j) and 83(2)(k) criteria are to be treated as neither mitigating nor aggravating for the purpose of the Article 6(1) GDPR infringement.

359. On the basis of the above, I proposed to impose an (additional) administrative fine of an amount falling within the range of €50 to 60 million, in respect of the infringement of Article 6(1) GDPR (and taking into account the infringement of the Article 5(1)(a) fairness principle).

360. I expressed the (provisional) view that an administrative fine within this range would satisfy the requirement in Article 83(1) GDPR for any administrative fine imposed to be effective, proportionate and dissuasive in each individual case. In this regard, I have taken account of:

- a. The purpose of the fine, which is to sanction the infringement of Article 6(1) (and taking into account the infringement of the Article 5(1)(a) fairness principle) that was found to have occurred (by the EDPB in the Article 65 Decision);
- b. The requirement for any fine to be effective. In this regard, the Commission notes that the fine proposed above reflects the circumstances of the case, including both the specific elements of the infringement as well as those elements that relate to the controller which committed the infringement, namely its financial position (as required by paragraph 414 of the EDPB's binding decision 1/2021);
- c. The requirement for a genuinely deterrent effect, in terms of discouraging both Meta Ireland and others from committing the same infringement in the future; and
- d. The requirement for any fine to be proportionate and to not exceed what is necessary to achieve the stated objective (as recorded at a., above). The Commission considers that the fine proposed is proportionate to the circumstances of the case, taking into account the gravity of the infringements and all of the elements that may lead to an increase (aggravating factors) or decrease (mitigating factors) of the initial assessment as well as the significant turnover of the undertaking concerned. The fine also takes account of the fact that the (additional) fine will be imposed in addition to an order requiring Meta Ireland to take action to bring its processing into compliance.
- e. I have also taken particular account, in this regard, of the facts that:
  - i. The EDPB's finding of infringement of Article 6(1) GDPR was partially based on the lack of transparency (see, for example, paragraphs 126, 129 and 130 of the Article 65

Decision), as regards the information that was presented to the data subject concerning the processing that would be carried out further to the Terms of Use.

- ii. The EDPB's finding of infringement of Article 5(1)(a) fairness principle was similarly largely based on the lack of transparency (see, for example, paragraphs 224, 225, 228 and 235 of the Article 65 Decision), as regards the information that was presented to the data subject concerning the processing that would be carried out further to the Terms of Use.
- iii. As already noted, the Draft Decision contains separate proposed findings of infringement of the transparency obligations set out in Articles 5(1)(a), 12(1) and 13(1)(c) together with corresponding proposals to exercise corrective powers in the form of an administrative fine and an order to bring processing into compliance. I have taken this previous sanction into account when proposing the fining range set out above so as to avoid the risk of punishing Meta Ireland twice in respect of the same conduct. This factor necessitated a moderately significant reduction in the fine that might otherwise have been imposed, notwithstanding the significant turnover of the undertaking concerned and the outcome of the Article 83(2)(a) assessment, as recorded above.

Meta Ireland's Final Submissions in response to the assessment of the Article 6(1) infringement for the purpose of Article 83(2), as introduced to this Decision following the adoption of the Article 65 Decision

361. Meta Ireland, by way of its Final Submissions, disagreed with the above assessments of the Article 6(1) GDPR infringement. For ease of response, I have summarised the relevant submissions thematically, as follows:

*Discretion of the Commission*

362. Under this heading, Meta Ireland submitted, firstly, that "*by proposing exponential increases to the administrative fines in respect of the infringements related to Articles 5, 12, and 13 GDPR, (which themselves are unsupported, as explained further at sections 12, 13, and 14 below), the DPC has taken account of the Article 65 Decision and no additional administrative fine is required or warranted in respect of the infringement of Article 6(1) GDPR*".<sup>311</sup> Meta Ireland noted, in this regard, that the Article 65 Decision requires the Commission to impose an administrative fine to "cover" the EDPB's finding of infringement of Article 6(1) GDPR.

363. It submitted, secondly, that the imposition of a fine for the Article 6(1) infringement while also substantially increasing the fines for the Transparency Infringements is disproportionate and

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<sup>311</sup> Meta Ireland's Final Submissions dated 19 December 2022, at para. 8.1.

unnecessary in circumstances where the infringements are based on the same underlying processing and alleged harm to data subjects.<sup>312</sup>

364. Thirdly, it submitted that, just as the Commission has decided not to impose an additional fine in respect of Article 5(1)(a) (fairness principle) GDPR due to the overlapping nature of the infringements, it should similarly decide not to impose an additional fine in relation to the Article 6(1) infringement because this would risk punishing Meta Ireland twice for the same wrongdoing.<sup>350</sup> Furthermore, it submitted that it was “*particularly inappropriate for the [Commission] to impose three separate and substantial fines in respect of these infringements, having regard to the principle of concurrence of laws. It cannot plausibly be maintained that these infringements are sufficiently distinct to warrant three separate fines in circumstances where the [Commission] itself considers the conduct constituting the alleged Article 6(1) infringement to be so similar to the other infringements that it can incorporate significant elements of the fines assessment by reference*”.<sup>351</sup>

365. The above submissions are premised upon the misunderstanding that the Commission has discretion, as regards, the imposition of a fine for the Article 6(1) infringement. The Commission, being subject to a binding decision of the EDPB, has no such discretion. . This is clear from the Article 65 Decision itself, in particular paragraphs 410 and 411 which state that:

*“the EDPB agrees with the reasoning put forward by the [supervisory authorities of Austria, Germany, France, Norway and Sweden] in their objections. The EDPB reiterates that lawfulness of processing is one of the fundamental pillars of the data protection law and considers that processing of personal data without an appropriate legal basis is a clear and serious violation of the data subjects’ fundamental right to data protection.*

*Several of the factors listed in Article 83(2) GDPR speak strongly in favour of the imposition of an administrative fine for the infringement of Article 6(1) GDPR.”*

366. In the circumstances, it is clear that the Commission is required to impose an administrative fine in respect of the finding of infringement of Article 6(1) GDPR that was established by the EDPB and, when doing so, to take account of the instructions, deliberations and determinations of the EDPB, as recorded in Section 9.2.4.2.1 of the Article 65 Decision.

367. It is important to note that this instruction (to impose an administrative fine for the Article 6(1) infringement) sits separately to, and alongside, the EDPB’s further instruction that the

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<sup>312</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 8.1.

<sup>350</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 8.2.

<sup>351</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 8.4.

Commission “set out a significantly higher fine amount” in respect of the Transparency Infringements that were already proposed by way of the Draft Decision.

368. Finally, as regards the Commission’s decision not to impose a separate administrative fine in respect of the infringement of the Article 5(1)(a) principle of fairness that was established by the EDPB, the Article 65 Decision specifically afforded the Commission discretion in relation to the manner in which this particular infringement might be addressed by way of a corrective power. This is clear from paragraph 446 of the Article 65 Decision. The inclusion of this express discretion is in marked contrast with the absence of any similar discretion in relation to the imposition/increase of administrative fines for the Article 6(1) and Transparency Infringements.

#### *Inadequate Rationalisation*

369. Under this heading, Meta Ireland submitted that *“the reasoning in the Draft Decision in respect of the calculation of the fines is inadequate, such that it is impossible to understand how the proposed fining ranges have been calculated or how the different factors discussed by the DPC have had an impact on the proposed fine and, as a result, to make meaningful submissions in respect of same.”*<sup>313</sup>

370. I do not agree that this is the case. As is evident from the analysis set out above, the Commission has clearly identified the factors that were considered relevant for the purpose of each of the individual Article 83(2) assessments. Furthermore, the manner in which the relevant factors have been taken into account, e.g. as a mitigating or aggravating factor, as well as the weight that has been attributed to each one has been clearly addressed.

371. This approach is in line with the Commission’s obligation to provide reasons for its decisions. While the Commission is required to explain how it arrived at the level of a proposed fine, it is not required to apply such specificity so as to allow a controller or processor to make a precise mathematical calculation of the expected fine<sup>314</sup>.

#### *Incompatibility with Article 83(1) GDPR – Article 6(1)*

372. Meta Ireland, by way of its Final Submissions, has submitted that the *“proposed fine for the Article 6(1) infringement – both individually and taken cumulatively with the other significant administrative fines being proposed in respect of the Transparency Infringements – is inconsistent with the requirements of Article 83(1) GDPR”*.<sup>315</sup>

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<sup>313</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 9.2.

<sup>314</sup> See, by analogy, *HSBC Holdings plc and Others v Commission*, T-105/17, ECLI:EU:T:2019:675, paragraphs 336 – 354.

<sup>315</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at paras. 10.1-10.28.

373. Meta Ireland further submitted that the proposed fine is “*is manifestly excessive and far higher than the minimum amount necessary to be ‘effective’ and ‘dissuasive’, and is therefore not ‘proportionate’*”.<sup>316</sup>

374. Meta Ireland, thirdly submitted that the reasoning in the Draft Decision as to why the administrative fines comply with the requirements of Article 83(1) GDPR is “wholly inadequate”. Meta Ireland has added, in this regard, that this has undermined its ability to make meaningful submissions in response to same.<sup>317</sup>

375. I note that, in having detailed my views as to the reasons why I consider the proposed fines to be effective, proportionate and dissuasive, I have followed the directions of the EDPB that were set out on this particular matter in its Binding Decision 1/2021<sup>357</sup>. Accordingly, I consider that the Commission has adequately addressed this aspect of matters.

376. Otherwise, I note that I have already addressed many of the matters raised by Meta Ireland as part of this aspect of its Final Submissions elsewhere in this Decision. In relation to Meta Ireland’s submissions concerning the “*very onerous compliance order requiring significant expenditure of resources*”, it is important to recall that the objective sought to be achieved by the compliance order (the remediation of any identified infringements) differs from the objective sought to be achieved by the imposition of an administrative fine (the sanctioning of any identified infringements). Furthermore, the “significant expenditure of resources” are the resources of Meta Ireland itself, which is, as already noted, an entity with significant resources available to it. In the circumstances, I do not agree that such matters should, in the circumstances of this particular inquiry, operate to offset the quantum of any proposed fine.

377. Having completed my assessment of whether or not to impose a fine (and of the amount of any such fine), I must now consider the remaining provisions of Article 83 GDPR, with a view to ascertaining if there are any factors that might require the adjustment of the proposed fines.

378. Having taken account of the Final Submissions, I remain of the views set out in paragraph 359, above.

## 11 OTHER RELEVANT FACTORS

### *ARTICLE 83(3) GDPR*

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<sup>316</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 10.3.

<sup>317</sup> Meta Ireland’s Final Submissions dated 19 December 2022, at para. 10.8.

<sup>357</sup> See Binding Decision 1/2021, paragraphs 413 to 416



379. In accordance with Article 83(3) GDPR:

*“If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.”*

380. As outlined previously, Meta Ireland’s infringements of Articles 5(1)(a), 13(1)(c), and 12(1) GDPR all relate to the same processing operations concerning its processing carried out in accordance with Article 6(1)(b) GDPR.

381. In respect of the interpretation of Article 83(3) GDPR, I am mindful of the Commission’s obligations of cooperation and consistency in, *inter alia*, Articles 60(1) and 63 GDPR and, accordingly, it is necessary to follow the EDPB’s interpretation of Article 83(3) GDPR which arose following the EDPB Decision relating to IN 18-12-2, an inquiry conducted by the Commission into WhatsApp Ireland Limited’s compliance with Articles 12, 13 and 14 GDPR.<sup>318</sup>

382. The relevant passage of the EDPB Decision is as follows:

*“315. All CSAs argued in their respective objections that not taking into account infringements other than the “gravest infringement” is not in line with their interpretation of Article 83(3) GDPR, as this would result in a situation where WhatsApp IE is fined in the same way for one infringement as it would be for several infringements. On the other hand, as explained above, the IE SA argued that the assessment of whether to impose a fine, and of the amount thereof, must be carried out in respect of each individual infringement found and the assessment of the gravity of the infringement should be done by taking into account the individual circumstances of the case. The IE SA decided to impose only a fine for the infringement of Article 14 GDPR, considering it to be the gravest of the three infringements.*

*316. The EDPB notes that the IE SA identified several infringements in the Draft Decision for which it specified fines, namely infringements of Article 12, 13 and 14 GDPR, and then applied Article 83(3) GDPR.*

*317. Furthermore, the EDPB notes that WhatsApp IE agreed with the approach of the IE SA concerning the interpretation of Article 83(3) GDPR. In its submissions on the objections, WhatsApp IE also raised that the approach of the IE SA did not lead to a restriction of the IE SA’s ability to find other infringements of other provisions of the GDPR or of its ability to impose a very significant fine. WhatsApp IE argued that the alternative interpretation of Article 83(3) GDPR suggested by the CSAs is not consistent with the text*

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[https://edpb.europa.eu/system/files/2021-09/edpb\\_bindingdecision\\_202101\\_ie\\_sa\\_whatsapp\\_redacted\\_en.pdf](https://edpb.europa.eu/system/files/2021-09/edpb_bindingdecision_202101_ie_sa_whatsapp_redacted_en.pdf).

*and structure of Article 83 GDPR and expressed support for the IE SA's literal and purposive interpretation of the provision.*

318. *In this case, the issue that the EDPB is called upon to decide is how the calculation of the fine is influenced by the finding of several infringements under Article 83(3) GDPR.*

319. *Article 83(3) GDPR reads that if "a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement."*

320. *First of all, it has to be noted that Article 83(3) GDPR is limited in its application and will not apply to every single case in which multiple infringements are found to have occurred, but only to those cases where multiple infringements have arisen from "the same or linked processing operations".*

321. *The EDPB highlights that the overarching purpose of Article 83 GDPR is to ensure that for each individual case, the imposition of an administrative fine in respect of an infringement of the GDPR is to be effective, proportionate and dissuasive. In the view of the EDPB, the ability of SAs to impose such deterrent fines highly contributes to enforcement and therefore to compliance with the GDPR.*

322. *As regards the interpretation of Article 83(3) GDPR, the EDPB points out that the effet utile principle requires all institutions to give full force and effect to EU law. The EDPB considers that the approach pursued by the IE SA would not give full force and effect to the enforcement and therefore to compliance with the GDPR, and would not be in line with the aforementioned purpose of Article 83 GDPR.*

323. *Indeed, the approach pursued by the IE SA would lead to a situation where, in cases of several infringements of the GDPR concerning the same or linked processing operations, the fine would always correspond to the same amount that would be identified, had the controller or processor only committed one – the gravest – infringement. The other infringements would be discarded with regard to calculating the fine. In other words, it would not matter if a controller committed one or numerous infringements of the GDPR, as only one single infringement, the gravest infringement, would be taken into account when assessing the fine.*

324. *With regard to the meaning of Article 83(3) GDPR the EDPB, bearing in mind the views expressed by the CSAs, notes that in the event of several infringements, several amounts can be determined. However, the total amount cannot exceed a maximum limit prescribed, in the abstract, by the GDPR. More specifically, the wording "amount specified*

*for the gravest infringement” refers to the legal maximums of fines under Articles 83(4), (5) and (6) GDPR. The EDPB notes that the Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679 state that the “occurrence of several different infringements committed together in any particular single case means that the supervisory authority is able to apply the administrative fines at a level which is effective, proportionate and dissuasive within the limit of the gravest infringement”. The guidelines include an example of an infringement of Article 8 and Article 12 GDPR and refer to the possibility for the SA to apply the corrective measure within the limit set out for the gravest infringement, i.e. in the example the limits of Article 83(5) GDPR.*

325. *The wording “total amount” also alludes to the interpretation described above. The EDPB notes that the legislator did not include in Article 83(3) GDPR that the amount of the fine for several linked infringements should be (exactly) the fine specified for the gravest infringement. The wording “total amount” in this regard already implies that other infringements have to be taken into account when assessing the amount of the fine. This is notwithstanding the duty on the SA imposing the fine to take into account the proportionality of the fine.*

326. *Although the fine itself may not exceed the legal maximum of the highest fining tier, the offender shall still be explicitly found guilty of having infringed several provisions and these infringements have to be taken into account when assessing the amount of the final fine that is to be imposed. Therefore, while the legal maximum of the fine is set by the gravest infringement with regard to Articles 83(4) and (5) GDPR, other infringements cannot be discarded but have to be taken into account when calculating the fine.*

327. *In light of the above, the EDPB instructs the IE SA to amend its Draft Decision on the basis of the objections raised by the DE SA, FR SA and PT SA with respect to Article 83(3) GDPR and to also take into account the other infringements – in addition to the gravest infringement – when calculating the fine, subject to the criteria of Article 83(1) GDPR of effectiveness, proportionality and dissuasiveness.”*

383. The impact of this interpretation would be that administrative fine(s) would be imposed cumulatively, as opposed to imposing only the proposed fine for the gravest infringement. The only applicable limit for the total fine imposed, under this interpretation, would be the overall “cap”. By way of example, in a case of multiple infringements, if the gravest infringement was one which carried a maximum administrative fine of 2% of the turnover of the undertaking, the cumulative fine imposed could also not exceed 2% of the turnover of the undertaking.

384. Meta Ireland has argued that the above interpretation and application of Article 83(3) GDPR is incorrect and/or should not be applied because: the EDPB decision is incorrect as a matter of law

and is, in any event, not binding on the Commission; even if the decision were binding on the Commission, it does not require that the Commission impose administrative fines in the manner proposed; the Commission has not had regard to the criteria of effectiveness, proportionality and dissuasiveness in Article 83(1) GDPR when determining the total cumulative proposed fine; and no decision on the correct interpretation of Article 83(3) GDPR should be made prior to the determination of a pending application by WhatsApp Ireland, pursuant to Article 263 TFEU, before the General Court of the Court of Justice of the European Union, to annul the EDPB Decision (“the Annulment Proceedings”).<sup>319</sup>

385. In this regard, Meta Ireland submitted that the EDPB Decision is not binding on the Commission. A number of legal arguments are made in this regard, including that binding decisions of the EDPB only apply to specific individual cases (as set out in article 65(1) GDPR)<sup>320</sup> and that only the CJEU can issue binding decisions on matters of EU law.<sup>321</sup> For the avoidance of doubt, the Commission has not expressed the view, nor does it hold the view, that the EDPB Decision is legally binding on it in this Inquiry and/or generally. The Commission is nonetheless, in this regard, bound by a number of provisions of the GDPR and the real question that arises in this context is the extent to which the Commission should have regard to the EDPB’s approach.

386. The Commission is bound by Article 60(1) GDPR, which states in the imperative that “*the lead supervisory authority shall cooperate with the other supervisory authorities concerned in accordance with this Article in an endeavour to reach consensus*” [emphasis added]. The Commission is similarly required to cooperate with other supervisory authorities, pursuant to Article 63 GDPR. Meta Ireland has argued that these obligations relate only to specific cases where a dispute has arisen.<sup>322</sup> Moreover, it submits that the EDPB’s function in ensuring correct application of the GDPR is provided for instead in Article 70(1) GDPR, such as through issuing opinions and guidelines.<sup>323</sup>

387. It is not the position of the Commission that the EDPB in and of itself has the power to issue decisions of general application that bind supervisory authorities. The issue is not the powers or functions of the EDPB, but rather the legal responsibility of the Commission to the concerned supervisory authorities, who in themselves happen to be constituent members of the EDPB. In this regard, assistance is provided in the interpretation of the Commission’s duties under Article 60(1) GDPR by Recital 123, which states that “...*supervisory authorities should monitor the application of the provisions pursuant to this Regulation and contribute to its consistent application throughout the Union...*”. The Commission’s view is that the duty to cooperate and

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<sup>319</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at section 15.

<sup>320</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.3.

<sup>321</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.6.

<sup>322</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.4

<sup>323</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.5.

ensure consistency that is placed on it by the GDPR would be rendered ineffective were it not to ensure, to the best of its ability, such interpretations were applied consistently.

388. The alternative scenario, as proposed by Meta Ireland, would result in entrenched interpretations being consistently advanced by individual supervisory authorities. The consequence would be inevitable dispute resolution procedures under Article 65 GDPR, and the issuing of a binding decision once again applying an alternative interpretation to the specific facts at hand that had already been comprehensively addressed in a previous dispute resolution procedure. Such a scenario would deprive the duties to cooperate and act consistently of almost any meaning. In the Commission's view, such an interpretation would therefore be contrary to the principle of *effet utile*. This is, as has been set out, a distinct issue from the legal powers or functions of the EDPB itself.
389. Meta Ireland asserted that the EDPB Decision "*did not direct the [Commission] to impose separate fines in respect of each infringement and to then add those fines together*", but rather that the final amount should be considered in accordance with the requirements that the fine be effective, proportionate and dissuasive pursuant to Article 83(1) GDPR.<sup>324</sup> I further note Meta Ireland's submission that overlap between the infringements should be taken into account, in this regard.<sup>325</sup> It goes on to argue that as there is "*...significant – if not complete – overlap between the infringements*",<sup>326</sup> the fine is contrary to the EU law principles of proportionality, *ne bis in idem* and concurrence of laws.<sup>327</sup>
390. Meta Ireland further alleged that the "*Commission does [sic] engage in any meaningful assessment of whether the total fine proposed in the Inquiry is 'effective, proportionate and dissuasive' as required by Article 83(1) GDPR*".<sup>328</sup> In essence, it is Meta Ireland's view that the proposed fines, either individually or cumulatively, are disproportionate to the circumstances of the case where Meta Ireland had a differing interpretation of its transparency obligations in good faith, and Meta Ireland is committed to "*engaging with the Commission and dedicating significant resources to updating its Data Policy to take account of the Commission's views and concerns*".<sup>329</sup> I have outlined my views on this matter in the concluding paragraphs of Section 10.
391. Additionally, Meta Ireland has argued that my approach to imposing cumulative fines in this Inquiry is a "flawed application" of Decision 1/2021 on the basis that "*Decision 1/2021 did not direct the Commission to impose separate fines in respect of each infringement and to then add*

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<sup>324</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.11.

<sup>325</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.12.

<sup>326</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.13.

<sup>327</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at paras. 15.12 – 15.14.

<sup>328</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 16.4.

<sup>329</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 16.5.

*those fines together*".<sup>330</sup> In particular, Meta Ireland alleged that the "*fine being proposed essentially imposed two fines in [sic]Meta Ireland for what is essentially the same set of facts and the same alleged infringement*"<sup>331</sup> which "*is inconsistent with principles regarding the concurrence of laws*". In response to this, it is my view that the failure to provide required information, and the failure to set out required information in a transparent manner, are entirely different wrongs. The legislator has provided for two distinct requirements, and each individual requirement has been infringed by Meta Ireland. For these reasons, I do not accept this submission. Similarly, the Commission is not applying a new and retroactive view of wrongdoing to the conduct in a manner envisaged by principle of concurrence of laws. It is simply determining the proper interpretation of Article 83(3) GDPR. This has no impact on the Commission's detailed consideration of Meta Ireland's submissions on the separate and more general question of the appropriate penalty.

392. Meta Ireland also argued that the taking into account of the undertaking's turnover is incorrect as a matter of law, as it is not set out as a factor in Article 83(2) GDPR.<sup>332</sup> In this regard, the Commission relies on its existing analysis of its obligations to cooperate with the concerned supervisory authorities and apply the GDPR consistently. For the same reasons provided to support

the Commission's decision to apply the EDPB Decision's interpretation of Article 83(3) GDPR in general, the Commission intends to maintain this consideration of the undertaking's turnover. In relation to Meta Ireland's submissions as to the appropriate turnover to be considered,<sup>333</sup> this is addressed below.

393. In this Inquiry, the gravest infringement is that of the failure to provide information on data processing carried out pursuant to Article 6(1)(b) GDPR, in contravention of Articles 5(1)(a) and 13(1)(c) GDPR. The associated maximum possible fine for this infringement under Article 83(5) GDPR is 4% of the turnover of Meta Platforms, Inc. (as noted above, Instagram is wholly owned by Meta Platforms, Inc.). It is further to be noted that the EDPB's Decision, from which I quoted above, also directed the Commission to take account of the undertaking's turnover in the calculation of the fine amounts and I therefore factor that turnover figure below into my calculations of the individual infringement fining ranges.

394. For the sake of completeness, I note that Meta Ireland reiterated its concerns as part of its Final Submissions.<sup>374</sup> I have already addressed the subject-matter of those concerns above.

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<sup>330</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.11.

<sup>331</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 15.12.

<sup>332</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.29.

<sup>333</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 14.30.

<sup>374</sup> Meta Ireland's Final Submissions dated 19 December 2022, at paras. 11.1-11.2.

ARTICLE 83(5) GDPR

395. Turning, finally, to Article 83(5) GDPR, I note that this provision operates to limit the maximum amount of any fine that may be imposed in respect of certain types of infringement, as follows:

*“Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher:*

...

*(b) the data subjects’ rights pursuant to Articles 12 to 22; ...”*

396. In order to determine the applicable fining “cap”, it is first necessary to consider whether or not the fine is to be imposed on “an undertaking”. Recital 150 clarifies, in this regard, that:

*“Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes.”*

397. Accordingly, when considering a respondent’s status as an undertaking, the GDPR requires me to do so by reference to the concept of “undertaking”, as that term is understood in a competition law context. In this regard, the CJEU has established that:

*“an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed”.*<sup>334</sup>

398. The CJEU has held that a number of different enterprises could together comprise a single economic unit where one of those enterprises is able to exercise decisive influence over the behaviour of the others on the market. Such decisive influence may arise, for example, in the context of a parent company and its wholly owned subsidiary. Where an entity (such as a subsidiary) does not independently decide upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by another entity (such as a parent), this means that both entities constitute a single economic unit and a single undertaking for the purpose of Articles 101 and 102 TFEU. The ability, on the part of the parent company, to exercise decisive influence over the subsidiary’s behaviour on the market, means that the conduct of the

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<sup>334</sup> Case C-41/90 *Höfner and Elser v Macrotron GmbH* (23 April 1991), EU:C:1991:161, at para. 21.

subsidiary may be imputed to the parent company, without having to establish the personal involvement of the parent company in the infringement.<sup>335</sup>

399. In the context of Article 83 GDPR, the concept of “undertaking” means that, where there is another entity that is in a position to exercise decisive influence over the controller/processor’s behaviour on the market, then they will together constitute a single economic entity and a single undertaking. Accordingly, the relevant fining “cap” will be calculated by reference to the turnover of the undertaking as a whole, rather than the turnover of the controller or processor concerned.
400. In order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case.<sup>336</sup>
401. The CJEU has, however, established that, where a parent company has a 100% shareholding in a subsidiary, it follows that: the parent company is able to exercise decisive influence over the conduct of the subsidiary; and a rebuttable presumption arises that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.<sup>378</sup>
402. The CJEU has also established that, in a case where a company holds all or almost all of the capital of an intermediate company which, in turn, holds all or almost all of the capital of a subsidiary of its group, there is also a rebuttable presumption that that company exercises a decisive influence over the conduct of the intermediate company and indirectly, via that company, also over the conduct of that subsidiary.<sup>337</sup>
403. The General Court has further held that, in effect, the presumption may be applied in any case where the parent company is in a similar situation to that of a sole owner as regards its power to exercise a decisive influence over the conduct of its subsidiary.<sup>338</sup> This reflects the position that:

*“... the presumption of actual exercise of decisive influence is based, in essence, on the premise that the fact that a parent company holds all or virtually all the share capital of its subsidiary enables the Commission to conclude, without supporting evidence, that that parent company has the power to exercise a decisive influence over the subsidiary without*

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<sup>335</sup> Case C-97/08 P *Akzo Nobel and Others v Commission*, (10 September 2009) EU:C:2009:536, at paras. 58 – 60.

<sup>336</sup> C-490/15 P *Ori Martin and SLM v Commission* (C-490/15 P 14 September 2016) ECLI:EU:C:2016:678, at para. 60.

<sup>378</sup> Case C-97/08 P *Akzo Nobel and Others v Commission*, (10 September 2009) EU:C:2009:536.

<sup>337</sup> Case C-508/11 P *Eni v Commission* (8 May 2013) EU:C:2013:289, at para. 48.

<sup>338</sup> T-206/06 *Total and Elf Aquitaine v Commission*, (7 June 2011) EU:T:2011:250, at para. 56; T-562/08 *Repsol Lubricantes y Especialidades and Others v Commission* (12 December 2014) EU:T:2014:1078, at para. 42; T-413/10 and T-414/10 *Socitrel and Companhia Previdente v Commission* (15 July 2015) EU:T:2015:500, at para. 204.



*there being any need to take into account the interests of other shareholders when adopting strategic decisions or in the day-to-day business of that subsidiary, which does not determine its own market conduct independently, but in accordance with the wishes of that parent company ...*<sup>339</sup>

404. Where the presumption of decisive influence has been raised, it may be rebutted by the production of sufficient evidence that shows, by reference to the economic, organisational and legal links between the two entities, that the subsidiary acts independently on the market.

405. It is important to note that “decisive influence”, in this context, refers to the ability of a parent company to influence, directly or indirectly, the way in which its subsidiary organises its affairs, in a corporate sense, for example, in relation to its day-to-day business or the adoption of strategic decisions. While this could include, for example, the ability to direct a subsidiary to comply with all applicable laws, including the GDPR, in a general sense, it does not require the parent to have the ability to determine the purposes and means of the processing of personal data by its subsidiary.

406. As noted above, within the European Region, the Instagram service is provided by a subsidiary of Meta Platforms, Inc. known as Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) (referred to as “Meta Ireland” or “Facebook” in this Decision). Meta Ireland’s ultimate parent is Meta Platforms, Inc. (formerly Facebook, Inc.).<sup>340</sup> I have had regard to Meta Ireland’s Director’s Report and Financial Statements for the Financial Year ended 31 December 2020, which are available from the Companies Registration Office and are dated September 2021. The Director’s Report and Financial Statements describe the relationship between Meta Ireland and Meta Platforms, Inc. as follows:

*“Facebook Ireland Limited is wholly owned by Facebook International Operations Limited, a company incorporated in the Republic of Ireland. Its ultimate holding company and controlling party is Facebook, Inc., a company incorporated in the United States of America”.*<sup>341</sup>

407. The Director’s Report and Financial Statement also state the following:

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<sup>339</sup> Case C-97/08 P *Akzo Nobel and Others v Commission* EU:C:2009:262 (Opinion of Advocate General Kokott), at para. 73 cited in Case T-419/14 *The Goldman Sachs Group, Inc. v European Commission* (12 July 2018) ECLI:EU:T:2018:445, at para. 51.

<sup>340</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at footnote 144.

<sup>341</sup> Director’s Report and Financial Statements for Facebook Ireland Limited for the financial year ended 31 December 2020, at p. 3.

*“At 31 December 2020, the company is a wholly-owned subsidiary of Facebook International Operations Limited, a company incorporated in the Republic of Ireland, its registered office being 4 Grand Canal Square, Grand Canal Harbour, Dublin 2.*

*The ultimate holding company and ultimate controlling party is Facebook, Inc., a company incorporated in Wilmington, Delaware, United States of America. The ultimate holding company and controlling party of the smallest and largest group of which the company is a member, and for which consolidated financial statements are drawn up, is Facebook, Inc.”*<sup>342</sup>

I note, in this connection, that the same position was stated in Meta Ireland’s Directors’ Reports and Financial Statements for the years ended 31 December 2019 (dated December 2020) and 31 December 2018 (dated November 2019).

408. On this basis, it is my understanding that Meta Ireland is a wholly-owned subsidiary of Facebook International Operations Limited; Facebook International Operations Limited is wholly owned and controlled by Meta Platforms, Inc.; and, as regards any intermediary companies in the corporate chain, between Meta Ireland and Meta Platforms, Inc., it is assumed, by reference to the statement at Note 24 of the Notes to the Financial Statements (quoted above) that the *“ultimate holding company and controlling party of the smallest and largest group of which [Meta Ireland] is a member ... is Facebook, Inc.”*. It is therefore assumed that Meta Ireland, Inc. is in a similar situation to that of a sole owner as regards its power to (directly or indirectly) exercise a decisive influence over the conduct of Meta Ireland.

409. It seemed therefore at the time of preparing the Decision, that the corporate structure of the entities concerned is such that Meta Platforms, Inc. is in a position to exercise decisive influence over Meta Ireland’s behaviour on the market. Accordingly, I considered that a rebuttable presumption arose to the effect that Meta Platforms, Inc. does in fact exercise a decisive influence over the conduct of Meta Ireland on the market.

410. If this presumption is not rebutted, it would mean that Meta Platforms, Inc. and Meta Ireland constitute a single economic unit and therefore form a single undertaking within the meaning of Article 101 TFEU. Consequently, the relevant fining “cap” for the purpose of Articles 83(4) and (5) GDPR, would fall to be determined by reference to the consolidated turnover of the group of companies headed by Meta Platforms, Inc. Meta Ireland has made submissions in an attempt to rebut the presumption of decisive influence.

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<sup>342</sup> Director’s Report and Financial Statements for Facebook Ireland Limited for the financial year ended 31 December 2020, at p. 42 (Note 24).

411. In this regard, Meta Ireland submitted that the presumption of decisive influence on the market does not translate into a data protection context without considering what “behaviour on the market” means in a data protection context.<sup>343</sup> It argued that this analysis should focus instead on the entity that has the decision-making capacity in the context of data protection matters, rather than matters relating to the market in general as is the case in competition law.<sup>386</sup> I do not agree with this assessment for three reasons.
412. First, the suggested approach (involving an assessment of where the decision-making power lies, in relation to the processing of personal data) is effectively a replication of the assessment that must be undertaken at the outset of the inquiry process, the outcome of which determines (i) the party/parties to which the inquiry should be addressed; and (ii) (in cross border processing cases) the supervisory authority with jurisdiction to conduct the inquiry. Given the consequences that flow from this type of assessment, it would not be appropriate for this assessment to be conducted at the decision-making stage of an inquiry.
413. Second, the suggested approach could not be applied equally in each and every case. Where, for example, the presumption of decisive influence has been raised in the context of a cross-border processing case where one of the entities under assessment is outside of the EU, an assessment of that entity’s ability to exercise decisive influence over the respondent’s data processing activities would likely exceed the scope of Article 3 GDPR. Such a scenario risks undermining the Commission’s ability to comply with its obligation, pursuant to Article 83(1) GDPR, to ensure that the imposition of fines, in each individual case, is “effective, proportionate and dissuasive”.
414. Third, “behaviour on the market” has a meaning normally ascribed to it in EU competition law. In summary, “behaviour on the market” describes how an entity behaves and conducts its affairs in the context of the economic activity in which it engages. Such behaviour will include matters such as the policies and procedures it implements, the marketing strategy it pursues, the terms and conditions attaching to any products or services it delivers, its pricing structures, etc. I therefore can see no basis in law, in Meta Ireland’s submissions or otherwise, to deviate from this well-established principle as set out both in the GDPR, other provisions of EU law and the jurisprudence of the CJEU.
415. Applying the above to Article 83(5) GDPR, I first note that, in circumstances where the fine is being imposed on an “undertaking”, a fine of up to 4% of the total worldwide annual turnover of the preceding financial year may be imposed. I note, in this regard, that Meta Platforms, Inc. reported the generation of revenue in the amount of \$117.929billion in respect of the year ended

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<sup>343</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 17.4.

<sup>386</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at para. 17.4.

31 December 2021.<sup>344</sup> That being the case, I am satisfied that the fine proposed above does not exceed the applicable fining “cap” prescribed by Article 83(5) GDPR.

*SUMMARY OF ENVISAGED ACTION*

416. I therefore decide to exercise the following corrective powers:

417. An order is hereby made, pursuant to Article 58(2)(d) GDPR, requiring Meta Ireland to bring processing into compliance (“the Order”) within a period of three months commencing on the day following the date of service, on Meta Ireland, of this Decision. More specifically, the Order:

- a. firstly, requires Meta Ireland to bring the Data Policy and Terms of Service into compliance with Articles 5(1)(a), 12(1) and 13(1)(c) GDPR as regards information provided on: (i) data processed pursuant to Article 6(1)(b) GDPR as well as (ii) data processed for the purposes of behavioural advertising in the context of the Meta Ireland service, in accordance with the principles set out in this Decision; and
- b. secondly, requires Meta Ireland to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Instagram Terms of Use, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraphs 132 and 133 of the Article 65 Decision. More specifically, in this regard, Meta Ireland is required to take the necessary action to address the EDPB’s finding that Facebook is not entitled to carry out the Processing on the basis of Article 6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of the Article 65 Decision. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.

418. An administrative fine is hereby imposed, pursuant to Articles 58(2)(i) and 83 GDPR, addressed to Meta Ireland, in the amount of €180 million. For the avoidance of doubt, that fine reflects the infringements that were found to have occurred, as follows:

- a. In respect of the failure to provide sufficient information in relation to the processing operations carried out in purported reliance on Article 6(1)(b) GDPR, thereby infringing Articles 5(1)(a) and 13(1)(c) GDPR, a fine in the amount of €70 million is hereby imposed.

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<sup>344</sup> Letter dated 28 July 2022 from Meta Ireland to the DPC (in Inquiry IN-20-7-4), referencing financial information which is available at: <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-FourthQuarter-and-Full-Year-2021-Results/default.aspx>

- b. In respect of the failure to provide the information that was provided on the processing operations carried out in purported reliance on Article 6(1)(b) GDPR, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, thereby infringing Articles 5(1)(a) and 12(1) GDPR, a fine in the amount of €60 million is hereby imposed.
- c. In respect of the infringement of Article 6(1) GDPR (and taking into account the infringement of the Article 5(1)(a) fairness principle), a fine in the amount of €50 million is hereby imposed.

419. Meta Ireland has the right of an effective remedy as against this Decision, the details of which have been provided separately.

This Decision is addressed to:

Meta Platforms Ireland Limited  
4 Grand Canal Square  
Grand Canal Harbour  
Dublin 2

Dated the 31<sup>st</sup> day of December 2022

Decision-Maker for the Commission:

*[sent electronically, without signature]*

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Helen Dixon  
Commissioner for Data Protection

## Appendix 1 – Schedule 1

### 1 INTRODUCTION

#### a. Purpose of this Document

1. This document is the Schedule referred in the Draft Decision. This Schedule forms part of the Decision and, accordingly, must be read in conjunction with the Decision.
2. For the avoidance of doubt, this Schedule is a proposed integral and operative part of the Decision for the purposes of Article 60 and 65 GDPR. The previous division of material into two documents is entirely a structural choice, so as to enable a more exclusive focus on the substantive Complaint in the main document, while dealing with matters of a more procedural nature in this Schedule. It has been incorporated into the Decision itself as part of the finalisation process, prior to adoption.

### 2 CHRONOLOGY, PROCEDURAL AND SCOPE MATTERS PERTAINING TO THE INQUIRY

#### a. Procedural Background to the Inquiry

3. A complaint was lodged with the Belgian DPA on 25 May 2018, the date on which the GDPR came into operation, by NOYB, a verein (or association) under Austrian law, in respect of the processing of certain personal data by Meta Platforms Ireland Limited (“Meta Ireland”), then known as Facebook Ireland Limited (“Facebook”),<sup>345</sup> in the context of the Instagram service (the “Complaint”). The Complaint was lodged on behalf of a named Data Subject (the “Named Data Subject” or the “Data Subject”) in accordance with Article 80 GDPR. In general terms, the Complaint focussed on the requirement that (existing) registered users must accept the Instagram Terms of Use to access that service. In addition, the Complaint concerned the transparency of the information provided to Instagram users in respect of the legal basis of that processing. The Complaint was made against Meta Ireland on the basis that NOYB considered Meta Ireland to be the data controller in respect of the Instagram service.
4. The Complaint was transferred to the Data Protection Commission (the “Commission”) from the Belgian DPA on 31 May 2018. The Commission commenced an inquiry into this matter on 20 August 2018.

The Commission designated an investigator (the “Investigator”) to consider the issues raised in the Complaint and prepare a draft inquiry report (the “Draft Report”) which was issued to the parties on 20 May 2020. Following submissions from the parties, the Investigator also produced a final version of the inquiry report (the “Final Report”) which was issued to the parties on 18 January 2021. In considering the matters within this Complaint, I have relied on the facts as determined by the

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<sup>345</sup> I note in this respect that the Complaint was expressly made against Facebook Ireland Limited as that entity did not register a change of name to Meta Platforms Ireland Limited until 5 January 2022. Where references are made to either “Facebook” or “Meta Ireland”, this should be construed as referring to the same legal entity which is presently known as a “Meta Platforms Ireland Limited”.

Investigator in the Final Report. I have also had regard to the Investigator's views as set out in the Final Report and the entirety of the file relating to this matter.

5. Taking account of the above, I prepared a preliminary version of this Draft Decision and Schedule (the "Preliminary Draft") which set out my provisional views and findings in this matter, as the decisionmaker, in relation to (i) whether or not an infringement of the GDPR has occurred/is occurring, and (ii) the envisaged action to be taken by the Commission in respect of same. The Preliminary Draft was circulated to both NOYB and Meta Ireland (collectively the "Parties") on 23 December 2021. I received submissions from both Parties on 4 February 2022 and, in finalising the Draft Decision, I carefully considered these submissions and amended the Preliminary Draft accordingly.
6. On 1 April 2022, the Draft Decision was submitted by the Commission to other concerned supervisory authorities (the "CSAs", each one being a "CSA") (within the meaning of Article 4(22) GDPR), for their views, pursuant to Article 60 GDPR. The cross-border processing under examination in this Inquiry was such that all other EU/EEA supervisory authorities ("SAs, each one being an "SA") were engaged as supervisory authorities concerned ("CSAs") for the purpose of the cooperation process outlined in Article 60(3) of the GDPR. In response, the following CSAs raised objections to the Draft Decision:
  - a. The French SA (the "FR SA") raised an objection on 28 April 2022;
  - b. The Swedish SA (the "SE SA") raised an objection on 29 April 2022;
  - c. The Austrian SA (the "AT SA") raised an objection on 29 April 2022;
  - d. The Hungarian SA (the "HU SA") raised an objection on 29 April 2022;
  - e. The Finnish SA (the "FI SA") raised an objection on 29 April 2022;
  - f. The German SAs (the "DE SAs") raised an objection, submitted by the Hamburg DPA on 29 April 2022;
  - g. The Italian SA (the "IT SA") raised an objection on 29 April 2022;
  - h. The Norwegian SA (the "NO SA") raised an objection on 29 April 2022;
  - i. The Dutch SA (the "NL SA") raised an objection on 29 April 2022; and
  - j. The Spanish SA (the "ES SA") raised an objection on 29 April 2022.
7. In addition, the following comments were exchanged:
  - a. The Danish SA (the "DK SA") made a comment on 29 April 2022;
  - b. The Slovenian SA (the "SI SA") made a comment on 29 April 2022; and
  - c. The Hungarian SA (the "HU SA") made a comment on 29 April 2022.
8. Having considered the matters raised, the Commission, by way of a composite response memorandum dated 1 July 2022, set out its responses together with the compromise positions that it proposed to take in response to the various objections and comments. Ultimately, it was not possible to reach consensus with the CSAs on the subject-matter of the objections and, accordingly, the Commission

determined that it would not follow them. That being the case, the Commission referred the objections

to the Board for determination pursuant to the Article 65(1)(a) dispute resolution mechanism. In advance of doing so, the Commission invited Meta Ireland to exercise its right to be heard on all of the material that the Commission proposed to put before the Board. Meta Ireland exercised its right to be heard by way of its submissions dated 9 August 2022 (the “Article 65 Submissions”). The Board adopted its Article 65 Decision on 5 December 2022 and notified it to the Commission and all other CSAs on 8 December 2022. As per Article 65(1), the Board’s decision is binding upon the Commission. Accordingly, and as required by Article 65(6) of the GDPR, the Commission has now amended its Draft Decision, by way of this Decision, in order to take account of the Board’s determination of the various objections from the CSAs which it deemed to be “relevant and reasoned” for the purpose of Article 4(24) of the GDPR. As part of the amendment process, Meta Ireland was invited to exercise its right to be heard in relation to any matters in relation to which the Commission was required to make a final determination or, otherwise, exercise its own discretion. Meta Ireland exercised its right to be heard by way of its submissions furnished under cover of letter dated 19 December 2022 (“the Final Submissions”).

#### b. Legal Basis of the Decision

9. The Investigator in this case conducted the Inquiry under section 110 of the Data Protection Act 2018 (the “2018 Act”).
10. The decision-making process for inquiries conducted by the Commission is outlined in section 113(2)(a) of the 2018 Act. Additionally, section 113(3)(a) of the Act requires that the Commission must: consider the information obtained during the Inquiry; decide whether an infringement is occurring or has occurred; and if so, decide on the envisaged action (if any) to be taken in relation to the data controller. This function is performed by me in my role as the decision-maker. In so doing, I have carried out an independent assessment of all of the materials provided to me by the Investigator.
11. As stated above, the Inquiry was commenced pursuant to section 110 of the 2018 Act. By way of background in this regard, under Part 6 of the 2018 Act, the Commission has the power to commence an inquiry on several bases, including on foot of a complaint, or of its own volition.
12. I note that the Investigator, in his consideration of the material gathered during the initial stages of the Inquiry, was satisfied that Meta Ireland was a data controller in respect of the Instagram service.<sup>346</sup> The Investigator was also satisfied that the Commission was the lead supervisory authority (the “LSA”) as set out in the GDPR for the purposes of this matter on the basis that (i) Meta Ireland has its main establishment (for the purposes of the GDPR) in Ireland and (ii) that the processing at issue in the Complaint constitutes cross-border processing.<sup>347</sup> My consideration of these matters is below.

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<sup>346</sup> Final Inquiry Report dated 18 January 2021, at paras. 91 – 93.

<sup>347</sup> Final Inquiry Report dated 18 January 2021, at paras. 94 – 105.



c. Referral by the Belgium DPA

13. The Complaint was transferred to the Commission on the basis that the Commission was likely the LSA on the basis that (i) the Complaint concerns cross-border processing and (ii) Meta Ireland, as the data controller for the Instagram service, has its main establishment in Ireland. As I have noted, the Commission assessed the Complaint and, as the LSA, commenced the Inquiry under section 110 of the 2018 Act on 20 August 2018. The Parties were also notified of the commencement of the Inquiry on 20 August 2018.

d. Status of NOYB

14. As stated above, the Complaint was lodged by NOYB to the Belgian DPA on behalf of the Named Data Subject. For completeness, I note that the written Complaint provided a Belgian work address for the Named Data Subject.<sup>348</sup> Pursuant to Article 77 GDPR, an individual may lodge a complaint to any supervisory authority in respect of processing which that individual considers may amount to an infringement(s) of the GDPR.<sup>349</sup> In this context, NOYB is acting as a representative of a named individual in accordance with Article 80 GDPR, which states that:

*“The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects’ rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf...”*

15. For the purposes of assessing compliance with Article 80 GDPR, it is necessary to assess whether NOYB was a properly constituted not-for-profit body with objectives in the public interest and that was actively engaged in *“the field of the protection of data subject rights”*. The Investigator consulted NOYB’s website ([www.noyb.eu](http://www.noyb.eu)) and the Austrian Central Registry of Associations in his assessment of whether NOYB was a validly constituted non-profit entity.<sup>350</sup> The Investigator confirmed that NOYB was a *“verein”* (association) in Austrian law and had been formed prior to the date of the Complaint.<sup>351</sup> He also affirmed that Point 1 of NOYB’s Articles of Association stated that the association’s aims

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<sup>348</sup> Complaint made by NOYB in respect of the Instagram Service dated 25 May 2018 (the *“Complaint dated 25 May 2018”*), at para. 1.2.

<sup>349</sup> The language of Article 77 GDPR is open-ended in that it appears that there is no explicit limitation as to which supervisory authority a complaint may be made to. Nonetheless, Article 77 provides examples of appropriate supervisory authorities, including the supervisory authority in which the individual’s *“place of work”* is located in.

<sup>350</sup> See generally, Final Inquiry Report dated 18 January 2021, at paras. 107 – 110.

<sup>351</sup> Final Inquiry Report dated 18 January 2021, at para. 107.

included the “*protection and promotion of data protection rights, consumer rights, and the right to freedom of expression*”<sup>352</sup> and that NOYB’s website is active in providing commentary and information on campaigns in respect of data protection matters.<sup>353</sup> On the basis of these factors, he was satisfied that the criteria set out in Article 80 had been complied with.

16. Having regard to the Investigator’s assessment of this issue and NOYB’s Articles of Association, I am satisfied that that NOYB appears to be a non-profit body that is validly constituted in Austrian law, with objectives in the public interest and is active in the field of data protection. Nonetheless, I note in this regard that a formal determination as to whether NOYB is validly constituted as a matter of Austrian law is outside the scope of the Commission.

17. It is also necessary to consider whether NOYB has been mandated by the Named Data Subject in accordance with the requirements set out in Article 80(1) GDPR. First, I note that a document titled “Assignment of Representation” was annexed to the Complaint.<sup>354</sup> This document contains the name, place of work and signature of the Named Data Subject. While the mandate is undated, it clearly refers to the subject matter of the Complaint as it states that the Named Data Subject mandates NOYB:

*“to represent me in their case against Facebook Ireland Ltd over my forced consent to the updated privacy policy of Instagram that I clicked on to in May 2018.*

*In particular, I mandate noyb to present me and enforce my rights, arising in the context of the aforementioned case, by lodging a complaint before the competent supervisory authority and to exercise the rights referred to in Articles 77, 78 and 79 of the GDPR on my behalf, including taking any actions necessary to enforce those rights”*.<sup>355</sup>

18. In submissions on the Draft Report, NOYB stated that it “*is not limited in any respect when representing the complainant [and] ... the Complainant confirms that he endorses all submissions provided by noyb in the course of the present procedure*”.<sup>356</sup> While I agree that an entity mandated under Article 80 GDPR has certain discretion in formulating the scope of the initial complaint, I do not accept that the entity has unlimited powers to determine the direction of the resulting inquiry. Rather, it is my view that the nature of a mandate for the purposes of Article 80 GDPR cannot be altered *post hoc* after the complaint has been launched. .

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<sup>352</sup> Final Inquiry Report dated 18 January 2021, at para. 109.

<sup>353</sup> Final Inquiry Report dated 18 January 2021, at para. 110.

<sup>354</sup> See the Assignment of Representation under Article 80(1) of the General Data Protection Directive (GDPR), annexed to the Complaint.

<sup>355</sup> Assignment of Representation under Article 80(1) of the General Data Protection Directive (GDPR), annexed to the Complaint.

<sup>356</sup> NOYB’s Submissions on the Draft Inquiry Report dated 19 August 2020.

19. I am satisfied that, on a literal interpretation of the “Assignment of Representation”, NOYB has been given the authority to represent the Named Data Subject in relation to possible infringement(s) arising in the context of the updated (i.e. last revised on 19 April 2018) Instagram Terms of Use and/or Data Policy.
20. For completeness, I note Meta Ireland’s confirmation that the Named Data Subject is a registered user of the Instagram service.<sup>357</sup> I am therefore satisfied that the processing at issue relates to the Named Data Subject as required by Article 77 GDPR.
21. Accordingly, on the basis of the above, I am satisfied that NOYB was mandated by the Named Data Subject in accordance with the requirements of Article 80 GDPR.

e. Procedural Conduct of the Inquiry

22. As set out above, the Inquiry was commenced on 20 August 2018 for the purposes of examining and assessing the circumstances surrounding the Complaint as referred to the Commission by the Belgian DPA, with a view to ultimately facilitating a decision under section 113(2)(a) of the Act.
23. The Commission commenced an Inquiry into the matters complained of as it formed the view that one or more provisions of the GDPR and/or 2018 Act may have been contravened by Meta Ireland in respect of processing in the context of the Instagram service.<sup>358</sup> The Parties were notified on 20 August 2018 that the Inquiry had been commenced.<sup>359</sup> In the Notice of Commencement issued to Meta Ireland, the Commission included (1) a series of questions for Meta Ireland and (2) a copy of the Complaint, explaining that the scope of the Inquiry was limited to same. Following clarification, Meta Ireland responded to these questions by way of correspondence dated 28 September 2018, including several appendices.
24. The Investigator contacted NOYB by letter on 23 November 2018 and outlined the scope of the Inquiry. NOYB responded on 3 December 2018 and outlined a number of procedural concerns, including allegations of delay and bias on the part of the Commission, a failure of the Commission to respect fair procedures and disagreements as to the Investigator’s view on the scope of the Complaint. The Investigator responded to these concerns by letter dated 16 January 2019, strongly refuting these claims. In addition, a phone call between the Investigator and a representative of NOYB<sup>360</sup> took place on 26 January 2019 to further address these allegations.

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<sup>357</sup> See Meta Ireland’s Submissions dated 22 February 2019.

<sup>358</sup> Notice of Commencement dated 20 August 2018, at pp. 1 - 2.

<sup>359</sup> In respect of the notification to the Complainant, I note that the Commission issued the notification to the Belgian DPA (as the supervisory authority to which the Complaint was lodged) on 20 August 2018, who in turn informed the Complainant on 20 September 2018.

<sup>360</sup> In this regard, the phone call occurred between the Investigator and a representative from NOYB.

25. The Investigator wrote to Meta Ireland on 30 January 2019 to outline his views as to the scope of the Complaint and afford Meta Ireland the opportunity to provide submissions on the issues raised. This outline mirrored that which was communicated to NOYB on 23 November 2018. In a response dated 5 February 2019, Meta Ireland raised a number of procedural questions, in particular in respect of the mechanisms of the Article 60 process and the status of Meta Ireland's submissions dated 28 September 2018. In this regard, Meta Ireland also sought clarity on the confidentiality of the process and the extent to which information would be shared with other supervisory authorities.
26. The Investigator responded to Meta Ireland's procedural questions on 8 February 2019, confirming that Meta Ireland's submissions dated 28 September 2018 would be considered but only insofar as the submissions were relevant to the scope of the Complaint. The Investigator further stated that Meta Ireland's queries as to confidentiality would be addressed by way of separate communication. In an email dated 15 February 2019, Meta Ireland stated that it considered that the majority of its submissions dated 28 September 2018 fell outside the scope identified by the Investigator. In addition, Meta Ireland requested an extension of two days for submissions on the issues raised. In response, by email dated 15 February 2019, the Investigator granted the extension and requested that Meta Ireland identify, with specificity, the material in the submissions dated 28 September 2018, which it considered to be out of scope.
27. Meta Ireland sent its second set of submissions on 22 February 2019; this set of submissions related to the scope as identified by the Investigator. Meta Ireland included a marked-up copy of its submissions dated 28 September 2018, indicating which aspects of the submissions it considered to be (1) out of scope and/or (2) confidential.
28. The Investigator provided an update to NOYB on 26 February 2019, informing NOYB that Meta Ireland had made submissions on 22 February 2019 and that the Commission was presently considering the confidentiality of same. NOYB replied on 27 February 2019 and expressed concern that Meta Ireland's submissions could be considered confidential and to "*fundamentally object to any information in this procedure being shielded from us [as the Complainant]*". NOYB expressed concern that the submissions would be redacted and sought clarification on the role of the Belgian DPA. In addition, NOYB proactively offered to sign a non-disclosure agreement. NOYB sought an update on the Inquiry on 23 March 2019.
29. The Investigator wrote to NOYB on 28 March 2019, outlining the next steps in the inquiry process and informing NOYB that the material received in the course of the Inquiry would be provided to the Parties as annexes to the Draft Report. The Investigator provided an update as to the scope of the Complaint, reiterating the position he expressed in the letter to NOYB on 23 November 2018. In a short phone call with the Investigator on 1 April 2019, NOYB noted its disagreement as regards the procedural steps outlined by the Commission.
30. NOYB responded on 19 April 2019 by way of letter. In this response, NOYB expressed concern that the GDPR "*does not foresee the direct engagement with the Data Protection Commission*" as the

Complaint had been lodged with the Belgian DPA. NOYB further stated that, on their understanding of fair procedures, the relevant parties must be able to “*review the facts that were excluded from the evidence*” and queried whether any information received in the course of the Inquiry could be considered confidential. In addition, NOYB made further submissions on the scope of the Complaint.

31. The Investigator provided additional information on the next steps (mirroring the information provided to NOYB on 19 April 2019) to Meta Ireland by way of letter dated 5 June 2019. The Investigator also informed Meta Ireland that material collected in the course of the Inquiry which was relevant to the substance of the Complaint would be shared with the Parties when the Draft Report would be shared with same. He further noted that Meta Ireland would be provided the opportunity at another date to make submissions in respect of the disclosure of specific information to NOYB. Meta Ireland wrote to the Commission on 12 June 2019, reaffirming its earlier position that it be afforded the opportunity to make submissions as to confidentiality and/or commercial sensitivity prior to any material prepared by Meta Ireland being shared with NOYB.
32. On 24 February 2020, NOYB wrote to the Investigator and raised a number of procedural issues, including allegations of delay, “*unwieldy*” procedures and a failure to respect procedural rights by not sharing the materials with NOYB. The Investigator responded on 23 March 2020 and noted that NOYB would be afforded the opportunity to make submissions upon circulation of the Draft Report. The Investigator also provided an update as to the timeline of the Inquiry and outlined the next steps of same.
33. By letter dated 17 April 2020, the Investigator wrote to Meta Ireland to provide the opportunity for Meta Ireland to make submissions as to confidentiality over the material furnished in the course of the Inquiry, in particular, the submissions dated 28 September 2018 and 22 February 2019. Meta Ireland replied on 24 April 2020.
34. The Draft Report was circulated to the Parties on 20 May 2020. The Investigator also wrote to NOYB on 20 May 2020 to provide an update on same. NOYB informed the Commission, by way of letter dated 3 June 2020, that NOYB did not accept the Investigator’s responses in his letter dated 23 March 2020 to be adequate in addressing NOYB’s concerns.
35. Both Parties were granted extensions on the deadline for submissions on the Draft Report.<sup>404</sup> Meta Ireland provided the Investigator with its submissions on 22 June 2020. NOYB made their submissions on 19 August 2020, emphasising, in the covering email, their concerns as to procedural issues and an alleged failure by the Commission to provide “*all files of the case and all submissions of Facebook*”. NOYB also alleged that the submissions amounted to a “*supplemental complaint*”.
36. In the interim, on 25 May 2020, NOYB published an “*open letter to all DPAs*” (the “Open Letter”) which concerned several of the Commission’s complaint-based inquiries, including this Inquiry. In this letter, NOYB made a number of serious allegations against the Commission, including allegations of bias and

“*secret cooperation*” between the Commission and Meta Ireland and non-compliance with national

<sup>404404</sup> In this regard, Meta Ireland were granted an additional two days. As there was disagreement as to the language requirements of the Inquiry output (discussed further below), NOYB was given an additional two weeks after resolution of the disagreement.

procedural law (e.g. access to documents). NOYB also expressed concern with the scope of the investigation identified in the Draft Report and with the cooperation mechanism provided for the in GDPR. The EDPB responded to NOYB on 9 June 2020 in which it affirmed that the EDPB was “*committed to find solutions and address the challenges ahead where it lies within our competence*”. In essence, the EDPB noted and accepted the limitations on its competence in this regard.

37. As outlined above, the Final Report was transmitted to the Parties on 18 January 2021. The Parties were notified of the commencement of decision-making stage on 7 April 2021. The Preliminary Draft was circulated to the Parties on 23 December 2021. The Preliminary Draft was also transmitted to the Belgian DPA via the IMI on 23 December 2021.
38. On 29 December 2021, NOYB wrote to the Belgian DPA, copying the Commission, alleging procedural concerns and requesting (i) sight of all submissions in the Inquiry, (ii) the ability to make submissions in French and (iii) an oral hearing. The Commission replied to NOYB on 17 January 2022, responding to these requests.
39. Meta Ireland wrote to the Commission on 4 January 2022 seeking clarification on the confidentiality of the materials, to which the Commission responded on 5 January 2022. Meta Ireland sought additional clarification on 7 January 2022. On 27 January 2022, Meta Ireland further contacted the Commission to request that the inquiry process be paused until the resolution of similar matters raised in (i) a preliminary reference to the CJEU in respect of C-446/21 *Meta Ireland* and/or (ii) the Article 60 process in respect of IN-18-05-05 concerning NOYB and Meta Ireland. Meta Ireland restated this position in its submissions on the Preliminary Draft dated 4 February 2022 and alleged that CJEU jurisprudence on this matter precludes the Commission from adopting a decision when similar matters are pending.<sup>361</sup> Meta Ireland made further submissions on this point by way of letter dated 16 March 2022. The Commission responded to this request on 1 April 2022.
40. The Commission received submissions from Meta Ireland on 4 February 2022 on the Preliminary Draft. NOYB also transmitted its submissions on the Preliminary Draft to the Commission on 4 February 2022. In its accompanying cover letter, NOYB restated its allegations of bias and procedural concerns; in addition, NOYB requested that the submissions it made on the Preliminary Draft in respect of IN-1805-05 concerning NOYB and Meta Ireland also be considered its submissions for the purposes of this Inquiry.

### 3. Procedural Matters arising in the course of the Inquiry

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<sup>361</sup> Meta Ireland’s Submissions on the Preliminary Draft dated 4 February 2022, at paras. 2.1 – 2.3.

41. As I have set out, this is the Decision proposed to be made by the Commission, (at this point, I note that I am the sole member of the Commission) in accordance with section 113 of the 2018 Act. Section 113 of the 2018 Act provides as follows:

*(2) Where section 109 (4)(a) applies, the Commission shall—*

*(a) in accordance with subsection (3), make a draft decision in respect of the complaint (or, as the case may be, part of the complaint) and, where applicable, as to the envisaged action to be taken in relation to the controller or processor concerned, and*

*(b) in accordance with Article 60 and, where appropriate, Article 65, adopt its decision in respect of the complaint or, as the case may be, part of the complaint.*

*(3) In making a draft decision under subsection (2)(a), the Commission shall, where applicable, have regard to—*

*(a) the information obtained by the Commission in its examination of the complaint, including, where an inquiry has been conducted in respect of the complaint, the information obtained in the inquiry, and*

*(b) any draft for a decision that is submitted to the Commission by a supervisory authority in accordance with Article 56(4).*

*(4) Where the Commission adopts a decision under subsection (2)(b) to the effect that an infringement by the controller or processor concerned has occurred or is occurring, it shall, in addition, make a decision—*

*(a) where an inquiry has been conducted in respect of the complaint—*

*(i) as to whether a corrective power should be exercised in respect of the controller or processor concerned, and*

*(ii) where it decides to so exercise a corrective power, the corrective power that is to be exercised,*

42. In accordance with section 113, it is for me, as the sole member of the Commission, to: consider the information obtained in the course of the Inquiry; to decide whether an infringement is occurring or has occurred; and if so, to decide on the envisaged action in respect of the controller (if any). In so doing, I will carry out an independent assessment of all of the materials provided to me by the Investigator.

43. Given that the Commission is the lead supervisory authority under Article 56(1) GDPR for the purposes of the data processing operations at issue, I was obliged under section 113(2) and Article 60(3) GDPR to complete the Draft Decision to be provided to the CSAs, as defined in Article 4(22).
44. As set out above at paragraph 1, this is the Decision, having submitted the Draft Decision under Article 60(3) GDPR to the CSAs, and having taken account of the Article 65 Decision, as explained in the text of the Decision itself. The purpose of the Draft Schedule and the Preliminary Draft Decision were to allow the parties to make any submissions in respect of my provisional findings set out. This is the finalised version of the Schedule and Decision, as also explained in further detail in the Decision.

#### 4. Decision-Making Process and the Materials Considered

45. The Final Report was transmitted to me on 18 January 2021, together with the Investigator’s file, containing copies of all correspondence exchanged between the Investigator and the Parties; and copies of any submissions made by the Parties, including the submissions made by the Parties in respect of the Investigator’s Draft Report. A letter then issued to the Parties on 7 April 2021 to confirm the commencement of the decision-making process.
46. As set out above, a Preliminary Draft was circulated to the Parties for their submissions on 23 December 2021. The Parties provided the Commission with any such submissions on 4 February 2022. For the avoidance of doubt, I have had regard to all material contained in the file when preparing this Draft Decision.
47. A number of preliminary matters must be considered to ascertain whether the Commission is competent in respect of this Complaint. In this regard, I must be satisfied that Meta Ireland is the relevant controller for processing in the context of the Instagram service. If so, I must also be satisfied that the main or single establishment of Meta Ireland is in Ireland (i.e. that the Dublin office of Meta Ireland is the main or single establishment of Meta Ireland) and that the processing in connection with the Instagram service is cross-border in nature. In addition, I must also be satisfied that NOYB’s mandate is valid in accordance with the requirements of Article 80 GDPR.

##### a. Meta Ireland as Data Controller

48. Pursuant to Article 4(7) GDPR, the term “*data controller*”:

*“means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law”.*



49. The concept of the “controller” is broadly defined<sup>362</sup> and encompasses a “functional” or “factual” test.<sup>407</sup> In essence, I must be satisfied that, in the context of the specific processing at issue, Meta Ireland is “*the entity that actually exerts a decisive influence on the purposes and means of the processing*”.<sup>363</sup> In this regard, I also note that the EDPB is of the view that “*special attention*” must be given to the controllership assessment when an individual establishment may be processing personal data within a company group.<sup>364</sup>
50. First, I note that the Complaint was made against “Facebook Ireland Ltd.” (now known as “Meta Platforms Ireland Limited”), located at “4 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland”, as the “operator” of the Instagram application.<sup>365</sup> NOYB thereby identified Facebook (now Meta Ireland) as the relevant controller for the purposes of this Complaint; this was noted by Meta Ireland in their submissions dated 28 September 2018.<sup>366</sup>
51. In his assessment of the matter, the Investigator was of the view that Meta Ireland was the appropriate controller in respect of the processing at issue.<sup>367</sup> In this regard, I note that NOYB, in its submissions dated 19 August 2020 on the Draft Report, reserved its position in respect of controllership and asserted that “*the fact that the complaint is filed against Facebook Ireland does not mean that the Complainant ‘recognises the entity as the relevant data controller’*”.<sup>368</sup>
52. In considering the issue of whether Meta Ireland is the controller for the specific processing at issue in this Complaint, i.e. processing in the context of the Instagram application, I have first considered whether Meta Ireland is an appropriate entity as outlined in Article 4(7) GDPR. I subsequently considered whether Meta Ireland could be said to determine the “purposes and means” of processing the context of the Instagram service.
53. I note that “Facebook Ireland Limited” with the address “4 Grand Canal Square, Grand Canal Harbour, Dublin 2, Ireland” was registered with the Companies Registration Office (the “CRO”) as a private

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<sup>362</sup> As recognised by the CJEU: Case C-272/19 *VQ v Land Hessen* (ECJ, 9 July 2020), at para. 64. See also EDPB, Guidelines 07/2020 on the concepts of controller and processor in the GDPR (adopted 7 July 2021), at para 17. <sup>407</sup> EDPB, Guidelines 07/2020 on the concepts of controller and processor in the GDPR (adopted 7 July 2021), at para 21.

<sup>363</sup> EDPB, Guidelines 07/2020 on the concepts of controller and processor in the GDPR (adopted 7 July 2021), at para 30.

<sup>364</sup> EDPB, Guidelines 07/2020 on the concepts of controller and processor in the GDPR (adopted 7 July 2021), at para 17.

<sup>365</sup> Complaint, at p. 1.

<sup>366</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 3.2.

<sup>367</sup> Final Inquiry Report dated 18 January 2021, at para. 93.

<sup>368</sup> Complainant’s Submissions on the Draft Inquiry Report dated 19 August 2020 at pp. 16 – 17 (see section 1.12).

<sup>414</sup> See the Companies Registration Office: <https://core.cro.ie/e-commerce/company/495773> (accessed 30 August 2021).

company limited by shares on 6 October 2008.<sup>414</sup> I further note that, on 5 January 2022, a change of name from “Facebook Ireland Limited” to “Meta Platforms Ireland Limited” was registered with the CRO on 5 January 2022 and effective from 22 December 2021.<sup>369</sup> Accordingly, I am satisfied that Meta Ireland is a legal person as a matter of Irish law. I also am satisfied on the information available that the Instagram service is provided via Meta Ireland in the EU/EEA and that Instagram does not exist as an independent entity with separate legal personality from Meta Ireland.

54. With respect to whether Meta Ireland determines the “purposes and means” of processing in the context of the Instagram service, I have had regard to several factors. First, I note that Meta Ireland informed the Commission on 25 May 2018 that “Facebook Ireland Limited” is the data controller for the Instagram service in the EU.<sup>370</sup> Meta Ireland reaffirmed this position in their submissions dated 28 September 2018.<sup>371</sup>

55. Instagram’s Data Policy applicable at the date of the date of the Complaint (i.e. the Data Policy last revised 19 April 2018) states that:

*“The data controller responsible for your information is Facebook Ireland, which you can contact online, or by mail at:*

*Facebook Ireland Ltd.  
4 Grand Canal Square  
Grand Canal Harbour  
Dublin 2 Ireland”*.<sup>372</sup>

56. In addition, the Instagram Terms of Use at the date of the Complaint states that *“Instagram Service is one of the Facebook Products, provided to you by Facebook Ireland Limited. These Terms of Use therefore constitute an agreement between you and Facebook Ireland Limited”*.<sup>373</sup>

57. As regards the decision-making capacity of Meta Ireland in the context of the Instagram service, I note that in the submissions dated 28 September 2018, Meta Ireland further stated that:

*“Facebook Ireland is the service provider of the Instagram service in the EU and also determines the purposes and means of processing EU users’ data. It is the only entity with decision-making power regarding:*

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<sup>369</sup> See the Special Resolution to Change the Company Name (SR862231), available on the Companies Registration Office: <https://core.cro.ie/e-commerce/company/495773> (accessed 14 February 2022).

<sup>370</sup> Email from Meta Ireland to the Commission dated 25 May 2018 at 14:35.

<sup>371</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.2.

<sup>372</sup> Instagram Data Policy (last revised 19 April 2018).

<sup>373</sup> See Instagram’s Terms of Service (last revised 19 April 2018).

- *Setting policies governing how EU user data is processed;*
- *Deciding whether and how our products that involve processing of user data will be offered in the EU;*
- *Controlling the access to and use of EU user data; and*
- *Handling and resolving data-related inquiries and complaints from EU users of the Instagram service whether directly or indirectly via regulators”.*<sup>374</sup>

58. On the basis of the above, I am satisfied that Meta Ireland is a controller within the meaning of Article 4(7) GDPR for processing in the context of the Instagram service.

b. Competence of the Commission to Act as the Lead Supervisory Authority

59. In accordance with Article 56(1) GDPR, a supervisory authority is competent to act as the LSA where the (1) main or single establishment of the controller is located in the same jurisdiction as that authority and (2) the processing carried out by the controller is cross-border in nature. In assessing whether the Commission has competence to act as the LSA, I have considered both issues.

*Main or Single Establishment of Meta Ireland*

60. In determining whether the main or single establishment of Meta Ireland is located in Ireland, I considered two related issues: first, I considered whether Meta Ireland was a controller in respect of the processing at issue and, second, if so, whether Meta Ireland has its main or single establishment in Ireland. In respect of the first consideration, as outlined above in paragraphs 47 – 57. I am satisfied that Meta Ireland is a controller for the processing of personal data in the context of the Instagram service.

61. As regards the concepts of main or single establishment, I note that the term “establishment” is not defined in the substantive provisions of the GDPR. Nonetheless, Recital 22, which acts an interpretative aid, states that:

*“Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect”.*

62. In respect of “main establishment”, I note that Article 4(16) GDPR defines a controller’s main establishment as its place of “*central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union...*”.

63. This is further supported by Recital 36 to the GDPR which provides that

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<sup>374</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.4.

*“The main establishment of a controller in the Union should be the place of its central administration in the Union, unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller in the Union, in which case that other establishment should be considered to be the main establishment.”*

64. In this regard, I note that the Investigator was satisfied that *“the Dublin office of Facebook Ireland Limited is (at least) a single establishment of the controller in Ireland for the purposes of the GDPR”*.<sup>375</sup>

65. In submissions dated 28 September 2018, Meta Ireland restated its position that it considers the Dublin office of Meta Ireland to be the main establishment in respect of processing in the context of the Instagram service.<sup>376</sup> In this regard, Meta Ireland stated that:

*“Facebook Ireland’s Dublin office satisfies both strands of the ‘main establishment’ test set out in Article 4(16) of the GDPR as it is Facebook Ireland’s place of ‘central administration’ in the Union and the establishment where ‘decisions on the purposes and means of the processing of personal data are taken’ in relation to the Instagram service. Facebook Ireland’s governance, structures, processes, experience and significant resources means that it clearly ‘has the power to have such decisions implemented’”*.<sup>377</sup>

66. I also note that Meta Ireland provided extensive detail as to its personnel numbers in the Dublin office of Meta Ireland and information on the internal structure of Meta Ireland in respect of delivering the Instagram service.<sup>378</sup> In this regard, Meta Ireland stated:

*“Facebook Ireland has more than ██████ personnel in its headquarters in Dublin who manage, among other things, the operations and data processing relating to EU users of Instagram, including the analysis and fulfilment of those users’ rights, information security including user information security, engineering, user support, law enforcement response, data protection and privacy operations and policy and legal teams including, critically, the data protection teams. Facebook Ireland’s senior decision makers operate in cross-functional teams, which include representatives from its Legal, Policy, Law Enforcement Response, Community Operations, Information Security, and Privacy Operations. Many of these teams have designated contact points for issues related to Instagram EU user data, and some have dedicated personnel now specifically responsible for those functions supporting the Instagram service in the EU. For example, the Facebook Ireland data protection legal team and security team both now deal with all relevant issues relating to Instagram user data in the EU. Each of those teams also now have designated contact points for Instagram, who are responsible to ensure that all of the functions provided by those broader teams are leveraged for oversight and management of Instagram EU data. The DPO*

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<sup>375</sup> Final Inquiry Report dated 18 January 2021, at para. 100.

<sup>376</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.9.

<sup>377</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.9.

<sup>378</sup> Meta Ireland’s Submissions dated 28 September 2018, at para. 2.10.

*and his office provide oversight of these teams and their work. On a daily basis, Facebook Ireland's personnel are responsible for managing the personal data of EU users of the Instagram service and determining the means and purposes of processing this personal data, including collaborating to formulate Instagram user data processing policies and overseeing the implementation of these policies in respect of users of the Instagram service in the EU".*<sup>379</sup>

67. On the basis of the above, I am satisfied that the Dublin office of Meta Ireland makes decisions as to the purposes and means of processing in the context of the Instagram service. I further note that nothing has been brought to my attention to suggest that the position, in this regard, has changed since I considered it in the context of the preparation of the Preliminary Draft Decision.
68. Accordingly, I am satisfied that the Dublin office of Meta Ireland is the main establishment of Meta Ireland for the purposes of the GDPR. It is my view that Meta Ireland has its main establishment in Ireland in respect of the processing at issue in this Complaint.

#### *Cross-Border Processing*

69. I note that the Complaint has been transferred from the Belgian DPA to the Commission on the understanding that the processing at issue is cross-border in nature. Nonetheless, I consider it necessary, for completeness, to consider the matter.

70. Article 4(23) GDPR defines "cross-border processing" as follows:

*"(a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or*  
*(b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State."*

71. In submissions dated 28 September 2018, Meta Ireland stated that it "*provides the Instagram service to hundreds of millions of users across the European region and in doing so is engaged in cross-border processing pursuant to Article 4(23) GDPR*" and thus processing in this context is cross-border in nature.<sup>380</sup> Moreover, in both the Instagram Terms of Use and Data Policy applicable at the date of the Complaint, Meta Ireland stated that the Instagram service is a "*Global service*"<sup>381</sup> which is

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<sup>379</sup> Meta Ireland's Submissions dated 28 September 2018, at para. 2.10.

<sup>380</sup> Meta Ireland's Submissions dated 28 September 2018, at para. 2.8.

<sup>381</sup> Instagram Terms of Service (last revised 19 April 2018) under the subheading "Ensuring a stable global infrastructure for our Service".

provided “around the world”.<sup>382</sup> For completeness, I note that the Investigator was of the view that processing in the context of the Instagram service was cross-border in nature.

72. On the basis of the above, I am satisfied that the processing of personal data within the context of the Instagram service is cross-border in nature within the meaning of Article 4(23) GDPR.

*Conclusion of the Competence of the Commission to Act as LSA*

73. As it appears to me that Meta Ireland has its main establishment in Ireland and that the processing of personal data in the context of the Instagram service is cross-border in nature, I am satisfied that the Commission has competence, in accordance with the requirements of Article 56(1) GDPR, to act as the LSA for the purposes of this Complaint. I further note that nothing has been brought to my attention to suggest that the position, in this regard, has changed since I considered it in the context of the preparation of the Preliminary Draft Decision.

c. Issues in respect of Belgian Law

74. Another procedural issue arose which has underpinned NOYB’s submissions in respect of this Inquiry. In essence, this concerns the issue of which law ought to be applicable in respect of the Complaint. As outlined above, the Complaint was lodged with the Belgian DPA who subsequently transferred it to the Commission on the basis that the Commission was the competent authority (i.e. the LSA) in respect of this Complaint.
75. In submissions dated 19 August 2020, NOYB alleged that, as the Complaint had been lodged in Belgium and in accordance with the requirements of Belgian law, “*Belgian law remains applicable to the procedure*” and the Belgian DPA is the competent authority in respect of this Complaint.<sup>429</sup> In support of this argument, NOYB submitted that the provisions of the relevant Belgian legislation<sup>383</sup> are silent as to whether there is a change in procedure in circumstances wherein a Complaint is transferred from the Belgian DPA to another authority.<sup>431</sup> NOYB further alleged that “[t]he GDPR does not provide for the cooperation mechanism to deprive complainants from the procedure applicable in their jurisdiction” and that it would make “*little sense*” for certain procedural rules<sup>384</sup> to change after the Complaint has been lodged.<sup>433</sup> In essence, NOYB was of the view that, in making a decision in respect of a Complaint which originated in another Member State, I am bound to apply

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<sup>382</sup> Instagram Data Policy (last revised 19 April 2018) under the heading “How do we operate and transfer data as part of our global services” and the subheading “Sharing with Third-Party Partners” <sup>429</sup> NOYB’s Submissions dated 19 August 2020, at p. 7.

<sup>383</sup> Articles 55 and 56 of the Belgian Law of 3 December 2017 portant création de l’Autorité de protection des données. <sup>431</sup> NOYB’s Submissions dated 19 August 2020, at p. 7.

<sup>384</sup> In this regard, NOYB specifically refers to “*language, deadlines, role of the parties, appeal procedure, scope of the investigation and of the case, right to be heard*”: NOYB’s Submissions dated 19 August 2020, at p. 7. <sup>433</sup> NOYB’s Submissions dated 19 August 2020, at p. 7.

the national administrative and procedural law of that jurisdiction, Belgian law in this particular case.<sup>385</sup>

76. NOYB restated this issue in its submissions on the Preliminary Draft, taking the view that, as the Complainant was bound by certain procedural laws (i.e. Belgian law in this case), the Complaint therefore had to be interpreted by the Commission in accordance with that law.<sup>386</sup> It is NOYB's position that the Commission should have cooperated with the supervisory authority in which the Complaint was lodged (i.e. the Belgian DPA) to "*properly interpret the Complaint*".<sup>387</sup> I further note NOYB's assertion that the Commission "*seems to follow an archaic and purely nationalistic idea of international law*" and that is incorrect to find that the Commission "*must not interpret complaints, contracts or other legally relevant matters under the applicable law of another Member State*".<sup>388</sup>
77. For the avoidance of doubt, I emphasise that the Commission has cooperated in full with the Belgian DPA throughout this Inquiry.
78. In relation to the possible application of Belgian law, I note that NOYB has not identified any legal authority – either in Irish law or EU law – to support this position. Moreover, I have stated above that I am satisfied that the Commission is the LSA for the purposes of the GDPR. I note that each Member State is required by Article 51(1) GDPR to "*provide for one or more independent public authorities to be responsible for monitoring the application of this Regulation*". For completeness, I emphasise that the Belgian DPA has also stated that it considers the Commission to be the LSA for the purposes of this Inquiry.<sup>389</sup> I also note Recital 117 GDPR, an interpretive aid to the operative provision, which states that "*Member States should be able to establish more than one supervisory authority, to reflect their constitutional, organisational and administrative structure*" [my emphasis].
79. The 2018 Act governs the establishment of the Commission as a supervisory authority for the purposes of the GDPR.<sup>439</sup> The Commission's functions are outlined in section 12 of the 2018 Act;

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<sup>385</sup> NOYB's Submissions dated 19 August 2020, at p. 8.

<sup>386</sup> NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021, at p. 7. For completeness, while NOYB stated that these submissions are also to be considered the submissions for this Inquiry, it cannot be the case that the specifics of Austrian law are applicable in this Inquiry as it was lodged with the Belgian DPA in Belgium.

<sup>387</sup> NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021, at p. 7. As with the footnote above, I have read the references to Austrian law and the Austrian DPA as Belgian law and the Belgian DPA respectively for the purposes of this Inquiry.

<sup>388</sup> NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021, at p. 7. As with the footnote above, I have read the references to Austrian law and the Austrian DPA as Belgian law and the Belgian DPA respectively for the purposes of this Inquiry.

<sup>389</sup> Email dated 18 January 2022 (16:26) from the Belgian DPA to the Commission.

<sup>439</sup> Section 11 of the 2018 Act; see also s. 10 of the 2018 Act.

section 12 does not provide that the Commission is competent as regards national administrative or procedural law other than that in Ireland.

80. The powers of the Commission must be limited to those conferred on it by law. The Commission is tasked with encouraging, monitoring and enforcing compliance with the GDPR. In that context it is, like all other public authorities in the State, bound by the administrative law of Ireland and EU law, including EU law on fair procedures and the European Charter of Fundamental Rights and Freedoms. Further, as I stated above, Article 56(1) GDPR sets out that “*the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority*”.
81. The Commission therefore derives its legal authority to handle the Complaint from the GDPR and the 2018 Act, and is, in that regard, bound by the legal orders set out above. The Commission is not bound, nor must it have regard to, the procedural and/or administrative law of Belgium, or of any other jurisdiction, even in circumstances where a Complaint was initially lodged in that jurisdiction. Moreover, it seems to me that not only does the national procedural and/or administrative law of Belgium not bind the Commission, but that any attempt by the Commission to apply such law would be plainly *ultra vires* the powers conferred on the Commission by law.

#### d. Consumer Protection and Competition Authorities

82. The Investigator informed NOYB by letter dated 16 January 2019 that the Commission does not have competence to investigate matters pertaining to competition or consumer law.<sup>390</sup> Therefore, the Investigator provided the relevant competition<sup>391</sup> and consumer<sup>392</sup> law authorities with a partially redacted copy of the Complaint (published on the noyb.eu website) for consideration of matters which may fall within their competence.<sup>393</sup>
83. In submissions on the Draft Report, NOYB expressed “*astonishment*” that the Commission had referred matters relating to competition and consumer law to the relevant regulatory authorities.<sup>394</sup> NOYB sought sight of any and all communication in this respect and submitted that the referral to other regulatory authorities was not appropriate as the Commission had competence to consider the entirety of the Complaint.<sup>395</sup>

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<sup>390</sup> Letter from the Commission to NOYB dated 16 January 2019, at p. 5.

<sup>391</sup> The Irish Competition and Consumer Protection Commission (CCPC), Belgian Competition Authority, and the European Commission Directorate General for Competition (DG COMP).

<sup>392</sup> Irish Competition and Consumer Protection Commission (CCPC), Consumer Protection Division of the Belgian Federal Public Service Economy, S.M.E.s, Self-employed and Energy, and the European Commission Directorate General for Justice and Consumers (DG JUST).

<sup>393</sup> For further detail, see Final Inquiry Report dated 18 January 2021, at para. 389.

<sup>394</sup> NOYB’s Submissions dated 19 August 2020, at p. 15.

<sup>395</sup> NOYB’s Submissions dated 19 August 2020, at p. 16.



84. In this regard, I emphasise that the Commission’s competence is limited to matters pertaining to data protection. Accordingly, the Commission cannot consider issues which relate to competition or consumer law. Therefore, I am satisfied that the Investigator was correct in referring the appropriate matters to the relevant authorities.

e. The Right to be Heard and Access to the Complete File

85. In the course of the Inquiry, NOYB also submitted that *“both parties have to receive all files, documents and submissions before a DPA to be able to defend their legal positions”*.<sup>396</sup> In this regard, it should also be noted that NOYB has expressed concern that not *“all documents were communicated to noyb”*.<sup>397</sup> In particular, NOYB requested that *“all communication with Facebook concerning this case (no matter if in writing or orally) were recorded and disclosed to us”*.<sup>398</sup> This matter is linked to NOYB’s submission that the Commission is bound to apply Belgian administrative and procedural law (which I have considered above) as NOYB relies on Belgian law<sup>399</sup> to support the argument that NOYB, as a party to the procedure, is entitled to access to the entire file in respect of the Complaint and Inquiry.<sup>400</sup>

86. In response to NOYB’s request for access to the complete file, the Investigator correctly informed NOYB by way of letter dated 16 January 2019 that *“there is no statutory right of access to the complete inquiry file under Irish law”* and that the parties to the Complaint would be provided with the material information and documents as appropriate to ensure the right to be heard.<sup>401</sup> In the Preliminary Draft, I noted my agreement with the Investigator in this matter.

87. In response to the Preliminary Draft, NOYB wrote to the Belgian DPA on 29 December 2021, alleging that the Commission *“is (again) withholding crucial documents from the complainant and thereby violates [the] right to good administration including the right to be heard, and the right to access documents”*.<sup>402</sup> Further, in submissions on the Preliminary Draft dated 4 February 2022, NOYB reiterated these claims and requested *“full access to all submissions, exchanges and documentation”*.<sup>403</sup> There is no factual basis for this allegation; as the Commission stated by way of letter dated 17 January 2022, NOYB has been provided with the submissions made by Meta Ireland on all of the substantive issues in this Inquiry.<sup>404</sup> To this I would add that NOYB has not identified,

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<sup>396</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 3.

<sup>397</sup> NOYB’s Submissions dated 19 August 2020, at p. 8.

<sup>398</sup> NOYB’s Submissions dated 19 August 2020, at p. 8.

<sup>399</sup> Article 95(3) of the Belgian Law of 3 December 2017 portant création de l’Autorité de protection des données.

<sup>400</sup> NOYB Submissions dated 19 August 2020, at p. 8.

<sup>401</sup> Letter from the Commission to NOYB dated 16 January 2019, at p. 5.

<sup>402</sup> Letter from NOYB to the Belgian DPA dated 29 December 2021, at p. 1.

<sup>403</sup> NOYB’s Submissions dated 4 February 2022, at p. 1.

<sup>404</sup> Letter from the Commission to NOYB dated 17 January 2022, at p. 3.

with any degree of specificity, which provision of Irish law – or indeed EU law – it relies on to support its position that it is entitled to full access to the file. Rather, as I have noted above, this argument appears to be predicated on Belgian law being applicable in the within proceedings.

88. For reasons I have outlined above, it cannot be the case that the Commission is bound to apply Belgian law. As there seems to me to be no authority to the contrary, I am satisfied that the Commission furnished NOYB with sufficient information and material to ensure that they could effectively discharge their right to be heard. It is on this basis that I agree with the Investigator on this issue and do not propose to consider it further.

f. Language of the Procedure

89. NOYB also expressed concern with the language (i.e. English) in which the Inquiry material was issued to it,<sup>405</sup> despite the fact that the Complaint lodged with the Belgian DPA contained English, French and German versions. In essence, NOYB's position was that, as the Complaint had been lodged with the Belgian DPA in the French language, any Inquiry output should be in French. As the supervisory authority in which the Complaint was lodged, the issue of translation of the Inquiry output is a matter for the Belgian DPA. The Belgian DPA informed NOYB on 8 July 2020 that a French translation of the Draft Report would not be provided.

90. NOYB also expressed concern about language in the course of the Inquiry. In this regard, NOYB stated that:

*“noyb was required to file the present submissions in English, although the complaint was filed in French - with an unofficial translation in German and English by noyb for the convenience of the DPAs involved - despite noyb's request to the DPAs to receive a translation of the inquiry report in French before making its submission. This request was denied by both the DPC and the APD on the basis that some exchanges had already taken place in English with noyb.”*<sup>406</sup>

91. NOYB further noted that the English version of the Complaint should be considered an “informal” translation as it was a “machine translation”.<sup>407</sup> NOYB expressed particular concern that the Belgian DPA chose to conduct the procedure in English and did not translate the inquiry reports into the language of the Named Data Subject.<sup>408</sup> For completeness, I note that I issued the Preliminary Draft to both NOYB and the Belgian DPA in English. NOYB made additional submissions on this point.

92. Indeed, by way of letter to the Belgian DPA on 29 December 2021, NOYB expressed concern that the Preliminary Draft and Schedule were provided in English as *“this would cause procedural problems in*

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<sup>405</sup> See, for example, the email from NOYB to the Commission on 19 June 2020 at 18:41.

<sup>406</sup> NOYB's Submissions dated 19 August 2020, at pp. 9–11.

<sup>407</sup> NOYB's Submissions dated 19 August 2020, at p. 11.

<sup>408</sup> NOYB's Submissions dated 19 August 2020, at p. 11.

*the case of an appeal before the Belgian courts*".<sup>409</sup> In this respect, I note that NOYB did not identify with specificity any such "procedural problems". NOYB also indicated in its submissions on the Preliminary Draft that this may mean that "*this document may not be seen as properly served under the relevant national legislation*".<sup>410</sup>

93. The Commission responded to these allegations on 17 January 2022, reiterating the position that, as English is the language of the Commission, as LSA, it is also the language of this Inquiry.<sup>411</sup> Moreover, while the supervisory authority in which the Complaint was first filed may choose to translate any such documents, the Belgian DPA has decided not to do so in this Inquiry.<sup>412</sup> To this, I would add that the submissions in respect of the service of documents purport to concern Belgian law which, as I have outlined above, the Commission is not competent to apply and interpret.
94. In addition, in respect of the claim that the Commission is required to translate any documents it prepares in the course of an inquiry or decision-making process, I emphasise that, as a public body, the Commission may only be required to provide official publications in English and/or Irish. Therefore, it was appropriate that the Commission prepared and transmitted the inquiry reports and the Preliminary Draft - and indeed this Draft Decision – in English.

#### g. Allegations of Bias

95. In the letter dated 3 December 2018, NOYB raised a number of procedural concerns with the Commission. In particular, NOYB made an allegation of bias against the Commission.<sup>413</sup> In this regard, NOYB cited the rule against bias in Irish law and Belgian law<sup>414</sup> and alleged that the rule had been infringed in this case as Meta Ireland developed the Terms of Use and Data Policy in the course of engagement with the Commission's consultation functions.<sup>415</sup> NOYB did not identify, with specificity, the legal authority for these rules as a matter of Irish or Belgian law. I further note that NOYB did not outline the applicable legal test(s) for bias or explain how these tests have been satisfied in this context.
96. Instead, NOYB alleged that by engaging with Meta Ireland in the course of the consultation functions, the Commission had given "*approval*" to Meta Ireland as to the lawfulness of the Terms of Use and Data Policy.<sup>416</sup> To support this claim, NOYB referred to proceedings before the Vienna Regional Court

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<sup>409</sup> Letter from NOYB to the Belgian DPA on 29 December 2021, at p. 1.

<sup>410</sup> NOYB's Submissions on the Preliminary Draft dated 4 February 2022, at p. 1.

<sup>411</sup> Letter from the Commission to NOYB on 17 January 2022, at p. 3.

<sup>412</sup> Letter from the Commission to NOYB on 17 January 2022, at p. 3.

<sup>413</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 2.

<sup>414</sup> In this regard, I note that NOYB did not identify with specificity the legal authority for these rules.

<sup>415</sup> Letter from NOYB to the Commission dated 3 December 2018, at pp. 2 - 3.

<sup>416</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 1.

for Civil Matters in Austria, to which the Commission was not party to.<sup>417</sup> In this regard, NOYB stated that the consultation process

*“does not just raise questions about your claim that you have to “investigate” and “inquire” this matter – when in fact you have already negotiated with the Facebook Group about these legal and factual questions between 2017 and 2018, but raises issues about an obvious bias of a decision maker that has previously approved the criticized mechanism”*.<sup>418</sup>

97. NOYB did not substantiate this serious allegation of bias with factual evidence that the Commission approved the Instagram Terms of Use and Data Policy. Rather, as I have already stated, this allegation of bias is unfounded as there is a functional separation between the Commission’s consultation, investigative and decision-making functions. It is made clear to all participants who engage in a consultation exercise(s) with the Commission that such engagement is not an endorsement of GDPR compliance.<sup>419</sup> The Investigator informed Meta Ireland of this distinction.<sup>420</sup>
98. In response to the initial allegations of bias, the Investigator correctly informed NOYB that “[a]t no time in the course of its engagement with Facebook - or any other organisation which sought to consult with the DPC in relation to its GDPR preparations - did the DPC approve, jointly develop, endorse, consent to, or negotiate on the processing operations of Facebook”.<sup>421</sup> The Investigator further stated that the consultation process only provides “high level feedback” to controllers and formed part of the Commission’s statutory obligations in promoting awareness of GDPR obligations.<sup>422</sup> I am satisfied that the Investigator was correct in his assessment of this matter.
99. NOYB made further allegations of bias by the Commission in the Open Letter dated 25 May 2020, alleging that there was “secret cooperation” between the Commission and Meta Ireland and that “the DPC has maneuvered [sic] itself into a situation where it is structurally biased because it is essentially reviewing its own legal advice to Facebook on how to bypass Article 6(1)(a) GDPR”.<sup>423</sup>

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<sup>417</sup> Case 3Cg52/14k at the LGfZRS Wien; according to NOYB, Meta Ireland stated on 20 November 2018 that the “legal basis for the processing of data under GDPR was developed under extended regulatory involvement by the DPC in multiple personal meetings between November 2017 and July 2018”: see Letter from NOYB to the Commission dated 3 December 2018, at pp. 1 - 2.

<sup>418</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 2.

<sup>419</sup> NOYB was informed of this fact; see, Letter from the Commission to NOYB dated 16 January 2019, at p. 3.

<sup>420</sup> Letter from the Commission to Meta Ireland dated 30 January 2019, at p. 1.

<sup>421</sup> Letter from the Commission to NOYB dated 16 January 2019, at p. 3.

<sup>422</sup> In this regard, the Investigator correctly stated that the Data Protection Acts 1988 and 2003, the legislative regime at the time the consultations took place (i.e. in 2017 and 2018), provided for such consultations. This consultation function is also provided for in the GDPR and 2018 Act: Letter from the Commission to NOYB dated 16 January 2019, at p. 3.

<sup>423</sup> Letter from NOYB to all DPAs dated 25 May 2020, at p. 3.

100. NOYB restated its allegations of bias in the submissions on the Draft Report dated 19 August 2020. Indeed, NOYB stated that:

*“Since Facebook’s submission explicitly mentions that the Irish DPC discussed the issues at the core of the complaint with Facebook in ten sessions (e.g. page 2 of the Facebook submission of 28 September 2018), the problem of bias and lack of independence of the DPA is once again raised.*

*It is impossible to imagine that a DPA would make use of its corrective powers against a controller whose behaviour was already discussed and approved by the same authority. We have strong reservations about the independence of a DPA adopting such practices, which is at odds with Article 52 GDPR and 43 LAPD).*

*We do not yet know how the DPC or the APD intend to address this problem and we expressly reserve the right to appeal any decision that would be adopted by the DPC, given that they have met with Facebook and discussed the matter in a secret meeting”.*<sup>424</sup>

101. Following the provision of a copy of the relevant parts of the Preliminary Draft to NOYB on 23 December 2021, NOYB reiterated these allegations of bias. In particular, NOYB referred to “disclosures” made on its website, noyb.eu, on 4 December 2021 to support its assertion that the “DPC is biased in relation to the case as it (A) met with Facebook more [sic] at least 10 times between November 2017 and the coming into force of the GDPR, (B) the DPC then tried to push the consent bypass into EDPB Guidelines and (C) the DPC then tried to delay the publication of the deadline, once the EDPB rejected the joint approach of Facebook and the DPC” [footnotes omitted].<sup>425</sup> NOYB also alleged that the position I took in the Preliminary Draft “ignores” both (i) its submissions and (ii) the relevant and reasoned objections made by CSAs in IN-18-05-05 concerning NOYB and Meta Ireland.<sup>426</sup>

102. I will address the latter first. While I accept that, in the Draft Decision, I had taken a similar approach in IN-18-05-05, this was necessitated by the fact that NOYB submitted a virtually identical complaint in both inquiries and, when considering similar issues, I must ensure consistency and coherence with prior decisions. I would further add that, given that both complaints concern the same group of companies (i.e. Meta Platforms), a degree of similarity is inevitable. Notwithstanding this, I strongly refute the allegation that I have “ignored” the positions of either NOYB or the CSAs, as expressed in IN-18-05-05. Indeed, in preparing the Draft Decision, I carefully considered these submissions.

103. In respect of the serious allegation of bias, NOYB also restated its position that the Commission “has also never provided any evidence, memo or other evidence to substantiate its claims that these meetings did not have the substance that Facebook alleged before the Austrian courts” to support its

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<sup>424</sup> NOYB’s Submissions dated 19 August 2020, at p. 16.

<sup>425</sup> NOYB’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 1.

<sup>426</sup> NOYB’s Submissions on the Preliminary Draft dated 4 February 2022, at p. 2.

assertions of bias.<sup>427</sup> NOYB further stated that the Commission should have demanded a correction from Meta Ireland and implied that the Commission's failure to do so further supported its allegations of bias.<sup>478</sup> It simply cannot be the case that the Commission's decision to not "demand a correction" is indicative of bias by the Commission.

104. For the avoidance of doubt, I confirm that the Commission's consultation function is distinct from both its inquiry and decision-making functions. I further emphasise that the consultation functions are not an endorsement or approval of a controller or processor's compliance with the GDPR. It is factually not the case that the Commission endorsed or approved the Instagram Terms of Use and Data Policy that were in place at the time of the Complaint, or indeed of any other organisation. Moreover, irrespective of any feedback that may or may not have been provided to Meta Ireland, or any other organisation, the Commission always emphasises that the consultation function is entirely distinct from any statutory inquiries, investigations, or decisions of the Commission. I also emphasise that this decision-making process is also functionally independent of the procedure conducted by the Investigator that led to the Final Report, just as the statutory inquiries are functionally independent from any and all consultations with the Commission. The factual premise of the allegation is incorrect and the test for bias has not been met.

105. I am therefore satisfied that fair procedures have been followed in this and every regard thus far throughout the Inquiry.

## 5. Scope of the Complaint

### a. Procedural Issues Arising in respect of the Scope of the Complaint

106. As outlined above, the Inquiry is complaint-based and its scope was defined as an examination as to "*whether or not Facebook as data controller for Instagram has discharged its obligations in connection with the subject matter of the Complaint and determine whether or not any provision(s) of the Act and/or the GDPR has been contravened by Facebook as data controller for Instagram in this context*".<sup>428</sup> In this regard, I note that the scope of the Inquiry was defined by reference to the Complaint. Accordingly, the scope or parameters of the Complaint determined the scope of the resulting Inquiry.

107. In the course of the Inquiry, a disagreement as to the scope of the Complaint arose between NOYB and the Investigator, such that NOYB alleged that the right to fair procedures had not been respected. In a letter dated 3 December 2018, NOYB stated that the Complaint was "*obviously not limited to the issues you [i.e. the Investigator] identified*".<sup>429</sup> While NOYB accepted that the Commission could

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<sup>427</sup> NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021, at p. 8.

<sup>478</sup> NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021, at p. 8.

<sup>428</sup> Notice of Commencement of Inquiry dated 20 August 2018, at para. 7.

<sup>429</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 4.

prioritise certain aspects of the Complaint, NOYB asserted that “[i]t cannot be the case that a complaint has “one shot”, while the controller can freely maneuver [sic] in the response and does not have to expect any further question or counterargument by the complainant”.<sup>430</sup>

108. By letter dated 28 March 2018, the Investigator provided further information to NOYB as regards the scope of the Complaint, noting his view that it “*primarily relates to the lawful basis for processing personal data in connection with the Instagram service*”.<sup>431</sup> In this regard, the Investigator considered the Complaint to concern two issues: first, whether the processing of personal data in connection with the Instagram Terms of Service and/or Data Policy was consent for the purposes of Article 6(1)(a) GDPR and Article 9(2)(a); and second, whether such consent was lawful.<sup>432</sup>

109. In response, NOYB stated that it “*reserve[d] the right to amend our arguments should one of the controllers seek to depart from the factual or legal premises our complaints were based on*”.<sup>433</sup> In respect of the substantive issues identified by the Investigator, NOYB submitted that the “*core issue is clearly that the much stricter provisions on valid ‘consent’ under GDPR cannot be bypassed by simply moving the consent element into terms and conditions*”.<sup>434</sup> I note, for completeness, that NOYB raised additional allegations concerning the scope of the Inquiry in the Open Letter on 25 May 2020.

110. In the Draft Report, the Investigator relied on a statement in the Complaint which read:

*“For practical reasons, the scope of this complaint is explicitly limited to any processing operations that are wholly or partly based on Article 6(1)(a) and/or Article 9(2)(a) of the GDPR. Our current understanding is, that these are used as bases for all processing operations described in the controller’s privacy policy...”*<sup>435436</sup>

111. Having outlined the scope, NOYB added that “[n]evertheless, nothing in this complaint shall indicate that other legal bases the controller may rely on are not equally invalid or may not be equally the subject of subsequent legal actions.”<sup>437</sup> This qualifying remark, while alluding to the fact that NOYB may have other views in relation to other legal bases for data processing carried out by Meta Ireland (within the context of the Instagram service), is evidently not one that describes the character of the Complaint in question. While such a remark clearly refers to hypothetical positions NOYB may have

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<sup>430</sup> Letter from NOYB to the Commission dated 3 December 2018, at p. 3.

<sup>431</sup> Letter from NOYB to the Complainant dated 28 March 2019, at p. 3.

<sup>432</sup> Letter from NOYB to the Complainant dated 28 March 2019, at pp. 3 – 5.

<sup>433</sup> Letter from NOYB to the Commission dated 19 April 2019, at p. 2. For completeness, I note that this letter was drafted in the context of three distinct inquiries which concern similar complaints made by NOYB in respect of three different processing operations/controllers.

<sup>434</sup> Letter from NOYB to the Commission dated 19 April 2019, at p. 2.

<sup>435</sup> Final Inquiry Report dated 18 January 2021, at para. 40, referring to the Complaint made on 25 May 2018, at para.

<sup>436</sup> .6.

<sup>437</sup> Complaint made on 25 May 2018, at para. 1.6.

or take in the future, it cannot alter the limiting character of the preceding statement in and of itself. It instead clarifies that NOYB reserved its position in respect of any other legal bases on which Meta Ireland may or may not rely.

112. The Investigator, carefully considering the Complaint and taking an objective reading,<sup>438</sup> identified the following four issues as falling within the scope of the Complaint:

- Issue (a): whether the acceptance of the Terms of Use and/or Data Policy was an act of consent;
- Issue (b): whether Meta Ireland could lawfully rely on necessity for the performance of a contract to process data arising out of the data subject's acceptance of those same documents;
- Issue (c): Whether Meta Ireland misled and/or misrepresented the legal basis for processing this data; and
- Issue (d): Whether Meta Ireland failed to provide the necessary information regarding its legal basis for processing this data.

113. In submissions dated 19 August 2020 on the Draft Inquiry, NOYB asserted that (i) a Complainant could "adapt" the Complaint as there "*is no prohibition on filing new submissions*" and (ii), in the alternative, the contents of those submissions amounted to an "*additional supplemental complaint*" as provided for in Article 47 GDPR.<sup>439</sup>

114. In response to NOYB's allegations, Meta Ireland submitted that:

*"The Complainant has stated [in the Complaint] 'the scope of this complaint is explicitly limited to any processing operations that are wholly or partly based on Article 6(1)(a) and/or Article 9(2)(a) of the GDPR'. As a result, processing pursuant to section 1 of the Terms of Service [sic] falls outside of the Complaint and this Inquiry, given it is not based on Article 6(1)(a) or 9(2)(a)".*<sup>440</sup>

115. While the Investigator carefully considered these submissions, he did not revise his view as to the scope of the Complaint.<sup>441</sup> I should also note, in this regard, that Meta Ireland contended that the scope of the Complaint should be limited to a consideration of processing which is objectively based on consent.<sup>442</sup> The Investigator found that it was not necessary to engage in a factual "*wide-ranging trawl*" of each one of Meta Ireland's processing operations, but instead to carry out a legal and factual

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<sup>438</sup> See the Final Inquiry Report dated 19 January 2021, at para. 53.

<sup>439</sup> NOYB's Submissions on the Draft Inquiry Report dated 19 August 2020, at pp. 12 – 13.

<sup>440</sup> Meta Ireland's Submission dated 22 February 2019, at para. 2.12.

<sup>441</sup> See the Final Inquiry Report dated 19 January 2021, at para. 86.

<sup>442</sup> Meta Ireland's Submissions on the Draft Inquiry Report dated 22 June 2020, at para. 1.3(D).



analysis based on the objective content of the Complaint itself.<sup>443</sup> This was based simply on an assessment of the content of the Complaint.

116. While I acknowledge that NOYB made additional submissions on the substantive position I expressed in the Preliminary Draft,<sup>444</sup> it is appropriate, I think, to assess at this juncture whether NOYB's specific allegations of procedural unfairness in how this was addressed by the Commission thus far have merit. In the Open Letter, NOYB alleged (albeit in the context of a related inquiry) that "*the Investigator departed from the applications that were made in accordance with [Belgian] procedural law and decided to investigate only certain elements of our complaint and to reinterpret our requests.*"<sup>495</sup> Taking a broad reading of NOYB's submissions on the Preliminary Draft,<sup>445</sup> NOYB restated this concern in those submissions.
117. I do not agree that this is an accurate or fair representation of what has taken place. As I (and indeed the Investigator) have set out, Belgian – or any other national law other than Irish law – procedural law does not apply in respect of the activities and/or functions of the Commission. I therefore, do not accept that there is, in principle, a procedural defect in limiting the scope of a complaint-based inquiry to the objective contents of the very Complaint that led the Commission to conduct an Inquiry. As well as conforming to section 113 of the 2018 Act (set out earlier in this Schedule), this approach is perfectly logical.
118. NOYB's arguments in relation to any alleged procedural defects in the manner in which the scope of the Complaint is to be determined, i.e. by the objective content of the Complaint, are based on Belgian law, and on the LAPD, in particular. Insofar as that those arguments are based on Belgian law, for reasons already set out and taking into account the competence of the Commission, the Commission cannot consider those arguments, save to the extent that they raise issues of either Irish or EU law.
119. Moreover, the decision to conduct a complaint-based Inquiry arising out of the contents of a Complaint seems to me to be a perfectly logical approach. The alternative would be an open-ended procedure, where the content of a "complaint" would crystallise at some unspecified future date. The inherent problem with such an approach is that it would not amount to an inquiry based on the Complaint which was lodged with the Commission, but would instead be an inquiry directed by NOYB, with its subject matter and steps dictated on an evolving and ongoing basis by NOYB. Furthermore, it is unclear how it could be said that such an approach constitutes a complaint that concerns

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<sup>443</sup> Final Inquiry Report dated 18 January 2021, at para. 57.

<sup>444</sup> See NOYB's Submissions on the Preliminary Draft in Inquiry-IN-18-05-05 dated 11 June 2021, at pp. 8 – 10.

<sup>495</sup> Letter from NOYB to all DPAs dated 25 May 2020, at p. 6.

<sup>445</sup> Again, as NOYB have requested for its submissions on the Preliminary Draft in Inquiry-IN-18-05-05 dated 11 June 2021 to be read as its submissions for this Inquiry, there are certain arguments which are not, in a literal sense, applicable to this Inquiry. In particular, I refer to submissions made on Austrian law in this regard.

personal data relating to a complainant. This would presumably only occur once a complainant is satisfied of receipt of all information they might require, and has been afforded the opportunity to amend the complaint itself based on the submissions of the other party.

120. The unfairness that could arise from such an approach stems from the fact that it would, in effect, enable a form of *post-hoc* amendment to an existing complaint over the course of an indefinite period of time, which could only come to an end at a time and in a manner of the complainant's choosing. This would not only amount to a fundamentally one-sided approach, but would also alter the character of an inquiry to the extent that it could no longer be described as "complaint-based", but rather "complainant-led". Such a request following a Complaint that the Commission would consider a series of extremely broad requests to fundamentally alter an inquiry and deviate from the initial Complaint it had begun to investigate is therefore procedurally problematic. NOYB has pointed to no legal provision that mandates this, aside from assertions made in relation to Belgian law that have already been addressed herein.
121. I would add that this also applies to aspects of the Complaint that either reserve NOYB's position or express views on hypothetical investigative and/or corrective powers that, in NOYB's personal view, the Commission should exercise. I see no breach of fair procedures in considering the Complaint as a whole in order to determine the exact infringements being alleged. At this juncture, I note that NOYB may not compel the Commission, or indeed any other supervisory authority, to carry out certain actions or impose particular corrective powers. Indeed, in this regard, I note that Article 52 GDPR stipulates that each supervisory authority must act with "*complete independence*" in discharging its functions under the GDPR. Therefore, while I take account of the parties' submissions, I am not compelled to act or impose certain corrective powers by virtue of any such submissions.
122. NOYB, having lodged the Complaint with the Belgian DPA, responded to the Draft Report, which set out clearly the submissions of Meta Ireland and the Investigator's views on same. NOYB were also afforded the opportunity to make submissions on the Preliminary Draft. No suggestion has been made that the alternative procedure proposed by NOYB is a requirement of Irish law, nor that the procedure that has been followed in relation to the scope breaches any rules of fair procedures in Irish law. Moreover, I am unaware of any case law or statutory provisions in Irish law or EU law that suggests that such an approach is contrary to NOYB's right to fair procedures, and NOYB has not referred to any such law in its submissions.

#### b. Substantive Scope of the Complaint

123. At a general level, this complaint-based Inquiry concerns the requirement under EU data protection law for any entity collecting and processing personal data to establish "a lawful basis" for the processing under Articles 6 GDPR. This particular Complaint was lodged by reference to the Instagram service (for which Meta Ireland is the controller) and its lawful basis for processing user personal data and "special category" personal data. I have set out, in summary form, the contents of the Complaint and arguments contained in it at Section 2 of the Draft Decision.

### *Legislative Provisions*

124. “Personal data” is defined under Article 4(1) GDPR as:

*“any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.*

125. Moreover, Article 4(13) GDPR defines the “genetic data” referred to above as:

*“personal data relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question”.*

126. Article 4(14) GDPR defines “biometric data” as:

*“personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data”.*

127. Finally, “data concerning health” is defined by Article 4(15) GDPR as:

*“personal data related to the physical or mental health of a natural person, including the provision of health care services, which reveal information about his or her health status”.*

128. The other special categories or personal data referred to in Article 9 GDPR are not defined in the GDPR.

129. As set out above, Article 6 GDPR sets out the lawful bases for the processing of personal data. The provisions of Article 6 that arise in this complaint-based Inquiry are the first two lawful basis listed in the Article, in Articles 6(1)(a) and 6(1)(b) GDPR. Article 6(1) GDPR states:

*“6. 1 Processing shall be lawful only if and to the extent that at least one of the following applies:*

*(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;*

*(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;*

*(c) processing is necessary for compliance with a legal obligation to which the controller is subject;*  
*(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;*  
*(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*  
*(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.*  
*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.”*

130. A number of conditions for consent are enumerated in Article 7 GDPR:

*“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.”*

131. Article 13(c) GDPR requires data controllers to provide information to data subjects on *“the purposes of the processing for which the personal data are intended as well as the legal basis for the processing”*.

132. Article 12(1) GDPR requires that *“[t]he controller shall take appropriate measures to provide any information referred to in Articles 13 and 14...to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language...”*.

*My Consideration of the Scope of the Complaint*

133. The starting point of the Complaint is that in accepting the Instagram Terms of Use (and, allegedly, its Data Policy), all data processing is purported to have been brought under the lawful basis of consent for the purposes of Article 6(1)(a) GDPR. This starting point was rejected in Meta Ireland’s submissions. The Investigator also rejected this and, for the reasons set out below, I too rejected it in the Draft Decision. This rejection of the foundational premise of the Complaint has inevitably rendered the overall subject-matter of the Complaint effectively less cohesive.
134. The Complaint also refers to processing of special category data covered by Article 9 GDPR. NOYB’s submissions on the Draft Report make further arguments in this regard, focussing on (i) the alleged ability of Instagram to target users on the basis on special category data and (ii) the purported fact that *“messages, pictures, and all interaction data, event invitations or postings from other users regularly contain special categories of data (e.g. messages on health or sex life and invitations to political events)”*.<sup>446</sup> I expressed the view that, in the Draft Decision, NOYB did not provide sufficient evidence to substantiate these claims.
135. My view, as expressed in the Draft Decision was that, for the reasons set out above and the additional reasons set out below where I expressed my views, in the Draft Decision, on the scope of the Complaint, the Complaint even taken at its height quite clearly only concerned data processing arising out of the act of acceptance. In the Draft Decision, I expressed the view that NOYB’s central arguments on *“forced consent”* were predicated on the assertion by NOYB that the acceptance was forcing consent to personal data processing for the purposes of the GDPR.
136. On this basis, I did not accept, in the Draft Decision, that the processing of sensitive categories of personal data on the basis of Article 9 GDPR consent fell within the scope of this Inquiry. I noted, in the Draft Decision, that there was no evidence that Meta Ireland processes special category data at all in respect of the Instagram service. As set out in paragraph 32 of the Decision, the EDPB has taken a different view, in the Article 65 Decision.
137. Having reviewed and considered all of the material submitted by NOYB, I concluded, in the Draft Decision that the core of the issues raised by NOYB were as follows:
- a. Accepting the Instagram Terms of Use offered by Meta Ireland in May 2018 specifically constituted an act of consent to personal data processing under the GDPR. The precise extent of the processing complained of is unclear in the Complaint. A particular focus was, however, placed on both processing in order to deliver behavioural advertising, and on special category data. NOYB also took issue with any unlawful processing based on this agreement, whatever that agreement’s legal character might be.<sup>447</sup>

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<sup>446</sup> NOYB’s Submissions on the Draft Inquiry Report dated 19 August 2020, at pp. 34 - 35.

<sup>447</sup> NOYB’s Submissions on the Preliminary Draft in Inquiry-IN-18-05-05 dated 11 June 2021, at p. 9.

- b. NOYB argued that 6(1)(a) GDPR, i.e. consent, is the mandatory, default lawful basis for personal data processing where there is a contract or agreement primarily concerned with personal data processing, or where the “*declaration of intent*” of the parties primarily concerns data processing.<sup>448</sup>
- c. Consent under the GDPR is simply an indication of agreement by the data subject according to NOYB. The necessary attributes of freely given, specific, informed and unambiguous are merely “conditions for its validity”, but not features of objective “consent”.
- d. As an alternative to point (a), Meta Ireland is not entitled to rely on the “necessary for the performance of a contract” legal basis under Article 6(1)(b) GDPR other than for very limited processing such as friends lists, photo albums, profiles and news. It therefore cannot rely on this as an alternative legal basis to consent for the acceptance of the Terms of Use as a whole. In this regard, NOYB argued that the “purpose” of the contract (in this case, the delivery of a social media service) must be considered.
- e. On the basis of the above, NOYB contended that clicking accept was an attempt by Meta Ireland to seek consent under the GDPR but did not constitute not valid consent. NOYB described this as “forced consent”, in that the only choice a user had in May 2018 was to delete his/her account and stop using the service, and “hidden consent”, in that some of the description of the Instagram service in the Terms of Use implicitly relies on processing of personal data.
- f. NOYB contended that Meta Ireland leads data subjects to believe that it relies on consent as lawful basis for personal data processing and/or is not transparent about its lawful bases for processing personal data.

138. On the other hand, Meta Ireland argued that it forms a contract with its users for the use of its (free) Instagram service. The Commission observes that this is delivered in the form of a “Click Wrap” agreement that the user signs up to when clicking “Agree to Terms” on the Terms of Use and it looks similar to an industry standard format for such agreements. According to Meta Ireland, its intention was to rely on the legal basis of Article 6(1)(b) GDPR (necessary for the performance of a contract) for processing carried out on foot of the acceptance of the Terms of Use (and, for other separate processing, it would rely on other legal bases).

139. In this regard, Meta Ireland claimed that the processing is necessary for the performance of the contract with the Instagram user. Meta Ireland further alleged that the Instagram Data Policy further sets out, in more detail, the other legal bases that would be relied on for other processing operations.

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<sup>448</sup> NOYB’s Submissions on the Preliminary Draft in Inquiry-IN-18-05-05 dated 11 June 2021, at p. 9.

Meta Ireland does not agree that it sought to persuade users that consent was the legal basis for all personal data processing.

140. The Investigator analysed the arguments made by NOYB in the original Complaint submitted. It seemed to me, when preparing the Draft Decision, that this was a sensible and correct approach. This was not an “own volition” Inquiry where the Commission was entitled to scope matters of risk which it decided warranted investigation. While it is normally the role of the Investigator to focus on the establishment of facts, to set out what elements of the GDPR are engaged against those facts, to come to a preliminary view on whether there are likely infringements identified which will then be the subject of further legal analysis and ultimately decision-making by the Commission, this case is somewhat different.

141. By reference to the above approach, the facts to be established are fairly limited and largely relate to the wording of the Instagram Terms of Use and Data Policy, in addition to the User Engagement Flow introduced in May 2018 to guide users through the process of acceptance process. In fact, it appears

to me that the Investigator ended up devoting time responding to legal and theoretical assertions of NOYB, such as the argument that consent is a *lex specialis* and therefore the mandatory legal basis where a contract primarily concerns personal data processing. Consequently, the Final Report contains more legal analysis and argument than might otherwise have been the case (relative to a draft decision). I have considered all of the analysis of the Investigator carefully and, in some instances, I adopt it and concur with it. In other instances, I reject it, replace it, and explain why.

142. Another feature of the Complaint is a section entitled “*Applications*”. In this section, NOYB requested an investigation of a very specific nature, and sets out the corrective powers that NOYB believed should be imposed i.e. an administrative fine and a prohibition on the “relevant processing operations”. This section asked that the Commission:

*“fully investigates this complaint, by especially using its powers under Article 58(1)(a), (e) and (f) of the GDPR, to particularly determine the following facts:*

*(i.) which processing operations the controller engages in, in relation to the personal data of the data subject,*

*(ii.) for which purpose they are performed,*

*(iii.) on which legal basis for each specific processing operation the controller relies on and*

*(iv.) he/she additionally requests that a copy of any records of processing activities (Article 30 of the GDPR) are acquired.”*

143. The right to lodge a complaint with a supervisory authority is governed by Article 77 GDPR. Article 77(1) states how a complaint may be made: “*every data subject shall have the right to lodge a complaint with a supervisory authority...if the data subject considers that the processing of personal data relating to him or her infringes this Regulation*” [emphasis added]. Neither the request above,

nor a request to impose specified corrective powers, can be considered to constitute part of a complaint made in accordance with Article 77(1) GDPR. NOYB does not specify any processing operations or any alleged infringements of the GDPR in the above request, but simply asks the Commission to gather information on its behalf. As I have stated above, neither the GDPR nor the 2018 Act confer a particular right on a Complainant to make such a request, nor to specify what corrective powers should be imposed in circumstances where the supervisory authority is of the view that an infringement has occurred/is occurring. To the extent that such an approach might be provided for in Belgian law, I have already set out in detail why I do not accept that such law is applicable to the exercise of my functions.

144. In those circumstances, it was for the Investigator, and ultimately for me as decision-maker, to carry out an objective reading of the Complaint. In so doing, I must consider not only the content of the Complaint, but also the legal framework by which the Commission is bound. It is also necessary that an inquiry conducted on foot of a complaint must be feasible and workable. According to Article 77(1) GDPR, a complaint should relate to data processing that, in a complainant's view, infringes the GDPR. There is a lack of reasonable specificity in the above request in relation to processing operations or alleged infringements.

145. Any request to investigate all processing, or hypothetical processing, particularly a request of such an indefinite nature, does not, in my view, conform to the requirements of Article 77 GDPR. Such a request does not specify any data processing or any alleged infringement, and would result in a practically unworkable inquiry. Rather than being a complaint about specific processing operations, the Complaint in this matter has, at times, strayed into the territory of instructing the Commission to conduct an open-ended inquiry, and to direct that inquiry and the Commission's resources in a manner determined by NOYB. It is instead for the Commission to decide on the manner in which a reasonably specific Complaint is to be investigated.

146. I set out my views as to scope (as outlined above) in the Preliminary Draft. In response, Meta Ireland submitted that the Complaint was limited to "forced consent" and that the Commission's analysis and consideration of this Complaint must accordingly be limited to "forced consent".<sup>449</sup> In support of this position, Meta Ireland cited the EDPB's Guidelines 09/2020 on relevant and reasoned objections under Regulation 2016/679 which define a complaint-based inquiry as being one which is "*defined by the aspects addressed by the complaint or report*".<sup>450</sup> In essence, it is Meta Ireland's position that the Commission ought not have considered matters relating to Article 6(1)(b) GDPR or Meta Ireland's compliance with the transparency obligations.

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<sup>449</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at paras. 3.1 – 3.3.

<sup>450</sup> Meta Ireland's Submissions on the Preliminary Draft dated 4 February 2022, at para. 3.3 citing EDPB's Guidelines 09/2020 on relevant and reasoned objection under Regulation 2016/679, version 2.0 (adopted on 9 March 2021) at para. 27.



147. The Complaint, as Meta Ireland correctly pointed out, concerns what is referred to as “forced consent”. In making this Complaint, it is argued that there has been an attempt to mislead on Meta Ireland’s part. Indeed, the Complaint rests on the allegation that Meta Ireland attempted to mislead the Complainant and users generally by informing them that they were required to consent to certain processing in order to remain an Instagram user. Following submissions from Meta Ireland to the effect that it was not relying on consent but instead the performance of the contract as a legal basis, NOYB went on to argue that the agreement had the appearance of consent, and that this in itself was misleading. The Complainant has repeated this argument in the submissions on the Preliminary Draft.<sup>451</sup>

148. In the Draft Decision, I agreed with Meta Ireland to some extent that the Complaint *primarily* outlined concerns as to “forced consent”, however, I was of the view that the Complaint was not solely limited to consent. Rather, as I have outlined above, I expressed the view, in the Draft Decision, that the Complaint concerned the legal basis of the processing<sup>503</sup> and, where Meta Ireland had not sought to rely on consent as the legal basis, it followed that the Commission was entitled to investigate and consider the legal basis which Meta Ireland has in fact sought to rely on. In terms of the transparency of the information provided, I would emphasise that the Complaint explicitly alleged that the information provided on the legal bases (in the privacy policy) is such that data subjects “*can only guess what data is processed, for which exact purpose and on which legal basis. This is inherently nontransparent and unfair within the meaning of Articles 5(1)(a) and 13(c)*”.<sup>452</sup> I expressed the view, in the Draft Decision, that this clearly concerned the transparency of the information provided and, accordingly, I was of the view that it fell within the scope of the Complaint.

149. Accordingly, I was satisfied, as outlined in the Draft Decision, that the Complaint did raise issues relating to (i) legal basis more generally and (ii) transparency in providing such information.

150. The Decision (incorporating this Schedule) therefore reflects the outcome of my determination on the matters relating to the procedural and scope issues. The conclusions on scope reflected in this Schedule 1 must read in conjunction with both Section 2 of this Decision as well as the corresponding assessment and determination of the scope of the Complaint made by the EDPB in the Article 65 Decision, as summarised at paragraph 32 of the Decision.

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<sup>451</sup> NOYB’s Submissions on the Preliminary Draft in Inquiry-IN-18-05-05 dated 11 June 2021, at pp. 15 - 19.

<sup>503</sup> For example, see Complaint dated 25 May 2018, at p. 19.

<sup>452</sup> Complaint dated 25 May 2018, at p. 17.

Appendix 2 – The Article 65 Decision