

Binding decision of the Board (Art. 65)



Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR)

Adopted on 5 December 2022

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The European Data Protection Board

Having regard to Article 63 and Article 65(1)(a) of the Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter “**GDPR**”)¹,

Having regard to the European Economic Area (hereinafter “**EEA**”) Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018²,

Having regard to Article 11 and Article 22 of its Rules of Procedure (hereinafter “**EDPB RoP**”)³,

Whereas:

(1) The main role of the European Data Protection Board (hereinafter the “**EDPB**”) is to ensure the consistent application of the GDPR throughout the EEA. To this effect, it follows from Article 60 GDPR that the lead supervisory authority (hereinafter “**LSA**”) shall cooperate with the other supervisory authorities concerned (hereinafter “**CSAs**”) in an endeavour to reach consensus, that the LSA and CSAs shall exchange all relevant information with each other, and that the LSA shall, without delay, communicate the relevant information on the matter to the other supervisory authorities concerned. The LSA shall without delay submit a Draft Decision to the other CSAs for their opinion and take due account of their views.

(2) Where any of the CSAs expressed a reasoned and relevant objection on the Draft Decision in accordance with Article 4(24) and Article 60(4) GDPR and the LSA does not intend to follow the RRO or considers that the objection is not reasoned and relevant, the LSA shall submit this matter to the consistency mechanism referred to in Article 63 GDPR.

(3) Pursuant to Article 65(1)(a) GDPR, the EDPB shall issue 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.

(4) The binding decision of the EDPB shall be adopted by a two-thirds majority of the members of the EDPB, pursuant to Article 65(2) GDPR in conjunction with Article 11(4) EDPB RoP, within one month after the Chair of the EDPB and the competent supervisory authority have decided that the file is complete. The deadline may be extended by a further month, taking into account the complexity of the subject matter upon decision of the Chair of the EDPB on own initiative or at the request of at least one third of the members of the EDPB.

(5) In accordance with Article 65(3) GDPR, if, in spite of such an extension, the EDPB has not been able to adopt a decision within the timeframe, it shall do so within two weeks following the expiration of the extension by a simple majority of its members.

(6) In accordance with Article 11(6) EDPB RoP, only the English text of the decision is authentic as it is the language of the EDPB adoption procedure.

¹ OJ L 119, 4.5.2016, p. 1.

² References to “Member States” made throughout this decision should be understood as references to “EEA Member States”.

³ EDPB Rules of Procedure, adopted on 25 May 2018.

HAS ADOPTED THE FOLLOWING BINDING DECISION

1 SUMMARY OF THE DISPUTE

1. This document contains a binding decision adopted by the EDPB in accordance with Article 65(1)(a) GDPR. The decision concerns the dispute arisen following a Draft Decision (hereinafter “**Draft Decision**”) issued by the Irish supervisory authority (“Data Protection Commission”, hereinafter the “**IE SA**”, also referred to in this context as the “**LSA**”) and the subsequent objections expressed by a number of CSAs (“Österreichische Datenschutzbehörde” hereinafter the “**AT SA**”; “Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit” also on behalf of other German SAs⁴, hereinafter the “**DE SAs**”; “Office of the Data Protection Ombudsman”, hereinafter the “**FI SA**”; “Commission Nationale de l’Informatique et des Libertés”, hereinafter the “**FR SA**”; “Garante per la protezione dei dati personali”, hereinafter the “**IT SA**”; “Autoriteit Persoonsgegevens”, hereinafter the “**NL SA**”; “Datatilsynet”, hereinafter the “**NO SA**”; “Urząd Ochrony Danych Osobowych”, hereinafter the “**PL SA**”; “Comissão Nacional de Proteção de Dados”, hereinafter the “**PT SA**”; and “Integritetsskyddsmyndigheten”, hereinafter the “**SE SA**”).
2. The Draft Decision at issue relates to a “complaint-based inquiry” which was commenced by the IE SA on 20 August 2018 into the Facebook social media processing activities (hereinafter “**Facebook service**”) of Facebook Ireland Limited, a company established in Dublin, Ireland. The company has subsequently changed its name to “Meta Platforms Ireland Limited” and hereinafter it is referred to as “**Meta IE**”. Any reference to Meta IE in this binding decision means a reference to either Facebook Ireland Limited or Meta Platforms Ireland Limited, as appropriate.
3. The complaint was lodged on 25 May 2018 with the AT SA by a data subject who requested the non-profit NOYB - European Center for Digital Rights (hereinafter, “NOYB”) to represent her under Article 80(1) GDPR (both hereinafter referred to as the “**Complainant**”). The Complainant alleged a violation of the right to data protection and especially “a violation of Articles 5, 6, 7, and 9 of the GDPR and Article 8 of the CFR [Charter of Fundamental Rights of the EU]”⁵, by arguing that the controller relied on a “forced consent”⁶. The Complainant articulated its requests into a request to investigate⁷, a request to find a violation of data subject rights⁸, and a request to impose corrective measures⁹.

⁴ Objections raised by the Hamburg Commissioner for Data Protection and Freedom of Information also on behalf of the Bavarian State Office for Data Protection Supervision, the Berlin Commissioner for Data Protection and Freedom of Information, the Brandenburg Commissioner for Data Protection and Freedom of Information, the Federal Commissioner for Data Protection and Freedom of Information, the State Commissioner for Data Protection in Lower Saxony and the State Commissioner for Data Protection North Rhine-Westphalia.

⁵ Complaint, paragraph 1.2

⁶ Complaint, paragraph 1.3, 1.4, 2.1, 2.2.

⁷ Within its request to investigate, the Complainant requested that a full investigation be made to determine “which processing operations the controller engages in, in relation to the personal data of the data subject”, “for which purpose they are performed”, “on which legal basis for each specific processing operation the controller relies on”, and to acquire “a copy of any records of processing activities”. The complaint also requested “that the results of this investigation [be] made available to [her]”. Complaint, paragraph 3.1.

⁸ Complaint, paragraph 3.2. The specific rights that the Complainant mentions as violated are Art. 5, 6, 7 and 9 GDPR and Art. 8 of the Charter of Fundamental Rights of the EU, Complaint, paragraph 1.2.

⁹ More specifically, the complaint requested in paragraph 3.3 that the SA “prohibits all processing operations that are based on an invalid consent of the data subject”, and in paragraph 3.4 that an “effective, proportionate and dissuasive fine” be imposed.

4. On 30 May 2018, the AT SA transferred the complaint to the IE SA. The IE SA stated in its “Schedule to the Draft Decision”¹⁰ that it was satisfied that the IE SA is the LSA, within the meaning of the GDPR, for Meta IE, as controller, for the purpose of the cross-border processing of personal data in the context of the Facebook service.
5. The following table presents a summary timeline of the events part of the procedure leading to the submission of the matter to the consistency mechanism:

20.08.2018	The scope and legal basis of the inquiry were set out in the notice of commencement of inquiry that the IE SA sent to the parties on 20 August 2018. The IE SA commenced the inquiry and requested information from this date.
20.08 2018-17.04.2020	<p>Inquiry Report stage:</p> <ul style="list-style-type: none"> • the IE SA commenced work on the draft inquiry report; • the IE SA prepared a draft inquiry report and issued it to Meta IE and to the Complainant to allow them to make submissions in relation to the draft inquiry report; • Meta IE provided its submissions in relation to the draft inquiry report; • The Complainant provided its submissions in relation to the draft inquiry report; • Meta IE and the Complainant were furnished with each other’s submissions and the final report was provided to the decision-maker; • The IE SA issued a copy of its final inquiry report to Meta IE and the Complainant. • The IE SA issued a letter to Meta IE and to the Complainant to confirm the commencement of the decision-making stage.
14.05.2021	The IE SA issued a Preliminary Draft Decision (hereinafter “ the Preliminary Draft Decision ”) (including a Schedule) to Meta IE and to the Complainant.
June 2021	<p>The Complainant provided submissions on the Preliminary Draft Decision to the IE SA (“Complainant’s Preliminary Draft Submissions dated 11 June 2021”¹¹).</p> <p>Meta IE made submissions on the Preliminary Draft Decision to the IE SA (“Meta IE’s Preliminary Draft Submissions dated 16 June 2021”).</p>
06.10.2021 Between 21.10.2021 and 03.11.2021	<p>The IE SA shared its Draft Decision with the CSAs in accordance with Article 60(3) GDPR.</p> <p>Several CSAs (AT SA, DE SAs, FI SA, FR SA, IT SA, NL SA, NO SA, PL SA, PT SA and SE SA) raised objections in accordance with Article 60(4) GDPR.</p>
28.01.2022	The IE SA issued a Composite Response setting out its replies to such objections and shared it with the CSAs (hereinafter, “ Composite ”).

¹⁰ IE SA Schedule to the Draft Decision of 6 October 2021 in the matter of LB (through NOYB) v Facebook Ireland Limited, paragraphs 2.13 - 2.22.

¹¹ This document is mistakenly dated “11.06.2020”.

	Response). The IE SA requested the relevant CSAs to confirm whether, having considered the IE SA's position in relation to the objections as set out in the Composite Response, the CSAs intended to maintain their objections.
	In light of the arguments put forward by the IE SA in the Composite Response, the AT SA ¹² , DE SAs ¹³ , NO SA ¹⁴ , IT SA ¹⁵ , FR SA ¹⁶ and NL SA ¹⁷), confirmed to the IE SA that they maintain their remaining objections.
30.05.2022	The FI SA informed the IE SA of their decision to withdraw their objection due to procedural reasons related to their objection ¹⁸ .
3.06.2022	The IE SA invited Meta IE to exercise its right to be heard in respect of the objections (and comments) that IE SA proposed to refer to the EDPB under Article 65(1) GDPR along with the IE SA's Composite Response and the communications received from the CSAs in reply to the Composite Response.
15.07.2022	Meta IE furnished the requested submissions (" Meta IE Article 65 Submissions ").
25.07.2022	The IE SA referred the matter to the EDPB in accordance with Article 60(4) GDPR, thereby initiating the dispute resolution procedure under Article 65(1)(a).

6. The IE SA triggered the dispute resolution process in the Internal Market Information system (hereinafter "**IMI**")¹⁹ on 25 July 2022.
7. Following the submission by the LSA of this matter to the EDPB in accordance with Article 60(4) GDPR, the EDPB Secretariat assessed the completeness of the file on behalf of the Chair in line with Article 11(2) EDPB RoP.
8. The EDPB Secretariat contacted the IE SA on 27 July 2022, asking for the transmission via IMI of the original complaint and any document attached thereto, such as the "Gallup survey" to which the Complainant referred in its submissions. The IE SA provided the original complaint and its attachments and confirmed that it had been shared with Meta IE. The IE SA also provided an updated version of the memorandum it had sent to the Secretariat²⁰ with a revised schedule. These additional documents did not include the "Gallup survey", which the IE SA explained was not attached to the original complaint, but was provided by way of correspondence dated 20 November 2019, sent by the

¹² Response of Austrian SA to the IE SA's Composite Response dated 31 January 2022.

¹³ Response of Hamburg SA to the IE SA's Composite Response dated 11 February 2022.

¹⁴ Response of Norwegian SA to the IE SA's Composite Response dated 11 February 2022.

¹⁵ Response of Italian SA to the IE SA's Composite Response dated 11 February 2022.

¹⁶ Response of French SA to the IE SA's Composite Response dated 11 February 2022.

¹⁷ Response of Dutch SA to the IE SA's Composite Response dated 17 February 2022.

¹⁸ Withdrawal of Finnish Objection communicated on 30 May 2022.

¹⁹ The Internal Market Information (IMI) is the information and communication system mentioned in Art. 17 of the EDPB Rules of Procedure.

²⁰ The IE SA sent to the EDPB Secretariat a memorandum for the purpose of providing it with the file of material that the IE SA wished to refer to the EDPB for assessment and determination pursuant to the Article 65(1)(a) GDPR procedure.

Complainant to the AT SA, for onward transmission to the IE SA. This occurred over one week after the Complainant's representative provided its observations on the investigator's Draft Inquiry Report.

9. The EDPB Secretariat contacted the IE SA on 23 and 27 September 2022, asking for the transmission via IMI of specified documents pertaining to the investigation conducted by the IE SA²¹. The request was made to allow the EDPB to come to a fully informed decision on the objections raised by some CSAs on the scope and conduct of the investigation. From the schedule to the Draft Decision, the EDPB Secretariat concluded that both Meta IE and the Complainant were given access to the documents requested and invited the IE SA to confirm this was indeed the case. With regard to the request for the "Gallup survey", the EDPB Secretariat pointed out that Meta IE specifically included counter-arguments to this document in its Article 65 submissions²².
10. The IE SA declined the request, as it considers that the material already provided as sufficient to enable the EDPB to determine the objections referred to it, as the Draft Decision provides information about the scope of the inquiry commenced for the purpose of examining the complaint, the procedural steps taken in the inquiry, the information that was collected during the course of the inquiry process, the allegations that were put to the data controller, the submissions made by the parties to the inquiry and the assessments and views of the IE SA. Further, the IE SA expressed its concern over the possibility of the EDPB concluding its decision on the basis of material which was never put to the controller concerned as part of the formulation of any allegation of potential wrongdoing. Finally, the IE SA underlined that, in accordance with Article 11(2) in fine EDPB RoP they would also provide documents the Board deems necessary.
11. The EDPB considers the "Gallup study" part of the file. The Gallup study is a publicly available document to which the Complainant refers in its letter to the EDPB and CSAs, which is part of the file submitted by the IE SA²³. The Complainant had previously submitted it to the AT SA on 20 November 2019 for onward transmission to the IE SA. Some CSAs refer to this document in their objections and Meta IE provides counter arguments to its findings and challenges its reliability with a report (the "Vanhuele Report") that Meta IE appends to Annex 2 of its pre-Article 65 submission²⁴.

²¹ The following documents were requested:

Draft Inquiry Report (DRI) of 28 June 2019;

Meta IE's submissions of 28 July 2019 to the DRI;

Letter from Meta IE to the IE SA of 25 May 2018 whereby Meta IE confirmed it was the controller for the data processing in the EU;

Meta IE's submissions of 27 Sept 2018 on the complaint;

IE SA letter to NOYB on scope of the inquiry of 23 Nov 2018;

NOYB's submissions of 3 Dec 2018 on scope and procedure;

IE SA letter to NOYB of 16 Jan 2019 (refusal);

IE SA letter to Meta IE on scope of 25 Jan 2019;

Meta IE's submissions of 22 Feb 2019 on the complaint;

NOYB's submissions of 19 April 2019 on scope and procedural issues;

Meta IE's submissions of 28 July 2019 to the draft report NOYB's submissions of 9 Sept 2019 to the draft report;

NOYB's submissions of 9 Sept 2019 to the draft report;

NOYB's submission to the IE SA containing the Gallup study in attachment;

Meta IE's additional submissions of 14 Feb 2020 on the draft report;

IE SA Investigator's final report of 4 April 2020;

²² Meta IE Article 65 Submissions, Annex 2 "the Vanhuele report".

²³ NOYB letter of 25 May 2020, p.2.

²⁴ Meta IE Article 65 Submissions, footnote 132, p.75, and Annex 2.

12. A matter of particular importance that was scrutinised by the EDPB Secretariat was the right to be heard, as required by Article 41(2)(a) of the Charter of Fundamental Rights. Further details on this are provided in Section 2 of this Binding Decision.
13. On 5 October, the decision on the completeness of the file was taken, and it was circulated by the EDPB Secretariat to all the members of the EDPB.
14. The Chair of the EDPB decided, in compliance with Article 65(3) GDPR in conjunction with Article 11(4) EDPB RoP, to extend the default timeline for adoption of one month by a further month on account of the complexity of the subject-matter.

2 THE RIGHT TO GOOD ADMINISTRATION

15. The EDPB is subject to Article 41 of the EU Charter of Fundamental Rights, in particular Article 41 (right to good administration). This is also reflected in Article 11(1) EDPB RoP. Further details were provided in the EDPB Guidelines on Article 65(1)(a) GDPR²⁵.
16. The EDPB decision *“shall be reasoned and addressed to the lead supervisory authority and all the supervisory authorities concerned and binding on them”* (Article 65(2) GDPR). It is not aiming to address directly any third party. However, as a precautionary measure to address the possible need for the EDPB to offer the right to be heard at EDPB level to Meta IE, the EDPB assessed if Meta IE was offered the opportunity to exercise its right to be heard in relation to the procedure led by the LSA and the subject matter of the dispute to be resolved by the EDPB. In particular, the EDPB assessed if all the documents received containing the matters of facts and law used by the EDPB to take its decision in this procedure had been previously shared with Meta IE.
17. The EDPB notes that Meta IE has received the opportunity to exercise its right to be heard regarding all the documents containing the matters of facts and of law considered by the EDPB in the context of this decision and provided its written observations²⁶, which have been shared with the EDPB by the LSA.
18. Considering that Meta IE has been already heard by the IE SA on all matters of facts and law addressed by the EDPB in its decision, the EDPB is satisfied that Article 41 of the EU Charter of Fundamental Rights has been respected.
19. The EDPB considers that the Complainant is not likely to be adversely affected by this binding decision, and consequently does not meet the conditions to be granted a right to be heard by the EDPB in line with Article 41 of the EU Charter of Fundamental Rights, applicable case law, and Article 11 of the EDPB RoP. This is without prejudice to any right to be heard or other related rights the Complainant may have before the competent national supervisory authority(/-ies).

²⁵ EDPB Guidelines 03/2021 on the application of Article 65(1)(a) GDPR, adopted on 13 April 2021 (version for public consultation) (hereinafter, “Guidelines on Art.65(1)(a)”), paragraphs 94-108.

²⁶ In particular, Meta IE Preliminary Draft Submissions dated 16 June 2021, Meta IE Submissions on Article 83(3) GDPR dated 23 September 2021, Meta IE Article 65 Submissions dated 15 July 2022.

3 CONDITIONS FOR ADOPTING A BINDING DECISION

20. The general conditions for the adoption of a binding decision by the EDPB are set forth in Article 60(4) and Article 65(1)(a) GDPR²⁷.

3.1 Objection(s) expressed by several CSA(s) in relation to a Draft Decision

21. The EDPB notes that several CSAs raised objections to the Draft Decision via IMI. The objections were raised pursuant to Article 60(4) GDPR.

3.2 The IE SA finds the objections to the Draft Decision not relevant or reasoned and does not follow them

22. On 28 January 2022, the IE SA provided to the CSAs an analysis of the objections raised by the CSAs in the Composite Response.
23. The IE SA concluded that it would not follow the objections, as it did not consider them relevant and/or reasoned, within the meaning of Article 4(24) GDPR for the reasons set out in the Composite Response and below.

3.3 Admissibility of the case

24. The case at issue fulfils, *prima facie*, all the elements listed by Article 65(1)(a) GDPR, since several CSAs raised objections to a Draft Decision of the IE SA within the deadline provided by Article 60(4) GDPR, and the IE SA has not followed objections or rejected them for being, in its view, not relevant or reasoned.
25. The EDPB takes note of Meta IE's position that the current Article 65 GDPR dispute resolution should be suspended in light of the IE SA's ongoing inquiry on Meta IE's legal basis for processing data for behavioural advertising²⁸. Additionally, Meta IE argues such suspension would be appropriate due to pending preliminary ruling proceedings before the Court of Justice of the EU (hereinafter, "CJEU")²⁹. Meta IE refers in particular to cases C-252/21³⁰ and C-446/21³¹. Following its assessment, the EDPB decides to **continue** its proceedings on this Article 65 GDPR dispute resolution, as there is no explicit legal basis for a stay of the dispute resolution procedure in EU law, nor are existing CJEU rulings on the matter conclusive for the situation of the EDPB³². Also, the EDPB takes into consideration the data

²⁷ According to Art. 65(1)(a) of the GDPR, the EDPB will issue a binding decision when a supervisory authority has raised a relevant and reasoned objection to a Draft Decision of the LSA and the LSA has not followed the objection or the LSA has rejected such an objection as being not relevant or reasoned.

²⁸ Meta IE Article 65 Submissions, paragraphs 3.4.

²⁹ Meta IE Article 65 Submissions, paragraphs 3.1 - 3.3.

³⁰ Request for a preliminary ruling of 22 April 2021, *Meta Platforms and Others*, C-252/21 (hereinafter 'C-252/21 *Oberlandesgericht Düsseldorf request*').

³¹ Request for a preliminary ruling of 20 July 2021, *Schrems*, C-446/21 (hereinafter 'C-446/21 *Austrian Oberster Gerichtshof request*').

³² Judgement of the Court of Justice of 28 February 1991, *Delimitis*, C-234/89, ECLI:EU:C:1991:91; Judgement of the Court of Justice of 14 December 2000, *Masterfoods*, C-344/98, ECLI:EU:C:2000:689. These cases concerned proceedings before the national courts, where the parties faced the risk of being confronted with a conflicting decision of the national judge that could be seen as de facto nullifying the Commission decision – a power which is retained by the CJEU. The current dispute resolution procedure concerns the adoption of an administrative decision, which can be subject to full judicial review.

subjects' right to have their complaints handled within a "reasonable period" (Article 57(1)(f) GDPR), and to have their case handled within a reasonable time by EU bodies (Article 41 Charter). Moreover, ultimately there are remedies available to the affected parties in case of a discrepancy between the EDPB binding decision and CJEU rulings in the aforementioned cases³³.

26. Considering the above, in particular that the conditions of Article 65(1)(a) GDPR are met, the EDPB is competent to adopt a binding decision, which shall concern all the matters which are the subject of the relevant and reasoned objection(s), i.e. whether there is an infringement of the GDPR or whether the envisaged action in relation to the controller or processor complies with the GDPR³⁴.
27. The EDPB recalls that its current decision is without any prejudice to any assessments the EDPB may be called upon to make in other cases, including with the same parties, taking into account the contents of the relevant Draft Decision and the objections raised by the CSA(s).

3.4 Structure of the binding decision

28. For each of the objections raised, the EDPB decides on their admissibility, by assessing first whether they can be considered as a "relevant and reasoned objection" within the meaning of Article 4(24) GDPR as clarified in the guidelines on the concept of a relevant and reasoned objection³⁵.
29. Where the EDPB finds that an objection does not meet the requirements of Article 4(24) GDPR, the EDPB does not take any position on the merit of any substantial issues raised by that objection in this specific case. The EDPB will analyse the merits of the substantial issues raised by all objections it deems relevant and reasoned³⁶.

4 ON WHETHER THE LSA SHOULD HAVE FOUND AN INFRINGEMENT FOR LACK OF APPROPRIATE LEGAL BASIS/UNLAWFUL DATA PROCESSING

4.1 Analysis by the LSA in the Draft Decision

30. The IE SA concludes that the GDPR, the jurisprudence and the EDPB guidelines do not preclude Meta IE from relying on Article 6(1)(b) GDPR as a legal basis to carry out the personal data processing

³³ In case an action for annulment is brought against the EDPB decision(s) and found admissible, the General Court/CJEU has the opportunity to invalidate the decision of the EDPB. In addition, and if the General Court/CJEU were to deliver any judgment in the time between the adoption of the EDPB's Art. 65 decision and the adoption of the IE SA's final decision, the IE SA may ultimately decide to revise the final national decision it takes following the EDPB's binding decision - if the CJEU's rulings give cause to do so - in accordance with the principle of cooperation as elaborated by the CJEU in the *Kühne & Heitz NV* case (Judgement of the Court of Justice of 12 January 2004, *Kühne & Heitz NV*, C-453/00, ECLI:EU:C:2004:17).

³⁴ Art. 65(1)(a) and Art. 4(24) GDPR. Some CSAs raised comments and not per se objections, which were, therefore, not taken into account by the EDPB.

³⁵ EDPB Guidelines 9/2020 on the concept of relevant and reasoned objection, version 2 adopted on 9 March 2021, (hereinafter, "EDPB Guidelines on RRO").

³⁶ "The EDPB will assess, in relation to each objection raised, whether the objection meets the requirements of Art. 4(24) GDPR and, if so, address the merits of the objection in the binding decision." See EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 63.

activities involved in the provision of its service to users, including behavioural advertising insofar as that forms a core part of the service³⁷. Finding 2 reads *“I find the Complainant’s case is not made out that the GDPR does not permit the reliance by Facebook on 6(1)(b) GDPR in the context of its offering of Terms of Service”*³⁸.

31. The IE SA understands the Complainant’s allegations as³⁹: being that, firstly, the Complainant was given a binary choice: i.e. either accept the Facebook Terms of Service and the associated Data Policy by selecting the “accept” button, or delete her Facebook account⁴⁰, lack of clarity on which specific legal basis Meta IE relies on for each processing operation⁴¹, and the Complainant’s concern on Meta IE’s reliance on Article 6(1)(b) GDPR to deliver the Facebook Terms of Service⁴².
32. While the IE SA acknowledges that the EDPB considers in its EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR that, as a general rule, processing for online behavioural advertising is not necessary for the performance of a contract for online service under Article 6(1)(b) GDPR, in this particular case, having regard to the specific terms of the contract and the nature of the service provided and agreed upon by the parties, IE SA concluded that Meta IE may in principle rely on Article 6(1)(b) GDPR as legal basis of the processing of users’ 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 users⁴³.
33. The IE SA disagrees with what it defines as a *“strict threshold of ‘impossibility’ in the assessment of necessity”* proposed by the Complainant and the EDPB⁴⁴. By “impossibility”, IE SA refers to the argument put forward that a particular term of a contract (here, behavioural advertising) is not necessary to deliver an overall service or contract⁴⁵. The IE SA considers that Article 6(1)(b) GDPR cannot be interpreted as requiring that it is impossible to perform the contract without the data processing operations in question⁴⁶.
34. The IE SA considers behavioural advertising a core part of the service offered to and accepted by the users, having regard to the specific terms of the contract and the nature of the service provided and agreed upon by Meta IE and the user⁴⁷. The IE SA points out that the nature of the service being offered to Facebook users is set out in the first line of the Facebook Terms of Service: a personalised service that includes advertising. The IE SA argues that a distinguishing feature and commercially essential element of the contract between Meta IE and the user is that it funds its Facebook social media service with targeted and personalised advertising to the user⁴⁸.
35. The IE SA considers this information clearly set out and publicly available⁴⁹. Moreover, the IE SA states that any reasonable user would expect and understand that this was the bargain being struck, even if

³⁷ Draft Decision, paragraph 4.52 and 4.55.

³⁸ Draft Decision, Finding 2 p. 39.

³⁹ Draft Decision, paragraph 2.12.

⁴⁰ Draft Decision, paragraph 2.9.

⁴¹ Draft Decision, paragraph 2.10.

⁴² Draft Decision, paragraphs 2.10 and 4.10.

⁴³ Draft Decision, paragraph 4.53.

⁴⁴ Draft Decision, paragraph 4.47, 4.50 and 4.52.

⁴⁵ Draft Decision, paragraph 4.47.

⁴⁶ Draft Decision, paragraph 4.47, 4.49 and 4.50.

⁴⁷ Draft Decision, paragraphs 4.42 and 4.53.

⁴⁸ Draft Decision, paragraphs 4.43.

⁴⁹ Draft Decision, paragraphs 4.43 and 4.44.

they might prefer that the market would offer them better alternative choices⁵⁰. The IE SA responds to the Complainant's arguments that this analysis amounts to speculation by pointing out that the only evidence the Complainant put forward was the Complainant's own statement and a Gallup poll and that the IE SA is obliged to consider all of the evidence before it and entitled to take notice of matters in the public domain⁵¹.

36. The IE SA considers that having regard to what it described as the "*clear*" terms of the contract, targeted advertising forms a core element of Meta IE's business model and transaction with users⁵².
37. The IE SA thus concludes that 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 Facebook social media service, including through the provision of behavioural advertising insofar as this forms a core part of that service offered to and accepted by users⁵³.
38. The IE SA clarified that, having regard to the scope of the complaint and its inquiry, the above conclusion ought 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) GDPR⁵⁴.
39. The IE SA also notes that other provisions of the GDPR such as transparency act to strictly regulate the manner in which this service is to be delivered and the information that should be given to users and decides to address it separately in its Draft Decision⁵⁵. The IE SA considers that there have been significant failings of transparency in relation to the processing⁵⁶.
40. The IE SA considers that these failings of transparency do not change the "*basic fact*" that behavioural advertising forms part of the service offered by Facebook. The IE SA considers that information on which specific clauses of the "*Terms of Service*" are used by Meta IE to justify the specific purpose of its processing, the type of personal data processed and the applicable legal basis would not assist in deciding the question of principle as to whether Meta IE can rely on Article 6(1)(b) GDPR to provide a service that includes behavioural or targeted advertising⁵⁷.

4.2 Summary of the objections raised by the CSAs

41. The AT, DE, FR, IT, NL, NO, PL, PT and SE SAs object to **Finding 2 of the Draft Decision** and the assessment leading up to it⁵⁸.

⁵⁰ Draft Decision, paragraph 4.43.

⁵¹ Draft Decision, paragraph 4.44.

⁵² Draft Decision, paragraph 4.44.

⁵³ Draft Decision, paragraphs 4.53 and 4.55.

⁵⁴ Draft Decision, paragraph 4.54.

⁵⁵ Draft Decision, paragraph 4.51.

⁵⁶ Draft Decision, paragraph 4.12

⁵⁷ Draft Decision, paragraph 4.12.

⁵⁸ AT SA Objection, pp. 1-7; IT SA Objection, pp 1-7; NL SA Objection, paragraphs 4, 25-36; NO SA Objection, pp.1-2 and 7; PT SA Objection, paragraphs 65-68; SE SA Objection, pp. 2-3.

42. The AT, IT, NL, NO, and SE SAs consider that **the IE SA should have found an infringement of Article 6(1)(b) GDPR**⁵⁹, in line with the EDPB's interpretation of this provision⁶⁰. The DE, FR and PL SAs argue that the IE SA should have found an infringement of Article 6(1) GDPR⁶¹. The PT SA contends that the IE SA should have found an infringement of Article 5(1)(a) GDPR on the aspect of lawfulness⁶². The DE SAs in their objection, further argue that the IE SA should find an additional infringement of Article 5(1)(a) GDPR⁶³.
43. The DE SAs consider that the IE SE should impose a temporary or definitive limitation of the respective processing without legal basis in accordance with Article 58(2)(f) GDPR, i.e. the erasure of unlawfully processed personal data and the ban of the processing of data for the purpose of behavioural advertising until a valid legal basis is in place⁶⁴.
44. The FR SA notes that reversing the findings concerning the infringements of Article 6(1) GDPR also affects the scope of the corrective actions proposed by the IE SA, in addition to the administrative fine⁶⁵. The PT SA considers that the proposed additional infringement in relation to the breach of the lawfulness obligation (Article 5(1)(a) GDPR) should lead to the application of an additional corrective measure which is not now envisaged in the Draft Decision⁶⁶.
45. The IT SA, in its objection, also argues that the finding of an infringement of Article 6(1)(b) GDPR should result in the taking of appropriate corrective measures under Article 58(2)(d) (order to bring processing operations into compliance) GDPR along with the imposition of an administrative fine pursuant to Article 83(5)(a) GDPR⁶⁷.
46. The NO SA, in its objection, also argues that the IE SA should take concrete corrective measures. More specifically, the NO SA considers that the IE SA should order Meta IE to delete personal data processed under Article 6(1)(b) GDPR, unless those data were also collected for other purposes with a valid legal basis, as well as order Meta IE to identify a valid legal basis for future behavioural advertising or from now on abstain from such processing activities⁶⁸.
47. The AT, DE, FR, IT, NL, NO, PL, PT and SE SAs put forward several **factual and legal arguments** for the proposed change in legal assessment⁶⁹. Specifically they argue that Meta IE cannot rely on Article 6(1)(b) GDPR as a legal basis to process a Facebook user's data for behavioural advertising.
48. In the context of their objection, the AT and FR SAs argue that the factual background of **the Draft Decision does not include all relevant facts**. They request amending the factual background to include

⁵⁹ AT SA Objection, pp. 1-7; IT SA Objection, pp 1-7; NL SA Objection, paragraphs 4, 25-36; NO SA Objection, pp.1-2 and 7; SE SA Objection, pp. 2-3.

⁶⁰ EDPB 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, adopted on 8 October 2019 (hereinafter, "EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR").

⁶¹ DE SAs Objection, pp. 1-6 and pp.9-10; FR SA Objection, paragraphs 5-14, 33 and 52; PL SA Objection, pp. 1-2.

⁶² PT SA Objection, paragraphs 66 and 73.

⁶³ DE SAs Objection, p.10.

⁶⁴ DE SAs Objection, p. 10.

⁶⁵ FR SA objection paragraph 53.

⁶⁶ PT SA objection, paragraphs 66 and 73.

⁶⁷ IT SA Objection, p. 6.

⁶⁸ NO SA Objection, p. 7.

⁶⁹ AT SA Objection, Section B, (p. 1-7); DE SAs Objection, Section I (p. 2 - 10); FR SA Objection, Section II; IT SA Objection, Section 1 (p. 1-7) ; NL SA Objection, Objection 2 (paragraphs 25-36); NO SA Objection, Objection 1 (pp. 1 - 8); PL SA Objection, p. 1-2; PT SA Objection, paragraphs 49 - 68; SE SA Objection, Section 1 (p. 2-3).

a definition of “*behavioural advertising*”⁷⁰. The AT SA suggests mentioning also the technical possibilities Facebook uses to conduct it, such as collecting data from other group services, third-party websites, apps, cookies or similar storage technologies placed on the user’s computer or mobile device and linking that data with the user’s Facebook account⁷¹. The AT SA also suggests including the fact that on 28 May 2018 Meta IE switched its legal basis to process data for behavioural advertising from consent to contractual performance. The AT SA considers that the Gallup Institute study presented by the Complainant should also be included among the relevant facts⁷². The AT SA considers it as scientific evidence that shows that only 1.6% of Facebook users understood the request to accept the Facebook Terms of Service to be “*a contract*”⁷³. The AT SA states that this supports its arguments that data subjects do not have the “*expectation*” to receive personalised advertisements as “*part of a contract*”.

49. The DE and NL SAs **question the validity of a contract** between Meta IE and the user to ground the processing on Article 6(1)(b) GDPR⁷⁴, in light of the transparency issues identified by the IE SA⁷⁵. The DE SAs question whether the parties reached an agreement if the user did not know that they would enter into a contract, because Meta IE did not clearly communicate in a transparent manner that the use of its Facebook service would in the future be based on a contract⁷⁶. The NL SA argues that as a general rule, both parties must be aware of the substance of a contract, in order to willingly enter into it and considers that “*the established serious lack of transparency on behalf of the controller, therefore leads to a reasonable doubt whether data subjects have indeed been able to enter into a contract with the controller both willingly and sufficiently informed*”⁷⁷. The NL SA compounds its doubts on the validity of the contract by arguing that the Terms of Use and the Data Policy documents are lengthy and unclear and that Meta IE presents a completely one-sided deal whereby an individual data subject has no influence on any of the terms⁷⁸. The DE and NL SAs therefore consider that Meta IE’s statement that it relies on Article 6(1)(b) GDPR for its Facebook Service, in combination with documents with general descriptions of the service provided, and the IE SA’s reference to the controller’s right to choose its own legal basis to process data, are insufficient to accept that the performance of a contract can be used as a legal basis⁷⁹.
50. The DE and PT SAs contend that the IE SA is competent to assess the validity of contracts in the context of the GDPR, which is a prerequisite for controllers to base the processing of personal data on

⁷⁰ AT SA Objection, pp.6-7 ; FR SA Objection, paragraph 6.

⁷¹ AT SA Objection, pp.5-7.

⁷² AT SA Objection, p.7 and SE SA Objection, p.3.

⁷³ AT SA Objection, p.7.

⁷⁴ DE SAs Objection, p. 4; NL SA Objection, paragraphs 28 and 30.

⁷⁵ In Finding 3, the IE SA states that “*In relation to processing for which Article 6(1)(b) GDPR is relied on, Articles 5(1)(a), 12(1) and 13(1)(c) have been infringed.*” The IE SA considered, among others, that “*Information on the specific processing operations (necessarily including the data processed) that will be carried out for the purposes specified and by reference to the lawful bases specified (the latter two being currently, in my view, set out in a disjointed manner) should have been provided to the data subject. To the extent that this information was provided at all, it was not clearly linked with a specific purpose or lawful basis, and was described in an ambiguous manner (...)*” (Draft Decision, paragraph 5.71).

⁷⁶ DE SAs Objection, p. 4.

⁷⁷ NL SA Objection, paragraph 30.

⁷⁸ NL SA Objection, paragraph 28.

⁷⁹ DE SAs Objection, pp. 3-4 ; NL SA Objection, paragraph 26.

Article 6(1)(b) GDPR⁸⁰. The DE, NL, and PT SAs argue that the IE SA should assess whether a suitable contract is in place as required under Article 6(1)(b) GDPR⁸¹.

51. Without prejudice to any arguments made on the existence of a valid contract above, the AT, DE, FR, IT, NL, NO, PL, PT, and SE SAs are not satisfied by the assessment of necessity in the Draft Decision⁸². The AT, DE, FR, IT, NL, NO, PL, PT, and SE SAs assert that **behavioural advertising is objectively not necessary for the performance of Meta IE's contract with the data subject to deliver the Facebook service and is not an essential or core element of it**⁸³. To highlight the unnecessary of behavioural advertising to perform the contract with the Facebook user, the AT, DE, and SE SAs contrast this contract to the contract of providing personalised advertisement between Meta IE and a specific advertiser, in which Meta IE would presumably have this obligation towards the advertisers, yet not towards Facebook users that are not party to this contract⁸⁴. The DE SAs support this assertion by pointing out that there is no obligation to offer personalised advertising to the user, and contractual sanctions for the failure to provide it, as it can be seen from the Facebook Terms of Service⁸⁵. The AT, DE, IT, NO, PL, and SE SAs consider, while referring to the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, that the business models to offer “free” services and in return generate income by behavioural and personalised advertisement, inter alia, to support the service, cannot be necessary to perform a contract and fail to comply with data protection regulations⁸⁶. The DE SAs also cite the EDPB Guidelines 08/2020⁸⁷ to underscore that processing cannot be rendered lawful by Article 6(1)(b) GDPR simply because such advertising indirectly funds the provision of the service and that while personalisation of content, may, in certain circumstances, constitute an intrinsic and expected element of certain online services, Article 6(1)(b) GDPR in the context of targeting of social media users is hardly applicable⁸⁸. The AT, PL and SE SAs argue that advertisements can still be displayed on Facebook using alternative methods to behavioural advertising not involving profiling and tracking⁸⁹. The SE SA adds that some degree of targeting for increased relevance is possible, such as geography, language and context⁹⁰.
52. In addition, the AT, FR, NO, PT and SE SAs argue, also while referring to EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR⁹¹, that the IE SA should have considered the EDPB's argument that behavioural advertising cannot be “necessary” within the meaning of Article 6(1)(b) GDPR while a data subject can

⁸⁰ DE SAs Objection, p. 3; PT SA Objection, paragraph 60.

⁸¹ DE SAs Objection, p. 3; NL SA Objection, paragraph 30; PT SA Objection, paragraph 60 - 61.

⁸² AT SA Objection, pp.3-5; DE SAs Objection pp.4-6; FR SA Objection, paragraphs 8-12; IT SA Objection p.4-5; NL SA Objection paragraphs 31-32; NO SA Objection, pp.3, 5-7; PL SA Objection, pp.1-2; PT SA, paragraphs 57-58; SE SA Objection, pp.2-3.

⁸³ AT SA Objection, pp.3-5; DE SAs Objection pp.4-6 ; FR SA Objection, paragraphs 8-12; IT SA Objection p.4-5; NL SA Objection, paragraph 31; NO SA Objection, pp.3, 5-7; PL SA Objection, pp.1-2; PT SA, paragraphs 57-58; SE SA Objection, pp.2-3.

⁸⁴ AT SA Objection, p.3; DE SAs, p.5 ; SE SA Objection, p. 3.

⁸⁵ DE SAs Objection, pp.4-5.

⁸⁶ AT SA Objection, pp.4-5 ; DE SAs Objection, pp.5-6; FR SA Objection, paragraph 11; IT SA Objection, p.5; NO SA Objection, pp.5-6; PL SA Objection, pp.1-2; PT SA Objection, paragraph 55; SE SA Objection, pp.2-3.

⁸⁷ EDPB Guidelines 08/2020 on the targeting of social media users, version 2.0, adopted on 13 April 2021, paragraph 49.

⁸⁸ DE SAs Objection, pp.5 and 6.

⁸⁹ AT SA Objection pp.4-5; PL SA Objection, p.2; SE SA Objection, p.3.

⁹⁰ SE SA Objection, p.3.

⁹¹ See EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 52.

object to the processing of his/her personal data for direct marketing purposes at any time without any reason, in accordance with Article 21(2) GDPR⁹².

53. The NL SA also refers to the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR to state that *“the reasonable understanding and expectations of all contract parties as to what the core of the service is play an important role in what determines the extent of personal data processing that is ‘necessary’ for the performance of a contract”*⁹³. The AT, NL, and SE SAs contend that data subjects do not reasonably expect that their data is being processed for personalised advertising simply because Meta IE briefly refers to it in the Facebook Terms of Service⁹⁴. The NO SA takes into account how Meta IE markets its Facebook platform towards potential users (*“Connect with friends and the world around you on Facebook”*) and considers that Facebook users (including those with prior knowledge of data protection, technical means for profiling or the ad tech industry) should not be deemed to reasonably expect online behavioural advertising, especially to the extent as it is carried out by Meta IE⁹⁵. The IT SA argues that users can be aware, at the very most, that the service is being funded by personalised advertising, but they are not factually enabled to adequately know the features of the processing activities⁹⁶. The FR and NO SAs consider that the particularly massive and intrusive nature of the processing of the users’ data cannot meet the reasonable expectations of the users⁹⁷. The AT, NL and SE SAs also consider that the Draft Decision is inconsistent in finding that information on specific processing operations should have been provided, linked with a specific or lawful basis, and described in an unambiguous manner, while considering that data subjects had a perspective or expectation or were well informed that their data was being processed for behavioural advertising⁹⁸.
54. In addition to the arguments made above on the existence of a valid contract and the necessity of behavioural advertising for the performance of that contract, several SAs raise other considerations in their objections.
55. The NO SA argues that the IE SA’s interpretation of Article 6(1)(b) GDPR is contrary to the fairness principle, since data subjects face the dilemma of approving contractual terms possibly entailing intrusive and harmful processing practices, and being excluded from services on which they are de facto dependent, due to a lack of realistic alternatives to them⁹⁹.
56. On the **risks** posed by the Draft Decision, the AT, DE, NL, NO, PL, PT, and SE SAs explain that the proposed interpretation of Article 6(1)(b) GDPR leads to a situation where data protection principles are either undermined or bypassed entirely with regard to data subjects using the Facebook service¹⁰⁰.
57. Specifically the AT, DE, NO, and PT SAs point to the conditions of consent pursuant to Article 7 GDPR as being bypassed¹⁰¹. The NL SA considers that the Draft Decision allows Meta IE to engage in online

⁹² AT SA Objection, p. 3 - 4; FR SA Objection, paragraphs 11-12; NO SA Objection, p. 6; PT SA Objection, paragraphs 64-65; SE SA Objection, p. 2.

⁹³ NL SA Objection, paragraph 31.

⁹⁴ AT SA Objection, pp.3-4; NL SA Objection, paragraph 28, 30 - 32 ; SE SA Objection, p.3.

⁹⁵ NO SA, pp. 6-7.

⁹⁶ IT SA Objection, p.6.

⁹⁷ FR SA Objection, paragraph 18; NO SA Objection, p.6.

⁹⁸ AT SA Objection, p.4; NL SA Objection, paragraph 30; SE SA Objection, p.3.

⁹⁹ NO SA Objection, p. 5.

¹⁰⁰ AT SA Objection, pp.5-6; DE SAs Objection, pp.9-10; NL SA Objection, paragraphs 27, 35-36; NO SA Objection, p.7; PL SA Objection, p.2; PT SA Objection, paragraphs 64; SE SA Objection, p.5.

¹⁰¹ AT SA Objection, p 2 and 5; DE SAs Objection, p. 10; NO SA Objection, p. 4; PT SA Objection, paragraph 64.

behavioural advertising in a way that bypasses informed consent of data subjects¹⁰². The NO SA considers that users “*would face a dilemma between approving (though not by way of valid consent) contractual terms possibly entailing intrusive and harmful processing practices, and being excluded from services*”, which ultimately would also “*adversely affect data subjects’ freedom of expression and information*”¹⁰³. The PT SA sees users’ choice reduced to “*refusing to contract in order to protect his/her rights or accepting all data processing without the possibility of exercising the rights conferred on him by the GDPR under Article 7(3) or Article 21 GDPR*”¹⁰⁴. The FR SA considers that the Draft Decision “*does not allow the European users of the social network to have control over the fate of their data*”¹⁰⁵. The PL SA argues the Draft Decision significantly limits “*the possibilities of data subjects to assert their rights, including pursuing claims*”, adding that the lack of a proportionate, dissuasive and effective corrective measure may lead to Meta IE further infringing the rights or freedoms of data subjects protected under Article 8 of the Charter of Fundamental Rights of the European Union¹⁰⁶.

58. Further, the AT SA sees the risk materialise as in its view Article 25(2) GDPR (privacy by default) is not applied, “*since Facebook – at least in its contract – declares that behavioural advertising is ‘necessary’ for the contractual performance*”¹⁰⁷.
59. The DE SAs argue the Draft Decision allows Meta IE to “*bypass the requirements of a valid legal basis for the processing that cannot be based on contract performance*”¹⁰⁸. The IT SA considers the Draft Decision would substantially undermine the users’ right “*to freely determine the processing of their personal data for online behavioural advertising*”, in part because the requirement to identify a suitable legal basis would in many situations be reduced to adding a description of processing in a contract¹⁰⁹. The NL SA considers the Draft Decision lowers the threshold for legality of data processing on the basis of Article 6(1)(b) GDPR severely¹¹⁰. The NO SA considers that the Draft Decision erodes the lawfulness principle, as in the Draft Decision “*it is not the legislation which sets the boundaries for lawfulness under Article 5(1)(a) GDPR, but instead the individual contract*”, which is incompatible with Article 8 of the Charter of Fundamental Rights and Article 5(1)(a) GDPR¹¹¹.
60. Several SAs take the view that the Draft Decision, as it stands, sets a dangerous precedent contrary to the GDPR. The FR SA notes that it could be understood as reflecting the common position of the European supervisory authorities on this matter, since it is issued following the cooperation procedure among SAs¹¹². Specifically, the AT, DE, IT, and SE SAs raise that this interpretation of Article 6(1)(b) GDPR could essentially be used by every controller and therefore endanger the rights of nearly every data subject within the EEA¹¹³.

¹⁰² NL SA Objection, paragraph 35.

¹⁰³ NO SA Objection, p. 5.

¹⁰⁴ PT SA Objection, paragraph 64.

¹⁰⁵ FR SA Objection, paragraph 36.

¹⁰⁶ PL SA Objection, p. 2.

¹⁰⁷ AT SA Objection, p 5.

¹⁰⁸ DE SAs Objection, p. 9.

¹⁰⁹ IT SA Objection, p. 4 and p. 6-7.

¹¹⁰ NL SA Objection, paragraph 35.

¹¹¹ NO SA Objection, p. 2 and 8.

¹¹² FR SA Objection, paragraph 37.

¹¹³ AT SA Objection, p 6; DE SAs Objection, p. 10; FR SA Objection, paragraph 37; IT SA, p.7; SE SA Objection, p.5.

61. Moreover, the AT, DE, IT, NL, NO, and PT SAs explain that the Draft Decision creates a loophole, allowing Meta IE and any other controller to make lawful virtually any collection and reuse of personal data by, as long as they declare that it is processed for the performance of a contract¹¹⁴.

4.3 Position of the LSA on the objections

62. The IE SA considers that the objections above are not relevant and/or not reasoned for the purpose of Article 60(4) GDPR and decides not to follow them¹¹⁵.
63. The IE SA contends that a broad, direct competence in contract law to assess **the validity of contracts** cannot be inferred from the GDPR tasks of supervisory authorities¹¹⁶. It argues that this inference would create a very extensive power for SAs to regulate private law, without an appropriate basis in EU law.
64. The IE SA argues that the core or fundamental aspects of the Facebook Terms of Service, including behavioural advertising processing, reflects the mutual expectations of the parties on contractual performance¹¹⁷. The IE SA contends that a reasonable user would have had sufficient understanding that the Facebook service was provided on the basis of personalised advertising, based also on a *“recognised public awareness”* of behavioural advertising as a form of processing.
65. On the **necessity of the processing to perform the contract**, the IE SA considers that it does not adopt a merely formal approach to Article 6(1)(b) GDPR that relies only on the textual content of the Facebook Terms of Service¹¹⁸. The IE SA states that it does not take the view that all written contractual terms are necessary for the performance of the contract. The IE SA contends that it focuses in its Draft Decision on the fundamental purpose or core function of the contract that is necessary for its performance.
66. The IE SA argues that the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR do not prohibit behavioural advertising processing under Article 6(1)(b) GDPR if it falls within the core or essential aspects of the service¹¹⁹. In relation to Meta IE’s processing of personal data, the IE SA differs from the SAs in that it considers online behavioural advertising as necessary for the performance of the contract (as described in the Facebook Terms of Service) between Facebook Ireland and the data subject.
67. The IE SA also disagrees with the interpretation of Article 21 GDPR making behavioural advertising optional and not indispensable¹²⁰. The IE SA argues that Article 6(1)(b) GDPR is not limited to aspects of contractual performance which are expressly mandatory and unconditional obligations of the parties. The IE SA contends that the CJEU has in the past held that processing which exceeds the most minimal level of processing possible may be regarded as necessary, where it renders a lawful objective *“more effective”*. The IE SA affirms that the necessity in the context of Article 6(1)(b) GDPR cannot be

¹¹⁴ AT SA Objection, pp.5-6; DE SAs Objection, pp.9-10; IT SA Objection, pp.4 and 6; NL SA Objection, paragraphs 27, 35-36 ; NO SA Objection, p. 2-3 and 7; PT SA Objection, paragraphs 54 and 63 ; SE SA Objection, p.5.

¹¹⁵ Composite Response, paragraphs 45, 51, 72, 80, 84, 91.

¹¹⁶ Composite Response, paragraph 45.

¹¹⁷ Composite Response, paragraphs 67 and 68.

¹¹⁸ Composite Response, paragraphs 48-51.

¹¹⁹ Composite Response, paragraphs 65-66.

¹²⁰ Composite Response, paragraphs 69 and 79.

assessed by reference to hypothetical alternative forms of the Facebook service and that it is not the role of SAs to impose specific business models on controllers¹²¹.

68. The IE SA considers EDPB guidelines as not binding on supervisory authorities, yet it acknowledges that they should be taken into account¹²². However, the IE SA argues that the EDPB has not been provided with the legal power to mandate that certain categories of processing must be based on consent, to the exclusion of any other legal bases for processing. IE SA's view is that such a power is properly exercised from time to time by the EU legislator, in the form of specific legislative measures¹²³. The IE SA is therefore not satisfied that the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR can be construed as a binding and specific prohibition on processing for online behavioural advertising on the basis of Article 6(1)(b) GDPR. The IE SA considers that under these Guidelines, where processing for behavioural advertising is a distinguishing characteristic of the service in question, it can support the business objectives and interests of the controller and be based on Article 6(1)(b) GDPR. The IE SA considers that to be the case regarding Meta IE's processing with reference to the Facebook service¹²⁴.
69. The IE SA argues that compliance with GDPR transparency obligations under Article 13(1)(c) GDPR involves a separate and different legal assessment to that required in Article 6(1)(b) GDPR¹²⁵. The IE SA acknowledges that the necessity test under Article 6(1)(b) GDPR may require considering contractual terms and other relevant information, and that the information provided under Article 13(1)(c) GDPR could, in some cases, inform a data subject's expectations as to a contractual service. However, in the present case, the IE SA considers that the transparency infringement it proposes for its Draft Decision does not impact its findings on the legal basis, as it considers that the expectations and understanding of the parties on the Facebook Terms of Service include personalised advertising¹²⁶.

4.4 Analysis of the EDPB

4.4.1 Assessment of whether the objections were relevant and reasoned

70. The objections raised by the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs concern "*whether there is an infringement of the GDPR*"¹²⁷.
71. The EDPB takes note of Meta IE's view that not a single objection put forward by the CSAs meets the threshold of Article 4(24) GDPR¹²⁸. Meta IE's primary argument is that "*Objections which raise matters which are not within the Defined Scope of Inquiry are not 'relevant and reasoned' within the meaning of Article 4(24) GDPR and such objections 'ought to be disregarded in their entirety by the EDPB'*"¹²⁹. Contrary to Meta IE's¹³⁰ position on relevance, objections can have bearing on the "*specific legal and*

¹²¹ Composite Response, paragraph 71.

¹²² Composite Response, paragraph 76.

¹²³ Composite Response, paragraph 77.

¹²⁴ Composite Response, paragraphs 77-79.

¹²⁵ Composite Response, paragraphs 82-83.

¹²⁶ Composite Response, paragraph 82.

¹²⁷ EDPB Guidelines on RRO, paragraph 24.

¹²⁸ Meta IE Article 65 Submissions, Annex 1, p. 70.

¹²⁹ Meta IE Article 65 Submissions, paragraphs 4.9 and 4.10.

¹³⁰ Meta IE cites the EDPB Guidelines on RRO, which state that "[a]n objection should only be considered relevant if it relates to the specific legal and factual content of the Draft Decision" (paragraph 14) to draw the conclusion that any objection raising matters outside the scope of the inquiry is not relevant. See Meta IE Article 65

factual content of the Draft Decision”, despite not aligning with the scope of the inquiry as defined by an LSA. Nor does the EDPB accept Meta IE’s narrowing the scope of “*reasoned*” to arguments on issues that have been investigated or addressed in the inquiry¹³¹, as no such limitation can be read in Article 4(24) GDPR.

72. In essence, Meta IE argues that CSAs may not, under any circumstance, express disagreement with the scope of the inquiry as decided by the LSA by way of an objection. The EDPB does not share this reading of Article 65 GDPR, as is explicitly stated in the EDPB Guidelines on RRO¹³².
73. Furthermore, Meta IE states that “*it is not now open to the CSAs to seek to expand the scope of the Inquiry in the manner proposed and that, were the EDPB to do so, this would constitute a clear breach of Meta Ireland’s legitimate expectations and right to fair procedures, both as a matter of Irish law and in accordance with Article 41 of the Charter of Fundamental Rights and Freedoms of the EU (the ‘Charter’)*”¹³³. Despite claiming it is “*clear*”, Meta IE does not demonstrate in which manner its procedural rights would be inevitably breached by the mere fact that the EDPB finds specific objections admissible. Admissibility determines the competence of the EDPB, but not the outcome of the dispute between the LSA and the CSAs. Likewise, Meta IE does not explain how the mere act of considering the merits of admissible objections inevitably and irreparably breaches the procedural rights cited by Meta IE¹³⁴. Accepting Meta IE’s interpretation would severely limit the EDPB possibility to resolve disputes arising in the one-stop-shop, and thus undermine the consistent application of the GDPR.
74. The objections of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs on the finding of an infringement all have a direct connection with the LSA Draft Decision and refer to a specific part of the Draft Decision, i.e. Finding 2. All of those objections concern “*whether there is an infringement of the GDPR*” as they argue that the IE SA should have found an infringement of Article 6(1), 6(1)(b) or 5(1)(a)(on the aspect of lawfulness) of the GDPR. As the LSA considered that Article 6(1)(b) GDPR was not breached, the objections entail a need of a change of the LSA decision leading to a different conclusion. Consequently, the EDPB finds that the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs objections relating to the infringement of Article 6(1), 6(1)(b) or 5(1)(a)(on the aspect of lawfulness) GDPR are **relevant**.
75. As regards the part of the DE SAs objection arguing that the IE SA should find an infringement of Article 5(1)(a) GDPR and impose the erasure of unlawfully processed personal data and the ban of the processing of data for the purpose of behavioural advertising until a valid legal basis is in place; the part of the IT SA objection related to the imposition of an administrative fine pursuant to

Submissions, paragraph 4.11. The EDPB notes that paragraph 14 of the EDPB Guidelines on RRO draws a distinction between relevant objections and “*abstract or broad concerns or remarks*” on the one hand and “*minor disagreements*” on the other. Moreover, this paragraph should be read in conjunction with paragraph 27 of the EDPB Guidelines on RRO.

¹³¹ Meta IE puts forward that “*Objections which raise matters which are not within the Defined Scope of Inquiry*” are “*inadequately reasoned as they fail to explain how findings of infringement can be made on issues that have not been investigated or addressed in the Inquiry*”. Meta IE Article 65 Submissions, paragraph 4.10 and 4.11. The EDPB maintains its understanding of the term “*reasoned*”, as explained in paragraphs 16-19 of its EDPB Guidelines on RRO.

¹³² “*For instance, if the investigation carried out by the LSA unjustifiably fails to cover some of the issues raised by the complainant or resulting from an infringement reported by a CSA, a relevant and reasoned objection may be raised based on the failure of the LSA to properly handle the complaint and to safeguard the rights of the data subject.*” EDPB Guidelines on RRO, paragraph 27.

¹³³ Meta IE Article 65 Submissions, paragraph 4.5.

¹³⁴ The EDPB fails to see how, for instance, declaring an objection admissible but rejecting it on merits could impinge on the procedural rights of the controller involved in the underlying case.

Article 83(5)(a) GDPR for the additional infringement by Meta IE of Article 6(1)(b) GDPR; and the part of the NO SA objection arguing the IE SA should order Meta IE to delete personal data processed under Article 6(1)(b) GDPR, as well as order Meta IE to identify a valid legal basis for future behavioural advertising or from now on abstain from such processing activities, the EDPB notes that these parts of the objections concern “*whether the envisaged action in relation to the controller complies with the GDPR*”. These parts of the three objections are linked to the IE SA’s Finding 2 with regard to Article 6(1)(b) GDPR. Therefore, they are directly connected with the substance of the Draft Decision and, if followed, would lead to a different conclusion. Thus, the EDPB considers that these parts of the DE, IT and NO SAs objections are relevant.

76. The objections of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs on the finding of an infringement are **also reasoned** because they all include clarifications and arguments on legal/factual mistakes in the LSA’s Draft Decision that require amending. More specifically, the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs provide detailed arguments to challenge the Draft Decision’s consideration of behavioural advertising as a **necessary**, core or fundamental aspect of a contract leading to the need to change the decision and to find an infringement of Article 6(1)(b) GDPR¹³⁵. Some of them provide detailed arguments challenging the validity of the contract on which the use of Article 6(1)(b) GDPR as a legal basis depends and which the IE SA accepts¹³⁶.
77. Some SAs recall, while referring to the terms of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR¹³⁷, that it is the fundamental and mutually understood contractual purpose, which justifies that the processing is necessary¹³⁸. This purpose is not only based on the controller’s perspective but also on a reasonable data subject’s perspective when entering into the contract and thus on “*the mutual perspectives and expectations of the parties to the contract*”. The AT, NL, and SE SA contend that data subjects do not reasonably expect that their data is being processed for personalised advertising simply because Meta IE briefly refers to it in the Facebook Terms of Service¹³⁹. The FR, IT and NO SAs also support this finding and add that data subjects cannot be presumed to be aware of the particularly massive and intrusive nature of this processing¹⁴⁰. Several SAs also consider that the Draft Decision is inconsistent in finding that information on specific processing operations should have been provided, linked with a specific or lawful basis, and described in an unambiguous manner, while considering that data subjects had a perspective or expectation or were well informed that their data was being processed for behavioural advertising¹⁴¹.
78. The AT, DE, FR, IT, NL, NO, PL, PT and SE SAs objections also identify risks posed by the Draft Decision, in particular an interpretation of Article 6(1)(b) GDPR that could be invoked by any controller and would undermine or bypass data protection principles, and thus endanger the rights of data subjects within the EEA¹⁴².

¹³⁵ AT SA Objection, pp.3-5; DE SAs Objection pp.4-6; FR SA Objection, paragraphs 8-14; IT SA Objection p.4-5; NL SA Objection paragraphs 31-32; NO SA Objection, pp.3, 5-8; PL SA Objection, pp.1-2; PT SA, paragraphs 57-58; SE SA Objection, pp.2-3.

¹³⁶ DE SAs Objection, pp. 3-4; NL SA Objection, paragraph 26.

¹³⁷ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 32 and 33.

¹³⁸ AT SA Objection, p. 5; DE SAs Objection, p.5; FR SA Objection, paragraph 8; NL SA Objection, paragraph 31; NO SA, p.6; SE SA objection, p.3.

¹³⁹ AT SA Objection, pp.3-4; NL SA Objection, paragraph 28, 30 - 32; SE SA Objection, p.3.

¹⁴⁰ FR SA Objection, paragraph 18; IT SA Objection, paragraph 2.6, NO SA Objection, pp.6-7.

¹⁴¹ AT SA Objection, p.4; NL SA Objection, paragraph 30; SE SA Objection, p.3.

¹⁴² See their description of the risks in paragraphs 56 to 61 above.

79. Meta IE's contends that in terms of risk, the objections must "*demonstrate the likelihood of a direct negative impact of a certain significance of the Draft Decision on fundamental rights and freedoms under the Charter and not just any data subject rights*"¹⁴³. Meta IE thus adds a condition to Article 4(24) GDPR, which is not supported by the GDPR¹⁴⁴.
80. As regards the parts of the DE SAs objection requesting the finding of an infringement of Article 5(1)(a) GDPR, and the parts of the DE, IT and NO SAs objections requesting specific corrective measures under Article 58 GDPR for the infringement of Article 6(1) or 6(1)(b) GDPR, namely the imposition of an administrative fine, a ban of the processing of personal data for the purpose of behavioural advertising, an order to delete personal data processed under Article 6(1)(b) GDPR and an order to identify a valid legal basis for future behavioural advertising or to abstain from such processing activities, the EDPB considers that these parts of the objections do not sufficiently elaborate the legal or factual arguments that would justify a change in the Draft Decision leading to the finding of an infringement of Article 5(1)(a) GDPR or to the imposition of the specific corrective measures mentioned above. Likewise, the significance of the risk for the data subjects, which stems from the IE SA's decision not to conclude on the infringement of Article 5(1)(a) GDPR and not to impose the requested corrective measures, is not sufficiently demonstrated.
81. Considering the above, the EDPB finds that the objections of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs on the finding of an infringement of Article 6(1), 6(1)(b), or 5(1)(a) (on the aspect of lawfulness) GDPR are relevant and reasoned in accordance with Article 4(24) GDPR.
82. However, the parts of the DE SAs objection concerning the additional infringement of Article 5(1)(a) GDPR, and the parts of the DE, IT and NO SAs objections concerning the imposition of certain corrective measures, namely the imposition of an administrative fine, a ban on the processing of personal data for the purpose of behavioural advertising, an order to delete personal data processed under Article 6(1)(b) GDPR and an order to identify a valid legal basis for future behavioural advertising or to abstain from such processing activities are not reasoned and do not meet the threshold of Article 4(24) GDPR.

4.4.2 Assessment on the merits

83. In accordance with Article 65(1)(a) GDPR, in the context of a dispute resolution procedure 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.
84. The EDPB considers that the objections found to be relevant and reasoned in this subsection¹⁴⁵ require an assessment of whether the Draft Decision needs to be changed 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 Facebook Terms of Service. When assessing the merits of the objections raised, the EDPB also takes into account Meta IE's position on the objections and its submissions.

¹⁴³ Meta IE Article 65 Submissions, p. 70.

¹⁴⁴ Art. 1(2) GDPR provides that the GDPR itself "*protects fundamental rights and freedoms of natural persons and in particular their right to protection of personal data*", which directly stems from Art. 8(1) of the Charter. Therefore, there is no reason to draw a distinction between the data subject rights protected by the GDPR and the fundamental rights protected under the Charter when interpreting Art. 4(24) GDPR.

¹⁴⁵ These objections being those of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs arguing that the IE SA should have found an infringement of Art. 6(1)(b), Art. 6(1) or Art. 5(1)(a)(on the aspect of lawfulness) GDPR.

Meta IE's position on the objections and its submissions

85. In its submissions, Meta IE argues that the objections lack merit. Meta IE considers that they are based on incorrect factual assumptions and are legally flawed¹⁴⁶. Meta IE states that its reliance on Article 6(1)(b) GDPR does not “bypass” the GDPR. Nor would it, according to Meta IE, jeopardise data subject rights, be limited to individually negotiated agreements or be affected by Meta IE’s purported pre-GDPR legal basis for processing conducted pre-GDPR¹⁴⁷.
86. Meta IE argues that there is a lack of factual material and evidence on the issues on which the CSAs raise objections, including on its reliance on Article 6(1)(b) GDPR for the specific processing operations it conducts in its Facebook service for the purposes of behavioural advertising¹⁴⁸. Meta IE notes that the IE SA did not consider what processing operations would fall within the term “online behavioural advertising” and the actual processing operations that Meta IE conducted with respect to the Complainant or with respect to advertising on the Facebook service more generally¹⁴⁹.
87. At the same time, Meta IE contends that, to address the complaint, the IE SA did not have to reach any conclusions as to whether the actual processing conducted by Meta IE to deliver behavioural advertising based on Article 6(1)(b) GDPR was lawful¹⁵⁰. Meta IE supports the IE’s position that it would not “have been appropriate to undertake an open-ended assessment of all processing operations by the controller (having a general association with the Facebook Terms of Service) in order to handle the complaint. Such an approach would result in a disproportionate and open-ended examination of processing by Facebook, without first resolving the actual issues which are disputed between the parties”¹⁵¹.
88. Meta IE thus agrees with the “general and principled in nature” finding the IE SA reached on Meta IE’s not being precluded from relying on Article 6(1)(b) GDPR for the processing of data necessary to deliver behavioural advertising¹⁵², upon the IE SA’s review of the Facebook Terms of Service and the nature of its products and features as described in those terms.
89. Meta IE defends that Article 6(1)(b) GDPR can be relied on as a legal basis for behavioural advertising¹⁵³. Meta IE argues that its application requires the assessment of whether a given data processing operation, when properly investigated and analysed, is actually necessary for the performance of a contract¹⁵⁴. Meta IE notes that personalisation, including in the form of behavioural advertising, is clearly central and objectively reasonable and necessary with regard to the essence of the Facebook service (as per the Facebook Terms of Service, which govern the contractual relationship between Meta IE and its users)¹⁵⁵.
90. Meta IE argues that the Facebook Terms of Service make clear that users will be shown advertising personalised to their interests under the heading “Help you discover content, products and services

¹⁴⁶ Meta IE Article 65 Submissions, paragraph 5 of summary.

¹⁴⁷ Meta IE Article 65 Submissions, paragraph 6 of summary.

¹⁴⁸ Meta IE Article 65 Submissions, paragraph 4.42 and 4.43.

¹⁴⁹ Meta IE Article 65 Submissions, paragraph 4.7.

¹⁵⁰ Meta IE Article 65 Submissions, paragraph 3 of summary and 4.8.

¹⁵¹ Meta IE Article 65 Submissions, paragraph 4.8 and Composite Response, paragraph 21.

¹⁵² Meta IE Article 65 Submissions, paragraph 3 of summary and 4.8.

¹⁵³ Meta IE Article 65 Submissions, paragraph 6.5.

¹⁵⁴ Meta IE Article 65 Submissions, paragraph 6.7.

¹⁵⁵ Meta IE Article 65 Submissions, paragraphs 6.13 to 6.17.

*that may interest you*¹⁵⁶. Meta IE supports the DPC’s finding, based on its review of the Facebook Terms of Service and a general reference to public debate on these issues, that an average user who accepts the Facebook Terms of Service would have the expectation that personalisation, including in the form of behavioural advertising, forms a core and integral part of the Facebook Terms of Service¹⁵⁷. Meta IE backs this argument with a reference to a survey and a study conducted by a private entity and a digital industry association¹⁵⁸. Meta IE considers that its compliance with the GDPR’s transparency obligations involves a separate and different legal assessment from Article 6(1)(b) GDPR¹⁵⁹. Meta IE considers demonstrated in this case that Meta IE and its users have a mutual expectation that personalisation, including in the form of behavioural ads, is core to the Facebook Terms of Service¹⁶⁰.

91. Meta IE recalls that the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR do not categorically prohibit reliance on Article 6(1)(b) GDPR for behavioural advertising¹⁶¹. Meta IE further adds, referring to the CJEU’s *Huber* judgment¹⁶², that *“processing beyond the most minimal required to achieve the processing purpose could still be deemed ‘necessary’ if it allowed the relevant processing purpose to be ‘more effectively’ achieved”*¹⁶³. Meta IE submits that even if Article 6(1)(b) GDPR required the processing to be absolutely essential to perform the contract, it would be impossible to provide the Facebook service in accordance with its Term of Service without providing behavioural advertising¹⁶⁴. Meta IE states that the EDPB cannot compel it to change the nature of its service. Meta IE would view this as a violation of Article 16 of the Charter on the freedom to conduct business enabling service providers to determine what measures to take in order to achieve the result they seek, based on their resources, abilities, and compatibility with other obligations and challenges they may encounter in the exercise of their activity¹⁶⁵.
92. Meta IE further argues that its reliance on the contractual necessity legal basis does not jeopardise data subject rights¹⁶⁶. Meta IE considers that these would also be protected by contract and consumer protection legislations in the EU Member States and acknowledges that compliance with them is a necessary precondition to the reliance on this legal basis¹⁶⁷. Meta IE defends that the contractual necessity legal basis is not limited to individually negotiated agreements and can also be used for standard form contracts¹⁶⁸. Meta IE further adds that it would be improper for CSAs and the EDPB to analyse the validity of the Facebook Terms of Service under applicable laws of contract or to draw inferences from them¹⁶⁹. In response to what Meta IE considers mischaracterisations in certain

¹⁵⁶ Meta IE Article 65 Submissions, paragraph 6.15.

¹⁵⁷ Meta IE Article 65 Submissions, paragraphs 6.23 and 6.25.

¹⁵⁸ Meta IE Article 65 Submissions, paragraph 6.23.

¹⁵⁹ Meta IE Article 65 Submissions, paragraph 6.24.

¹⁶⁰ Meta IE Article 65 Submissions, paragraph 6.24.

¹⁶¹ Meta IE Article 65 Submissions, paragraph 6.29.

¹⁶² Judgement of the Court of Justice of 18 December 2008, *Heinz Huber v Bundesrepublik Deutschland*, C-524/06, ECLI:EU:C:2008:724 (hereinafter ‘C-524/06 Huber’), paragraphs 62 and 66.

¹⁶³ Meta IE Article 65 Submissions, paragraph 6.31.

¹⁶⁴ Meta IE Article 65 Submissions, paragraph 6.32.

¹⁶⁵ Meta IE Article 65 Submissions, paragraph 6.34.

¹⁶⁶ Meta IE Article 65 Submissions, paragraph 6.38.

¹⁶⁷ Meta IE Article 65 Submissions, paragraph 6.38.

¹⁶⁸ Meta IE Article 65 Submissions, section E.

¹⁶⁹ Meta IE Article 65 Submissions, paragraphs 6.43 and 6.44.

objections of national contract law Meta IE provides expert reports on the validity of the Facebook Terms of Service in 22 Member States¹⁷⁰.

93. Meta IE concludes its arguments in support of its reliance on Article 6(1)(b) GDPR stating that its pre-GDPR legal basis for data processing does not affect its flexibility to rely on other legal bases post GDPR if it complies with the relevant requirements¹⁷¹. Meta IE also distinguishes behavioural advertising on the Facebook service from direct marketing pursuant to Article 21(2) GDPR and thus considers this provision not applicable to behavioural advertising¹⁷².

EDPB's assessment on the merits

94. 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 Facebook 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 Facebook Terms of Service 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-252/21¹⁷³ and C-446/21¹⁷⁴ to which some of the documents in the file refer¹⁷⁵ contain helpful descriptions of Meta IE's behavioural advertising practices in the context of its Facebook service.
95. These requests for preliminary rulings mention that Meta IE collects data on its individual users and their activities on and off its Facebook social network 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.
96. 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. 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 Facebook Terms of Service and perceive it as necessary for Meta IE to deliver its service¹⁷⁶. 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 Facebook service to appropriately substantiate its reasoning leading to its acceptance of

¹⁷⁰ Meta IE Article 65 Submissions, paragraphs 6.44 and 6.45 and Annex 3.

¹⁷¹ Meta IE Article 65 Submissions, section F.

¹⁷² Meta IE Article 65 Submissions, Section G.

¹⁷³ C-252/21 *Oberlandesgericht Düsseldorf request*, pp.6-7.

¹⁷⁴ C-446/21 *Austrian Oberster Gerichtshof request* paragraphs 2-3, 6-13, 15-23.

¹⁷⁵ See for instance the references to these requests for a preliminary ruling in the AT SA Objection p.9 and Meta IE's Article 65 Submissions, p.14.

¹⁷⁶ In the same vein, the Advocate General also provides a description of behavioural advertising in its Opinion on the case C-252/21 *Oberlandesgericht Düsseldorf request*, see Opinion of the Advocate General on 20 September 2022), ECLI:EU:C:2022:704, paragraphs 9 and 10.

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 decision¹⁷⁷.

97. In the same vein, the EDPB also finds that the content of the Gallup Institute poll, which the Complainant's representative requested and subsequently submitted to the IE SA in its submission of 20 November 2019, could have been part of the facts of the Draft Decision¹⁷⁸. This poll provides a supplementary and useful indication on the perspective of Facebook users, which helps assessing whether they could expect being subject to behavioural advertising as part of a contract. The results of the poll allege, inter alia, that only 1.6% to 2.5% of the 1.000 respondents¹⁷⁹, who are Facebook users, understood the request to accept the Facebook Terms of Service to be a "*contract*" that provides them with a contractual right to personalised advertisement. The IE SA acknowledges the Complainant's submission of this poll in its Draft Decision but seemingly dismisses it by focusing primarily on what it considers as primary sources of factual evidence (primarily, the Facebook Terms of Service) and "*matters in the public domain*"¹⁸⁰. Conversely, Meta IE seems to attach importance to this poll. Meta IE engaged an expert to produce a report (the "Vanhuele Report") that Meta IE appends to Annex 2 of its pre-Article 65 submission to point to what Meta IE considers "*serious flaws*" in the report containing the poll and allege that the Complainant misinterpreted its results¹⁸¹.
98. 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 Facebook Terms of Service.
99. As described above in Section 4.1, the IE SA concludes in Finding 2 of its Draft Decision that the Complainant's case is not made out that the GDPR does not permit the reliance by Facebook on Article 6(1)(b) GDPR in the context of its offering of the Facebook Terms of Service. 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 service¹⁸². 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

¹⁷⁷ See EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 84 and EDPB Guidelines 02/2022 on the application of Article 60 GDPR (Version 1.0, Adopted on 14 March 2022), paragraph 111 (stating: "[...] every decision that is aimed at legal consequences needs to include a description of relevant facts, sound reasoning and a proper legal assessment. These requirements essentially serve the purpose of legal certainty and legal protection of the parties concerned. Applied to the area of data protection supervision this means that the controller, processor and complainant should be able to acknowledge all the reasons in order to decide whether they should bring the case to trial. Having regard to the decision making process within the cooperation mechanism, CSAs likewise need to be in the position to decide on possibly taking actions (e.g. agree to the decision, provide their views on the subject matter)"). See also by analogy Judgement of the Court of Justice of 26 November 2013, *Kendrion NV v European Commission*, C-50/12 P, ECLI:EU:C:2013:771, paragraph 42.

¹⁷⁸ An informal translation of the presentation of this Study, dated November 2019, as provided by the Complainant's representative through its public website, may be found here: https://noyb.eu/sites/default/files/2020-05/Gallup_Facebook_EN.pdf (Date of consultation 21 November 2022).

¹⁷⁹ According to the poll "*Austrians that are active online, age 14 and older*".

¹⁸⁰ Draft Decision, paragraph 4.44; Composite Response, paragraph 83.

¹⁸¹ Meta IE Article 65 Submissions, footnote 132, p.75, and Annex 2.

¹⁸² Draft Decision, paragraph 4.52.

the provision of its Facebook service, including through the provision of behavioural advertising insofar as this forms a core part of its service offered to and accepted by its users¹⁸³. The IE SA considers that a distinguishing feature and commercially essential element of the contract between Meta IE and the user is that the Facebook service is funded by targeted or personalised advertising to the user¹⁸⁴. The IE SA considers this information clearly set out, publicly available and understandable by any reasonable user. Meta IE supports this conclusion of the IE SA¹⁸⁵.

100. 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 context¹⁸⁶.
101. 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 law¹⁸⁷. 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”*¹⁸⁸. 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 data¹⁸⁹. 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 EU¹⁹⁰. 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 proportionality¹⁹¹ 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 contract¹⁹². 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 interests¹⁹³.
102. 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

¹⁸³ Draft Decision, paragraph 4.53.

¹⁸⁴ Draft Decision, paragraphs 4.43 and 4.44.

¹⁸⁵ Meta IE Article 65 Submissions, paragraphs 6.23 and 6.25.

¹⁸⁶ Judgement of the Court of Justice of 1 August 2022, *Vyriausioji tarnybinės etikos komisija*, Case C-184/20, ECLI:EU:C:2022:601, (hereinafter ‘C-184/20 *Vyriausioji tarnybinės etikos komisija*’), paragraph 121.

¹⁸⁷ Recitals 1 and 2 GDPR.

¹⁸⁸ Judgement of the Court of Justice of 21 June 2022, *Ligue des droits humains v. Conseil des ministres*, C-817/19, ECLI:EU:C:2022:491, (hereinafter ‘C-817/19 *Ligue des droits humains*’), paragraph 86; and Judgement of the Court of Justice of 2 February 2021, *Consob*, C-481/19, ECLI:EU:C:2021:84, paragraph 50 and the case-law cited.

¹⁸⁹ Article 1(1)(2) and Recital 6 and 7 GDPR.

¹⁹⁰ Article 1(3) and Recitals 9,10 and 13 GDPR.

¹⁹¹ Recital 4 GDPR.

¹⁹² EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 54.

¹⁹³ Judgement of the Court of Justice of 13 May 2014, *Google Spain SL*, C-131/12, ECLI:EU:C:2014:317, paragraphs 97 and 99.

the personal data of individuals if it is able to rely on one of the basis found in the exhaustive and restrictive lists of the cases in which the processing of data is lawful under Article 6 GDPR¹⁹⁴.

103. 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 controller¹⁹⁵.
104. The EDPB agrees with the IE SA and Meta IE that there is no hierarchy between these legal bases¹⁹⁶. 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 basis established under Article 6 GDPR if it is appropriate for the processing at stake¹⁹⁷. A specific legal basis will be appropriate insofar as the processing can meet its requirements set by the GDPR¹⁹⁸ 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 its Article 5(1)(a) and Article 6 GDPR¹⁹⁹. These criteria stem from the content of the GDPR²⁰⁰ and the interpretation favourable to the rights of data subjects to be given thereto described in paragraph 101 above.
105. 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 therefrom²⁰¹. 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 basis²⁰².
106. 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,

¹⁹⁴ Judgement of the Court of Justice of 11 December 2019, *TK v Asociația de Proprietari bloc M5A-ScaraA*, C-708/18, ECLI:EU:C:2019:1064, (hereinafter ‘C-708/18 *TK v Asociația de Proprietari*’), paragraph 37.

¹⁹⁵ See, recital 39 GDPR and EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 11 and 12.

¹⁹⁶ Draft Decision paragraph 3.16 and Meta IE’s Article 65 Submissions paragraph 5.12.

¹⁹⁷ As mentioned in the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 18, the identification of the appropriate lawful basis is tied to the principles of fairness and purpose limitation. It will be difficult for controllers to comply with these principles if they have not first clearly identified the purposes of the processing, or if processing of personal data goes beyond what is necessary for the specified purposes. See also Section 6 of this Binding Decision on the potential additional infringement of the principle of fairness.

¹⁹⁸ C-708/18 *TK v Asociația de Proprietari*, paragraph 37.

¹⁹⁹ See C-524/06 *Huber*, paragraph 52 on the concept of necessity being interpreted in a manner that fully reflects the objective of Directive 95/46). On the importance of considering the practical effect (*effet utile*) sought by EU law in its interpretation, see also for instance: C-817/19 *Ligue des droits humains*, paragraph 195; and Judgement of the Court of Justice of 17 September 2002, *Muñoz and Superior Fruiticola*, C-253/00, ECLI:EU:C:2002:497, paragraph 30.

²⁰⁰ Art. 1(1)(2) and (5) GDPR.

²⁰¹ Art. 5 (2) GDPR “Principle of accountability” of data controllers; see also C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 52.

²⁰² EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 26.

has to be able to **demonstrate that (a) a contract exists and (b) the contract is valid** pursuant to applicable national contract laws²⁰³.

107. Both the IE SA and Meta IE consider that the Facebook Terms of Service make up the entire agreement between the Facebook user and Meta IE and that the Data Policy is simply a compliance document setting out information to fulfil the GDPR transparency obligations²⁰⁴. The IE SA thus considers that the contract for which the analysis based on Article 6(1)(b) must take place, is the Facebook Terms of Service only²⁰⁵.
108. 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 contracts²⁰⁶. In its Draft Decision, the IE SA noted that the Complainant explicitly sought to have it investigate and make findings in respect of contract and consumer law. The IE SA noted that this falls outside of the remit of a supervisory authority under the GDPR and are instead within the competence of the relevant consumer and competition authorities²⁰⁷.
109. 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 child²⁰⁸.
110. As the DE and NL SAs²⁰⁹ argue, the validity of the contract for the Facebook 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.
111. Notwithstanding the possible invalidity of the contract, the EDPB refers to its previous interpretative guidance on this matter²¹⁰ to provide below its **analysis on whether behavioural advertising is objectively necessary** for Meta IE to provide its Facebook service to the user based on its Facebook Terms of Service and the nature of the service.

²⁰³ Binding Decision 2/2022, paragraph 84.

²⁰⁴ Draft Decision, paragraphs 4.4 to 4.6.

²⁰⁵ Draft Decision, paragraph 4.6.

²⁰⁶ Composite Response, paragraph 45; Meta IE Article 65 Submissions, paragraph 6.43.

²⁰⁷ Draft Decision, paragraph 4.14.

²⁰⁸ Art. 8(3) GDPR.

²⁰⁹ DE SAs Objection, p.4 and NL SA Objection, paragraph 30.

²¹⁰ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR.

112. The EDPB recalls²¹¹ 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”²¹². 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 subject²¹³.
113. 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 contract²¹⁴.
114. The IE SA accepts the EDPB’s position²¹⁵ that, as a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services²¹⁶. However, the IE SA considers that in this particular case, having regard to the specific terms of the contract and the nature of the Facebook 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.
115. The IE SA views behavioural advertising as a “core”, “fundamental” and “commercially essential” element of the contract and the commercial transaction between Meta IE and the Facebook users²¹⁷. In support of this consideration, the IE SA refers to the information provided in the Facebook Terms of Service under the headings: “Provide a personalized experience for you” and “Help you discover content, products, and services that may interest you”²¹⁸. The information provided includes reference to ads and includes the statement that “[w]e use the data we have ... to personalize your experience”. The IE SA further notes that the nature of the service being offered to Facebook users is set out in the first line of the Facebook Terms of Service,²¹⁹ which reads textually: “Provide a personalized experience for you:”. The IE SA considers that it is clear that the Facebook service is advertised (and widely understood) as one funded by personalised advertising and so, that any reasonable user would expect and understand and that this was the “bargain being struck, even if they [the users] might prefer that the market would offer them better alternative choices”²²⁰.
116. 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 GDPR²²¹. Accordingly, the concept of necessity under Article 6(1)(b) GDPR

²¹¹ See Binding Decision 2/2022, paragraph 89.

²¹² WP29 Opinion 06/2014 on the notion of legitimate interests, p. 17.

²¹³ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 30.

²¹⁴ See Binding Decision 2/2022, paragraph 90.

²¹⁵ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 52.

²¹⁶ Draft Decision, paragraph 4.53.

²¹⁷ Draft Decision, paragraphs 4.42, 4.43, 4.53, 4.55 and Finding 2.

²¹⁸ Draft Decision, paragraphs 4.36 to 4.38.

²¹⁹ Draft Decision, paragraph 4.43.

²²⁰ Draft Decision, paragraph 4.43.

²²¹ See paragraph 101 above on the principles guiding the interpretation of the GDPR and its provisions. The CJEU also stated in *Huber* that that “what is at issue is a concept [necessity] which has its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that Directive, [Directive 95/46], as laid down in Article 1(1) thereof”. C-524/06 *Huber*, paragraph 52.

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 data²²² or contradicts Article 8 of the Charter. On the processing of data in the Facebook service, Advocate General Rantos supports a strict interpretation of the Article 6(1)(b) GDPR among other legal basis, particularly to avoid any circumvention of the requirement for consent²²³.

117. Meta IE promotes among its prospective and current users the perception that the main purpose the Facebook service serves and for which it processes its users' data is to enable them to communicate with others. Meta IE presents its Facebook service in its landing website as a platform enabling users to *"connect with friends and the world around you on Facebook"* and at the beginning of its Facebook Terms of Service²²⁴ as being its mission *"to give people the power to build community and bring the world closer together. To help advance this mission, we provide the Products and services described below to you: (...)"* which include in consecutive headings *"Connect you with people and organizations you care about: (...)"*; *"Empower you to express yourself and communicate about what matters to you: (...)"* and *"Help you discover content, products and services that may interest you: (...)"*.
118. The fact that the Facebook Terms of Service²²⁵ do not provide for any contractual obligation binding Meta IE to offer personalised advertising to the Facebook users and any contractual penalty if Meta IE fails to do so shows that, at least from the perspective of the Facebook 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 Facebook service to Facebook users, but it is not presented as an obligation towards the Facebook users.
119. 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 Facebook service, among others, 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

²²² Art. 1(2) GDPR.

²²³ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, paragraph 51. (The EDPB refers to the Advocate General's Opinion in its Binding Decision as an authoritative source of interpretation to underline the EDPB's reasoning on the processing of data in the Facebook service, without prejudice to the case-law that the CJEU may create with its future judgments on the Cases C-252/21 and C-446/21).

²²⁴ Which the IE SA Meta IE consider as constituting the entire contract with the Facebook users (see paragraph 101).

²²⁵ The Facebook Terms of Service as formulated in one-sided terms as follows: *"These Terms govern your use of Facebook and the products, features, apps, services, technologies, and software we offer (the Facebook Products or Products), except where we expressly state that separate terms (and not these) apply."* While under Section 1 of the Terms of Service Facebook announces that it *"provides"* the following services, Section 3 of the Terms of Service is overwritten with *"Your Commitments to Facebook and Our Community"*. While Facebook itself only *"offers"* various services, it makes clear that the Terms of Service unilaterally impose duties and obligations on the user. Otherwise, the user may face suspension or termination of her/his account pursuant to Section 4.2 of the Terms of Service. No (contractual) sanctions appear to apply in the event that Meta IE fails to provide or poorly performs one or more of these services.

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 GDPR²²⁶.

120. As the EDPB provided in its guidance²²⁷ 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) GDPR will not cover processing that 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.
121. On the question of whether here there are realistic, less intrusive alternatives to behavioural advertising that make this processing not “*necessary*”²²⁸, the EDPB considers that there are. The AT, PL 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 users²²⁹. 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 possible²³⁰. By considering the existence of alternative practices to behavioural advertising that are more respectful of the Facebook users’ right to data protection, the EDPB, as the Advocate General, aims to assess if this processing is objectively necessary to deliver the service offered, as perceived by the Facebook 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 argue²³¹. 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 purposes²³².
122. 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 subject has the possibility to opt out from it at any time, and without providing any reason.

²²⁶ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 52.

²²⁷ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 25.

²²⁸ In *Schecke*, the CJEU held that, when examining the necessity of processing personal data, the legislature needed to take into account alternative, less intrusive measures. Judgement of the Court of Justice of 9 November 2010, *Volker und Markus Schecke GbR*, Joined Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662, (hereinafter ‘Case C-92/09 and C-93/09 *Schecke*’), paragraph 52. This was repeated by the CJEU in the *Rīgas* case where it held that “*As regards the condition relating to the necessity of processing personal data, it should be borne in mind that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary*”. Judgement of the Court of Justice of 4 May 2017, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA ‘Rīgas satiksme’*, C-13/16, ECLI:EU:C:2017:336, paragraph 30.

²²⁹ AT SA Objection; pp.4-5, PL SA Objection, p.2; SE SA Objection, p.3.

²³⁰ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, footnote 80.

²³¹ Meta IE Article 65 Submissions, paragraph 6.33 and Composite Response, paragraph 71.

²³² EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 25.

123. 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 the Facebook Terms of Service (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 behavioural advertising” derived from its “widespread prevalence” to which the IE SA refers²³³. Behavioural advertising, as briefly described in paragraph 95 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 Facebook Terms of Service 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 Facebook Terms of Service. The EDPB recalls its Guidelines 2/2019 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 users²³⁴. 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*”²³⁵ 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*”²³⁶.
124. Based on the considerations above, the EDPB considers that the main purpose for which users use Facebook and accept the Facebook Terms of Service is to communicate with others, not to receive personalised advertisements.
125. 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 Facebook service’s specific processing operations, the personal data processed in them, the specific purpose they serve, and the legal basis on which each of the processing operations relies, as the IE SA concludes in its Draft Decision²³⁷. The EDPB considers that this fundamental failure of Meta IE to comply with its transparency obligations contradicts the IE SA’s finding²³⁸ that Facebook users could reasonably expect online behavioural advertising as being necessary for the performance of their contract (as described in the Facebook Terms of Service) with Meta IE.
126. 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*

²³³ Composite Response, paragraphs 67 and 68.

²³⁴ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 57.

²³⁵ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 56.

²³⁶ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, footnote 81.

²³⁷ Draft Decision, paragraphs 5.70, 5.71 and Finding 3.

²³⁸ Draft Decision, paragraphs 4.43, 4.44, 4.51, 4.53, Finding 2.

service”²³⁹. 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 imply²⁴⁰, but also an indispensable and constitutive part of the legal basis.

127. 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 Facebook 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 contracts²⁴¹ mandates, as the transparency obligations under the GDPR, the use of plain, intelligible language in the terms of the contracts offered to consumers²⁴². This Directive even provides that where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail²⁴³. 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 fair²⁴⁴.
128. 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 networks 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”*²⁴⁵. In line with the logic of this argument, the EDPB considers that the dominant position of Facebook also plays an important role in the assessment of Meta IE’s reliance on Article 6(1)(b) GDPR for its Facebook service and its risks to data subjects, especially considering how deficiently Meta IE informs the Facebook users of the data it strictly needs to process to deliver the service.
129. Given that the main purpose for which a user uses the Facebook service is to communicate with others²⁴⁶, and that Meta IE conditions its use to the user’s acceptance of a contract and the behavioural advertising it includes, the EDPB cannot see how a user would have the option of opting

²³⁹ Binding Decision 01/2021, paragraph 214 and EDPB Guidelines 2/2019 on Article 6(1)(b), paragraph 20.

²⁴⁰ Draft Decision, paragraph 4.51.

²⁴¹ A contractual term that has not been individually negotiated is unfair under the Directive 93/13/EEC *“if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”*, see Art. 3(1) Directive 93/13/EEC.

²⁴² Art. 4(2) and Art. 5 Directive 93/13/EEC.

²⁴³ Art. 5 Directive 93/13/EEC.

²⁴⁴ EDPB Guidelines on Article 6(1)(b)GPDR, footnote 10.

²⁴⁵ C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, Conclusion, paragraph 78(4).

²⁴⁶ See paragraphs 117-118 and 122-124.

out of a particular processing which is part of the contract as the IE SA seems to argue²⁴⁷. 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 Article 6(1)(a) GDPR and Article 7 GDPR and/or to object to the processing of their data based on Article 6(1)(f) GDPR.

130. The EDPB agrees with the AT, DE, FR, IT, NL, NO, PL, PT, and SE SAs²⁴⁸ 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 Facebook 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 the Facebook Terms of Service and thus be excluded from a service that enables them to communicate with 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.
131. 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 6(1)(a) GDPR and legitimate interest 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, 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 Facebook service in the EEA and affect the protection of the hundreds of millions of people covered by the GDPR.
132. The EDPB thus concurs with the objections of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs²⁴⁹ to Finding 2 of the Draft Decision in that the behavioural advertising performed by Meta IE in the context of the Facebook service is objectively not necessary for the performance of Meta IE's alleged contract with data users for the Facebook service and is not an essential or core element of it.
133. In conclusion, the EDPB decides that Meta IE has inappropriately relied on Article 6(1)(b) GDPR to process the Complainant's personal data in the context of the Facebook Terms of Service and therefore lacks a legal basis to process these data for the purpose of behavioural advertising. Meta IE

²⁴⁷ Composite Response, paragraph 69.

²⁴⁸ AT SA Objection, pp.5-6; DE SAs Objection, pp.9-10; FR SA Objection, paragraphs 35-37; IT SA Objection, pp.5-7; NL SA Objection, paragraphs 27, 35-36; NO SA Objection, p.7; PL SA Objection, p.2; PT SA Objection, paragraphs 63-64; SE SA Objection, p.5.

²⁴⁹ AT SA Objection, pp. 1-2; DE SAs Objection, pp. 2 and 10; FR SA Objection, paragraphs 5-15 ; IT SA Objection, pp 1-7; NL SA Objection, paragraphs 4, 25-36; NO SA Objection, pp.1-2; PL SA Objection, pp. 1-2 ; PT SA Objection, paragraphs 65-68; SE SA Objection, pp. 2-3.

has not relied on any other legal basis to process personal data in the context of the Facebook Terms of Service for the purpose 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 Facebook Terms of Service, and to include an infringement of Article 6(1) GDPR based on the shortcomings that the EDPB has identified.

5 ON WHETHER THE LSA'S DRAFT DECISION INCLUDES SUFFICIENT ANALYSIS AND EVIDENCE TO CONCLUDE THAT META IE IS NOT OBLIGED TO RELY ON CONSENT TO PROCESS THE COMPLAINANT'S PERSONAL DATA

5.1 Analysis by the LSA in the Draft Decision

134. The IE SA concludes, as a matter of fact, in its Draft Decision that Meta IE did not rely, or purport to rely, on the Complainant's consent to process personal data to deliver the Facebook Terms of Service and is not legally obliged to rely on consent to do so²⁵⁰.
135. The IE SA accepts that Meta IE never sought to obtain consent from users through the clicking of the "Accept" button in the Facebook Terms of Service, based also on Meta IE's confirmation thereto²⁵¹.
136. The IE SA distinguishes between agreeing to a contract (which may involve the processing of data) and providing consent to personal data processing specifically for the purposes of legitimising that personal data processing under the GDPR. The IE SA observes that, as noted by the EDPB, these are entirely different concepts which *"have different requirements and legal consequences"*²⁵².
137. The IE SA also emphasizes that there is no hierarchy between the legal bases that controllers may use to process personal data under the GDPR²⁵³. The IE SA further argues that neither Article 6(1) GDPR nor any other provision in the GDPR require that the processing of data in particular contexts must necessarily be based on consent under Article 6(1)(a)GDPR²⁵⁴. The IE SA argues the GDPR does not provide that the specific nature and content of a contract, freely entered into by two parties, requires a higher category or *"default"* legal basis. The IE SA includes reference to the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR which assert that where data processing is necessary to perform a contract, consent is not an appropriate lawful basis on which to rely²⁵⁵.
138. The IE SA considers Article 7 GDPR and its conditions do not in and of themselves indicate the legal basis on which a controller should rely on in a particular context²⁵⁶. The IE SA contends that these

²⁵⁰ Draft Decision paragraph 3.12.

²⁵¹ Draft Decision, paragraphs 3.6, 3.8, 3.12.

²⁵² Draft Decision, paragraph 3.15.

²⁵³ Draft Decision, paragraph 3.16.

²⁵⁴ Draft Decision, paragraph 3.17.

²⁵⁵ Draft Decision, paragraph 3.18.

²⁵⁶ Draft Decision, paragraph 3.2.

conditions would only be relevant where the controller relies upon consent as the legal basis for its processing, which it views as not being the case for the processing of data by Meta IE in question.

5.2 Summary of the objections raised by the CSAs

139. The AT, DE, FR, NL, and PT SAs object to the assessment in the Draft Decision on consent, leading to Finding 1 of the IE SA²⁵⁷. These SAs put forward several factual and legal arguments for the changes they propose to the Draft Decision.
140. The SE SA holds that if the EDPB were to find that the processing can rely on Article 6(1)(b) GDPR, the investigation needs to encompass whether special categories of personal data pursuant to Article 9(1) GDPR are processed, since the performance of a contract is not an exemption pursuant to Article 9(2) GDPR. Since the SE SA presents its objection as being contingent on whether the EDPB finds that the data processing in Facebook, based on the Facebook Terms of Service, can rely on Article 6(1)(b) GDPR²⁵⁸ and the EDPB finds that Meta IE inappropriately relied on Article 6(1)(b) GDPR (see above in Section 4.4.2), the SE SA's objection is no longer applicable.

Arguments on the finding of the LSA that Meta IE is not legally obliged to rely on consent

141. The AT, DE, NL and PT SAs consider that the IE SA has not included enough analysis, evidence and research in the Draft Decision to conclude that Meta IE is not legally obliged to rely on consent to process the Complainants' data²⁵⁹.
142. The AT SA points out that the IE SA limits its facts and its legal assessment to the general question whether Article 6(1)(b) GDPR can be used as legal basis, specifically for behavioural advertising²⁶⁰. The Draft Decision does not clarify which data categories are being used for behavioural advertising and where Meta IE relies on Article 6(1)(a) and on 6(1)(b) GDPR for behavioural advertising. Also unaddressed is, if and to which extent, Meta IE relies on Article 9(2)(a) GDPR for behavioural advertising as far as sensitive data are concerned and whether Meta IE respected the GDPR conditions (for example Article 7 GDPR) when obtaining the consent pursuant to Articles 6(1)(a) and 9(2)(a) GDPR. The AT SA argues that the Draft Decision did not address the part of the complaint on the differences between "consent" and "contractual performance" and regarding Article 9 GDPR.
143. Even though the DE SAs share the IE SA's finding that Meta IE did not rely on consent for the processing of data as described in the Facebook Terms of Service, the DE SAs object against the IE SA's assessment that in the specific case at issue Meta IE was not legally obliged to obtain consent from the Complainant²⁶¹. The DE SAs further add, also in relation to the potential use of Article 6(1)(f) GDPR as a legal basis, that further investigations on the specific processing activities, purposes and their risks for rights and freedoms of the Complainant would be necessary to conclude an assessment on the applicable legal basis²⁶².

²⁵⁷ AT SA Objection, pp.8 to 10; DE SAs Objection, pp.6-8; FR SA Objection, paragraphs 14 and 33 ; NL SA Objection, paragraph 5; PT SA Objection, paragraphs 37 and 42, 46.

²⁵⁸ SE SA Objection, p. 3.

²⁵⁹ AT SA Objection, pp.8 to 10; DE SAs Objection, pp.6-8; NL SA Objection, paragraph 5; PT SA Objection, paragraphs 37 and 42, 46.

²⁶⁰ AT SA Objection, pp. 9-10.

²⁶¹ DE SAs Objection, p.7.

²⁶² DE SAs Objection, p.7.

144. The NL SA sees as a grave omission in the Draft Decision the lack of any substantive investigation into what kind of personal data is being processed besides relying on information submitted by the controller²⁶³. The NL SA considers that there are clear indications that consent is legally required for (parts of) the processing operations of the controller, and that the IE SA could thus draw a different conclusion on the basis of further inquiries and analysis²⁶⁴. The NL SA considers that the Draft Decision should be amended if a further inquiry by the IE SA establishes that reliance on consent as a legal ground is mandatory²⁶⁵.
145. The PT SA agrees with the IE SA's position in paragraph 3.18 in the Draft Decision on the need to always verify on the basis of the contract and the data processing actually carried out what legal bases each data processing at issue relies on, which may be on Article 6(1)(b), (a) and/or (f) GDPR²⁶⁶. The PT SA adds that it is precisely because a duly reasoned case-by-case verification is required that it cannot accept the IE SA's conclusion in paragraph 3.26 of the Draft Decision that the legal basis for the processing of data under the Facebook Terms of Service does not, as a matter of law, have to be consent without that analysis being expressed and substantiated in the Draft Decision²⁶⁷. The PT SA argues that it is not possible for the IE SA to draw proper legal conclusions on the need for consent, without having set out the relevant facts and the reasons given on the GDPR, which, in its view, the IE SA clearly did not do²⁶⁸.
146. In addition, the DE and FR SAs consider that even if Meta IE had relied on consent, it would not have met the requirements of Article 7(1) GDPR as being "*freely given*", as the service is conditional on the use of the Facebook service as a whole ("*take it or leave it*")²⁶⁹. Nor would consent meet the requirements of Article 7(2) GDPR since, as the IE SA finds, information on the processing of data as described in the Facebook Terms of Service, is not provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language.

Arguments on the possible breach of the obligation to rely on consent to process special categories of personal data (Article 9 GDPR)

147. The AT, DE, FR, NL, and PT SAs consider that the IE SA should have identified and separately assessed any processing of **special categories of personal data** under Article 9 GDPR in the context of the Facebook Terms of Service²⁷⁰. The DE and FR SAs conclude that Meta IE processes the entire amount of data it holds, including special categories of data, without a legal basis, and thus in breach of Articles 6 and 9 GDPR²⁷¹. The AT, NL and PT SAs²⁷² take the view that the IE SA should broaden the scope of its investigation and examine whether the conditions for the processing of special categories of personal data have been met by Meta IE.
148. The AT, FR, NL, and PT SAs consider that the factual background of the Draft Decision misses facts on whether Meta IE relies on Article 9(1)(a) GDPR to process special categories of personal data for the

²⁶³ NL SA Objection, paragraph 10.

²⁶⁴ NL SA Objection, paragraphs 19-20.

²⁶⁵ NL SA Objection, paragraph 20.

²⁶⁶ PT SA Objection, paragraph 36.

²⁶⁷ PT SA Objection, paragraph 37.

²⁶⁸ PT SA Objection, paragraph 46.

²⁶⁹ DE SAs Objection, pp. 7-8 ; FR SA Objection, paragraphs 21-29.

²⁷⁰ AT SA Objection, pp.8-10; DE SAs Objection, pp.6-7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 10 and 33 ; PT SA Objection, paragraphs 45-47.

²⁷¹ DE SAs Objection, p.8 ; FR SA Objection, paragraph 33.

²⁷² AT SA Objection, pp.8-10 ; NL SA Objection, paragraphs 10 and 33 ; PT SA Objection, paragraphs 45-47.

purpose of behavioural advertising and whether Meta IE respects the requirements of the GDPR, such as those of its Article 7, in obtaining consent to that end²⁷³.

149. The FR, NL, and PT SAs argue that the data that Meta IE's processing may include special categories of personal data under Article 9 GDPR²⁷⁴. The DE SAs contend that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes²⁷⁵.
150. The FR SA states that, in a first analysis, informal verifications show that when people fill in their Facebook profiles, no particular method is made available to them to ensure that they explicitly consent, on the basis of clear information, to the collection and processing of sensitive data by Meta IE in its Facebook service²⁷⁶. The FR SA refers to previous decisions and corrective measures it took against Meta IE on this issue on 26 January 2016 and 27 April 2017²⁷⁷.
151. The FR SA considers that in view of the current conditions under which the company requests the consent of individuals for the processing of their data, it cannot use the legal basis of contractual performance Article 6(1)(b) GDPR, legitimate interest Article 6(1)(f) GDPR and consent Article 6(1)(a) GDPR and Article 9 GDPR and that breaches of Articles 6 and 9 GDPR should then be observed.
152. The NL SA sees strong indications on the processing of photographs and other images with facial recognition technology²⁷⁸. The NL SA is also concerned that the information shared among users of the platform may include personal data concerning their health. The DE, FR, NL, PT SAs recall that only consent may be used in this context among the exceptions that Article 9(2) GDPR lays down to the general prohibition of processing special categories of data²⁷⁹.

Arguments on other types of data requiring consent

153. The NL SA identifies as another indicator contradicting the IE SA's conclusion that there is no obligation to seek consent the fact that the controller processes a significant amount of personal data that has been collected through cookies for online advertising purposes and of location data²⁸⁰.

Risks

154. On **the risks** posed by the Draft Decision, the DE SAs consider that, as the subject of the complaint was the processing as described in the Facebook Terms of Service there is also a significant risk for the fundamental rights and freedoms of all Facebook users in the European Union that their personal data, including data of special categories are processed without any legal basis²⁸¹. The AT SA also considers that the compliance of Meta IE with the GDPR rules on the processing of special categories

²⁷³ AT SA Objection, pp. 8-9; DE SAs Objection, p.7; FR Objection, paragraphs 30-31; NL Objection, paragraph 6; PT Objection, paragraph 45.

²⁷⁴ FR SA Objection, paragraphs 30-34, NL SA Objection, paragraphs 9-11; PT SA objection, paragraph 45.

²⁷⁵ DE SAs Objection, p.7.

²⁷⁶ FR SA Objection, p.31.

²⁷⁷ FR SA, Objection, p.32.

²⁷⁸ NL SA Objection, paragraphs 9 to 11.

²⁷⁹ DE SAs Objection, p.7; FR SA Objection, paragraphs 30-34, NL SA Objection, paragraphs 9-11; PT SA objection, paragraph 45.

²⁸⁰ NL SA Objection, paragraphs 7-8 and 12.

²⁸¹ DE SAs Objection, p.10.

of data goes beyond the case at stake and affects hundreds of millions of data subjects within the EEA, as Meta IE is the provider of the biggest social media network in the world²⁸².

155. The AT, DE, FR, NL, and PT SAs argue that the IE SA's conclusion that consent is not required affects the rights of data subjects and their control over their personal data²⁸³.
156. The AT SA argues that the first risk is that the data subject's right to lodge a complaint with a supervisory authority pursuant to Article 77(1) GDPR becomes ineffective because the IE SA did not handle the complaint in its entire scope, including sensitive data pursuant to Article 9 GDPR²⁸⁴. The AT SA argues that this is not in line with the CJEU ruling C-311/18, which provides that the supervisory authority must handle complaints with all due diligence²⁸⁵.
157. The FR SA argues that the Draft Decision poses a risk to the fundamental rights and freedoms of the individuals concerned, according to Article 4(24) GDPR, insofar as the legal basis of contractual performance to process the personal data of Facebook users to send them targeted advertising does not allow the European users to have control over the fate of their data²⁸⁶. The FR SA also notes that since the Draft Decision will be taken at the end of a cooperation procedure and made public, it could be interpreted as reflecting the common position of the European supervisory authorities on this issue, and setting a precedent for accepting that a company may use the legal basis of the contract to process its users' data for targeted advertising purposes when such processing is particularly massive and intrusive²⁸⁷.
158. The NL SA specifies the protections from which the data subjects would be deprived due to the IE SA's conclusion that consent is not required, such as the right to data portability (Article 20(1) GDPR); the possibility to specifically consent to certain processing operations and not to others and to the further processing of personal data (Article 6(4) GDPR); the freedom to withdraw consent (Article 7 GDPR) and the subsequent right to be forgotten²⁸⁸.
159. The AT, DE, and NL SAs note as an additional risk that sensitive personal data falling within the scope of Article 9 GDPR is processed without meeting the requirements of Article 9(2) GDPR²⁸⁹.
160. The NL SA underlines the risk that allowing the bypassing of legal provisions requiring consent to process data creates legal uncertainty that hampers the free flow of personal data within the EU²⁹⁰.
161. The NL SA also argues that not assessing the processing in a sufficiently thorough manner could create a precedent for controllers to exclude from their privacy policies or terms of service processing

²⁸² AT SA Objection, p.9.

²⁸³ AT SA Objection, p.10 ; DE SAs Objection, pp.9-10; FR SA Objection, paragraphs 36-37 ; NL SA Objection, paragraph 18; PT SA Objection, paragraph 43.

²⁸⁴ AT SA Objection, p.10.

²⁸⁵ Judgement of the Court of Justice of 16 July 2020, *Data Protection Commissioner v Facebook Ireland Limited and Maximilian Schrems*, C-311/18, ECLI:EU:C:2020:559 , (hereinafter 'C-311/18 Schrems II'), referred to in AT SA Objection, p.10.

²⁸⁶ FR SA Objection, paragraph 36.

²⁸⁷ FR SA Objection, paragraph 37.

²⁸⁸ Art. 17 GDPR and NL SA Objection, paragraph 18.

²⁸⁹ AT SA Objection, p.10; DE SAs Objection, pp.9-10; NL SA Objection, paragraph 18; SE SA Objection, p.5.

²⁹⁰ NL SA Objection, paragraph 18.

operations that must be based on consent. This would risk leaving data subjects with a reduced degree of transparency²⁹¹.

5.3 Position of the LSA on the objections

162. The IE SA considers the objections not reasoned and does not follow them²⁹².
163. The IE SA argues that the scope of the inquiry is appropriate and relates to the issues raised in the complaint²⁹³. The IE SA also argues that finding of additional infringements which have not been fully investigated or put to the controller would impose a risk of procedural unfairness by depriving the controller of its right to be heard in response to a particularized allegation of wrongdoing²⁹⁴.
164. The IE SA notes that it has discretion to determine the framework of the inquiry, taking into account the scope of the written complaint as lodged²⁹⁵. The IE SA argues that it would not have been possible to assess each discrete processing operation by Facebook, without first resolving the fundamental dispute between the parties on the interpretation of Article 6(1) GDPR. The IE SA considers that it would have been inappropriate and disproportionate for it to undertake an open-ended assessment of all of Facebook's processing operations related to the Facebook Terms of Service to handle the complaint.
165. The IE SA argues that its analysis of Article 6(1)(b) GDPR does not preclude the possibility that certain discrete processing operations by Facebook may fall outside the scope of Article 6(1)(b) GDPR²⁹⁶. The IE SA finds it reasonable and practical to set the scope of the inquiry, focusing on the principled issues of dispute, which it considers as not prejudicing the operation of more specific data protection rules.
166. The IE SA considers that the reference to Article 9 GDPR processing by Meta IE is an element of what it views as the Complainant's fundamental allegation: that the agreement to the Facebook Terms of Service is a form of GDPR consent to processing of personal data, including consent to the processing of special categories of data²⁹⁷. The IE SA argues that since the scope of its inquiry addresses this issue, it is not necessary for it to also conduct an indiscriminate and open-ended assessment of Meta IE's processing that may otherwise fall within the scope of Article 9 GDPR.
167. The IE SA notes that under Irish national law, there would be a very significant risk of procedural unfairness to Meta IE if the IE SA assumed, without any further factual examination, that Meta IE unlawfully processes special categories of personal data²⁹⁸.
168. According to the IE SA, the CSAs objecting to the Draft Decision intend to maximise the Complainant's rights by requiring consent-based processing for certain processing operations and thus prioritising it over other legal basis²⁹⁹. The IE SA considers that very extensive data protection rights also apply under the GDPR where the processing is based on Article 6(1)(b) or (f) GDPR. The IE SA contends that the variation in the extent of data subject rights and protections, depending on the applicable legal basis,

²⁹¹ NL SA Objection, paragraph 23.

²⁹² Composite Response, paragraphs 30 and 41.

²⁹³ Composite Response, paragraphs 94-95.

²⁹⁴ Composite Response, paragraph 94.

²⁹⁵ Composite Response, paragraph 21.

²⁹⁶ Composite Response, paragraph 22.

²⁹⁷ Composite Response, paragraph 23.

²⁹⁸ Composite Response, paragraph 27.

²⁹⁹ Composite Response, paragraphs 39 and 40.

is an inherent element of the legislative scheme of the GDPR. The IE SA considers that Article 6 GDPR does not provide that the “*appropriate*” data subject rights determine the legal basis for processing. The IE SA notes that separate to the user’s acceptance of the Facebook Terms of Service, Meta IE relies on different “*acts*” of consent for specific aspects of the service, including personalised advertising based on users’ off-Facebook activities, and to process their GPS location data. In this regard, the IE SA states that the complaint in this case was about the agreement to the Facebook Terms of Service and the processing it entails once accepted.

169. The IE SA argues that their objections are inconsistent with the principle of legal certainty, as cited in Recital 7 GDPR³⁰⁰. The IE SA indicates that it is not satisfied that the GDPR requires the limitation of processing for the purposes of behavioural advertising to situations where processing is based on data subject consent³⁰¹. The IE SA contends that interpretative approach of the CSAs raising objections would result in the arbitrary application of more restrictive data protection rules for reasons that are not found in the GDPR. The IE SA also argues that this approach does not take due account of the extensive data protection rights which apply to all legal bases under the GDPR. The IE SA asserts that it is not open to the supervisory authorities to create additional binding limitations on the applicable legal basis for the processing of data for behavioural advertising. The IE SA states that it is the legislator, not the supervisory authorities, which has defined the conditions for lawful processing.

5.4 Analysis of the EDPB

5.4.1 Assessment of whether the objections were relevant and reasoned

170. The EDPB responds to Meta IE’s primary argument to the contrary in Section 4.4.1 above³⁰².
171. The AT, DE, FR, NL, and PT SAs objections all have a direct connection with the LSA Draft Decision and refer to a specific part of the Draft Decision, i.e. Finding 1. The AT, DE, FR, NL, and PT SAs argue that the IE SA has not included enough analysis, evidence and research in the Draft Decision to conclude that Meta IE is not legally obliged to rely on consent to process the Complainants’ data³⁰³. According to these CSAs, the IE SA should have identified and separately assessed any processing of special categories of personal data in the context of the Facebook Terms of Service³⁰⁴. They consider that the IE SA should broaden the scope of its investigation and examine whether the conditions for the processing of special categories of personal data have been met by Meta IE. The FR, NL, and PT SAs argue that the data that Meta IE processes may include special categories of personal data under Article 9 GDPR³⁰⁵. The DE SAs contend that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes. The AT, DE, FR, NL, and PT SAs challenge the reasoning underlying the conclusion reached by the LSA. Following their assessment would lead to a

³⁰⁰ Composite Response, paragraph 40.

³⁰¹ Composite Response, paragraph 40.

³⁰² Meta IE argues that “*Objections which raise matters which are not within the Defined Scope of Inquiry are not ‘relevant and reasoned’ within the meaning of Article 4(24) GDPR*” and such objections “*ought to be disregarded in their entirety by the EDPB*”. The EDPB does not share this understanding, as explained above. See paragraphs 71-73.

³⁰³ AT SA Objection, pp.8 to 10; DE SAs Objection, pp.6-8; FR SA Objection, paragraphs 14 and 33 ; NL SA Objection, paragraph 5; PT SA Objection, paragraphs 37 and 42, 46.

³⁰⁴ AT SA Objection, pp.8-10; DE SAs Objection, pp.6-7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 10 and 33 ; PT SA Objection, paragraphs 45-47 ; SE SA Objection, pp.1 and 3.

³⁰⁵ DE SAs Objection, p.7; FR SA Objection, paragraphs 30-34; NL SA Objection, paragraphs 9-11; PT SA objection, paragraph 45.

different conclusion insofar as the IE SA would fully cover the complaint and include facts and a legal assessment on processing operations subject to Article 6(1)(a), Article 7 and Article 9 GDPR, which may reveal an infringement by Meta IE³⁰⁶.

172. Consequently, the EDPB finds that the AT, DE, FR, NL, and PT SAs objections relating to Finding 1, which states that Meta IE is not required to rely on consent to deliver the Facebook Terms of Service and its underlying reasoning, and referring to Meta IE's possible infringements of Article 6(1)(a) and Article 9 GDPR are **relevant**.
173. The objections are **reasoned** because they include clarifications and arguments on legal/factual mistakes in the LSA's Draft Decision that require amending. The AT, DE, FR, NL, and PT SAs consider that the IE SA should have identified and separately assessed any processing of **special categories of personal data** under Article 9 GDPR in the context of the Facebook Terms of Service³⁰⁷. In particular, the FR, NL, PT SAs argue that the data that Meta IE processes may include special categories of personal data under Article 9 GDPR³⁰⁸. The DE SAs contend that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes³⁰⁹. The AT, DE, FR, NL, and PT SAs recall that only consent may be used in this context among the exceptions that Article 9(2) GDPR lays down to the general prohibition of processing special categories of data³¹⁰. The NL SA identifies as another indicator contradicting the IE SA's conclusion that there is no obligation to seek consent the fact that the controller processes a significant amount of personal data that has been collected through cookies for online advertising purposes and of location data³¹¹. The NL SA also argues that the IE SA should have investigated more into the safeguards that are implemented by the controller to address the specific interests of children³¹².
174. On the risks posed by the Draft Decision, the AT, DE, FR, NL, and PT SAs³¹³ explain that the IE SA's Finding 1 - providing that consent is not required - puts at risk the rights of data subjects and their control over their personal data. The AT SA mentions the risk that the data subject's right to lodge a complaint with a supervisory authority pursuant to Article 77(1) GDPR becomes ineffective because the IE SA does not handle it in its entire scope, including special categories of data under Article 9 GDPR. The FR SA argues that the Draft Decision could set a precedent for accepting the use of the contractual performance legal basis to process users' data for behavioural advertising purposes, which it views as particularly massive and intrusive. The NL SA specifies that the data subjects could be deprived of the following protections derived from the use of consent: the right to data portability (Article 20(1) GDPR); the possibility to specifically consent to certain processing operations and not to others and to the further processing of personal data (Article 6(4) GDPR); the freedom to withdraw consent (Article 7 GDPR) and the subsequent right to be forgotten³¹⁴. The AT, DE, and NL SAs also note

³⁰⁶ See EDPB Guidelines on RRO, paragraph 15 and EDPB Guidelines on Article 65(1)(a) GDPR, paragraphs 40 and Sub-sections 4.2, 4.2.3 - 4.2.5.

³⁰⁷ AT SA Objection, pp.8-10; DE SAs Objection, pp.6-7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 10 and 33 ; PT SA Objection, paragraphs 45-47.

³⁰⁸ FR SA Objection, paragraphs 30-34; NL SA Objection, paragraphs 9-11; PT SA objection, paragraph 45.

³⁰⁹ DE SAs Objection, p.7.

³¹⁰ AT SA pp.8-10 ; DE SAs Objection, p.7; FR SA Objection, paragraphs 30-34; NL SA Objection, paragraphs 9-11; PT SA objection, paragraph 45.

³¹¹ NL SA Objection, paragraphs 7-8 and 12.

³¹² NL SA Objection, paragraph 16.

³¹³ AT SA Objection p.9; DE SAs Objection, pp.9-10; FR SA Objection, paragraphs 36-37; NL SA Objection, paragraph 18; PT SA Objection, paragraph 43.

³¹⁴ Art. 17 GDPR.

as an additional risk that special categories of personal data falling within the scope of Article 9 GDPR are processed without meeting the requirements of Article 9(2) GDPR³¹⁵. The NL SA also underlines the risk that this conclusion creates legal uncertainty that hampers the free flow of personal data within the EU³¹⁶. The NL SA further adds the risk that the decision could create by setting a precedent for controllers to exclude from their privacy policies or terms of service processing operations based on consent, thus undermining the principle of transparency³¹⁷.

175. The EDPB concludes that the objections mentioned above are relevant and reasoned (cf. Article 4(24) GDPR).
176. However, the part of the NL SA objection asking the IE SA to include in its Draft Decision the elements concerning the need to rely on consent for the placing of tracking technology on end users devices under ePrivacy legislation falls outside the scope of the EDPB's mandate³¹⁸.

5.4.2 Assessment on the merits

177. In accordance with Article 65(1)(a) GDPR, in the context of a dispute resolution procedure 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.
178. The EDPB considers that the objections found to be relevant and reasoned in this subsection³¹⁹ require an assessment of whether the Draft Decision needs to be changed on its Finding 1, which concludes that Meta IE has (a) not sought to rely on consent to process personal data to deliver the Facebook Terms of Service and (b) is not legally obliged to rely on consent in order to do so. When assessing the merits of the objections raised, the EDPB also takes into account Meta IE's position on the objections and its submissions.

Meta IE's position on the objections and its submissions

179. In its submissions, Meta IE supports the IE SA's conclusion that Meta IE does not rely on consent for the purposes of behavioural advertising and is not required to rely on it³²⁰.
180. Meta IE states that it does not seek or rely on consent as its legal basis for purposes of processing personal data to provide behavioural advertising, except in limited circumstances where Meta IE separately obtains consent, yet not through the Facebook Terms of Service³²¹. Meta IE claims that it explains in its Data Policy to data subjects that Meta IE relies on consent under Article 6(1)(a) GDPR *"(f)or using data that advertisers and other partners provide us about your activity off of Meta Company Products, so we can personalise ads we show you on Meta Company Products and on websites, apps and Devices that use our advertising services"* and that it has a specific process for obtaining this consent that satisfies the requirements of Article 7 GDPR, *"entirely separate from any interaction by users with the Terms of Service or Data Policy and which was not part of the Complaint"*

³¹⁵ AT SA Objection, p.10; DE SAs Objection, pp.9-10; NL SA Objection, paragraph 18.

³¹⁶ NL SA Objection, paragraph 18.

³¹⁷ NL SA Objection, paragraph 23.

³¹⁸ NL SA Objection, paragraphs 7 and 8.

³¹⁹ These objections being those of the AT, DE, FR, NL, PT SAs relating to Finding 1, which states that Meta IE is not required to rely on consent to deliver the Facebook Terms of Service, and its underlying reasoning.

³²⁰ Meta IE Article 65 Submissions, paragraph 5.2.

³²¹ Meta IE Article 65 Submissions, paragraph 5.4.

and was not examined” in the IE SA’s inquiry³²². Meta IE submits that the Complaint is limited to the question of whether Meta IE seeks forced consent to data processing through acceptance of the Facebook Terms of Service. Meta IE then asserts that since it does not seek, obtain, or rely on consent as a legal basis under Article 6(1)(a) GDPR to process user data via the Facebook Terms of Service, the inquiry should end there and all unrelated assertions in the objections should be disregarded³²³.

181. Meta IE alleges that some CSAs suggest that behavioural advertising must in all cases be based on consent, and in doing so, the CSAs suggest an approach that prioritises consent-based processing over other legal basis thereby creating a binding limitation for the processing for the purpose of behavioural advertising³²⁴. Meta IE agrees with the IE SA’s assertion that any approach limiting the legal basis on which a controller could rely would not be consistent with the principle of legal certainty³²⁵. Meta IE contends that the GDPR contains no express references to behavioural advertising and establishes no specific limitations on the available legal basis for such processing³²⁶. Meta IE considers that the GDPR was drafted in a way that protects data subjects while affording flexibility to controllers and that its application is highly dependent on facts and circumstances underlying the relevant processing and the nature of the service providers³²⁷.
182. Meta IE contends that the CSAs have failed to give sufficient consideration to extensive data protection rights that apply to all legal bases³²⁸. Meta IE argues that in defining the conditions for lawful processing, the EU legislature has ensured that appropriate data protection rights would be afforded to data subjects no matter what legal basis is relied on and extensive data protection rights apply to all legal bases³²⁹. Meta IE supports the IE SA’s view that Article 6 GDPR does not require legal bases to be determined by reference to the applicable data subject rights for each basis³³⁰.

EDPB’s assessment on the merits

183. The EDPB notes that the Draft Decision that the IE SA submitted via the Article 60 GDPR procedure results from an inquiry that the IE SA conducted based on a complaint from a data subject and Facebook user³³¹. The AT SA forwarded this complaint to the IE SA as LSA in the case, given Meta IE’s main establishment in Ireland.
184. In this complaint, the Complainant alleges that Meta IE violated Articles 5, 6, 7 and 9 GDPR. The Complainant argues that it is unclear to what the data subject has consented when the data subject agreed to the Facebook Terms of Service and Privacy Policy³³². More specifically, the Complainant points out that it remains unclear which exact processing operations the controller chooses to base on each specific legal basis under Articles 6 and 9 GDPR³³³. The Complainant argues that the Facebook Terms of Service and Privacy Policy also include special categories of data under Article 9(1) GDPR because the data subject, as a Facebook user, has interacted with various groups and individuals,

³²² Meta IE Article 65 Submissions Footnote 9 and paragraph 6.8.

³²³ Meta IE Article 65 Submissions, paragraph 5.9.

³²⁴ Meta IE Article 65 Submissions, paragraph 5.2.

³²⁵ Meta IE Article 65 Submissions, paragraph 5.15.

³²⁶ Meta IE Article 65 Submissions, paragraph 5.16.

³²⁷ Meta IE Article 65 Submissions, paragraph 5.16.

³²⁸ Meta IE Article 65 Submissions, paragraph 5.2.

³²⁹ Meta IE Article 65 Submissions, paragraph 5.17.

³³⁰ Meta IE Article 65 Submissions, paragraph 5.17.

³³¹ Draft Decision, paragraph 1.13.

³³² Complaint, pp.1-2.

³³³ Complaint, pp.1-2.

which would inevitably reveal the data subject's political affiliations, religious views, sexual orientation and health conditions, even if the data subject has not directly put them in their "profile"³³⁴. The Complainant claims that the controller also allows to target such information for advertisement³³⁵. The Complainant considers that it would be necessary for the SA to investigate the concrete subject of the alleged consent and the legal basis for all processing operations and to request the record of processing activities under Article 30(4) GDPR³³⁶.

185. Based on the scope of IE SA's investigation into this complaint, the EDPB considers that the IE SA decided to limit the scope of its Draft Decision to the following legal issues:
- Issue 1 – Whether clicking on the "accept" button constitutes or must be considered consent for the purposes of the GDPR
 - Issue 2 – Reliance on Article 6(1)(b) GDPR as a lawful basis for personal data processing
 - Issue 3 – Whether Facebook 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 manner³³⁷.
186. The IE SA argues that it has discretion to determine the framework of the inquiry taking into account the scope of the written complaint as lodged³³⁸. The IE SA considers that it would not have been possible to undertake an assessment of each discrete processing operation by Meta IE without first resolving the fundamental dispute between the parties on the interpretation of Article 6(1) GDPR³³⁹. In relation to the processing of Article 9 GDPR categories of data, the IE SA considers that the inquiry has addressed the fundamental issue of principle on which the complaint depends, and this makes it unnecessary to conduct an indiscriminate and open-ended assessment of processing falling within the scope of this Article³⁴⁰. The IE SA thus concludes that Meta IE has (a) not sought to rely on consent in order to process personal data to deliver the Facebook Terms of Service and (b) is not legally obliged to rely on consent in order to do so³⁴¹, based on the submissions of the Parties and the Facebook Terms of Service³⁴². The IE SA warns CSAs on the legal risks derived from asking through the objections to expand the material scope of the inquiry and thus cover infringements outside of the complaint and Draft Decision that the IE SA has not investigated (pursuant to its own decision to limit the scope of the inquiry) and put to Meta IE³⁴³.
187. The EDPB notes that the complaint makes plain the confusion of the Facebook user over which of the user's special categories of data are processed, for which purposes and on which basis.
188. The Facebook Terms of Service themselves note in general terms "*We collect and use your personal in order to provide the services described above to you*"³⁴⁴, (services which include "*Provide a personalized experience for you*" and "*Help you discover content, products and services that may*

³³⁴ Complaint, pp.1-2.

³³⁵ Complaint, pp.1-2.

³³⁶ Complaint, pp.7 and 16.

³³⁷ Draft Decision, paragraph 2.23.

³³⁸ Composite Response, paragraph 21.

³³⁹ Composite Response, paragraph 21.

³⁴⁰ Composite Response, paragraph 23.

³⁴¹ Draft Decision, Finding 1 p.23.

³⁴² Draft Decision, paragraph 3.26.

³⁴³ Composite Response, paragraph 25-27 and 29.

³⁴⁴ Facebook Terms of Service, Section 2.

interest you”)³⁴⁵. The Facebook Terms of Service, which are considered as making up the entire agreement³⁴⁶ include a reference to a separate document: Facebook’s “Data Policy”, which lists under the heading “Things you and others do and provide:” “Data with special protections: You can choose to provide information in your Facebook profile fields or Life Events, about your religious views, political views, who you are ‘interested in’ or your health. This and other information (such as racial or ethnic origin, philosophical beliefs or trade union membership) is subject to special protections under EU law”³⁴⁷. The Data Policy describes the purposes for which these data are processed in very general terms such as “Provide, personalize and improve our products” and “to select and personalize ads, offers and other sponsored content that we show you”³⁴⁸ with no specific reference to the specific processing operations and categories of data each purpose would cover. Meta IE thus seems to acknowledge in its Data Policy³⁴⁹ that it uses special categories of data for behavioural advertising purposes, without specifying the “special protections under EU law” that it would apply to such processing. Meta IE only includes a general reference to consent among other legal basis in the same page³⁵⁰, which includes a link to a separate page mentioning the use of consent on data with special protection and referring to the Facebook Settings³⁵¹.

189. The IE SA finds that the way in which Meta IE provides this information, in relation to processing for which Article 6(1)(b) GDPR is relied upon, and the lack of information on the specific processing operations, the data involved, their purposes and legal basis constitute an infringement of transparency obligations under the GDPR (Article 5(1)(a), Article 12 (1), and Article 13(1)(c) GDPR)³⁵². The IE SA considers the complaint in this case to be limited to the Facebook Terms of Service and the processing it entails once accepted³⁵³. In these circumstances, the IE SA accepts at face value Meta IE’s submission on its reliance on different “acts” of consent for discrete aspects of the service separately from the user’s acceptance of the Facebook Terms of Service³⁵⁴. The IE SA does not engage into any further examination or verification on how consent is sought in the case of processing carried out to provide discrete aspects of the service and whether all special categories of data under Article 9 GDPR that Meta IE processes³⁵⁵ in its Facebook service are subject to these “acts” of consent and thus effectively treated outside the scope of the Facebook Terms of Service and the legal basis of Article 6(1)(b) GDPR on which the Facebook Terms of Service purportedly rely, or whether some

³⁴⁵ Facebook Terms of Service, Section 1.

³⁴⁶ Facebook Terms of Service, Section 5, paragraph 1.

³⁴⁷ Facebook Data Policy, Section “Things you and others do and provide”.

³⁴⁸ Facebook Data Policy, Section “How do we use this information?-Provide, personalize and improve our Products”.

³⁴⁹ Facebook Data Policy, Section “Things you and others do and provide” and Section “How do we use this information?-Provide, personalize and improve our Products”.

³⁵⁰ Facebook Data Policy, Section “What is our legal basis for processing data?”.

³⁵¹ Facebook website.

³⁵² Draft Decision, paragraphs 5.70-2.76 and Finding 3.

³⁵³ The IE SA mentions in its Schedule to the Draft Decision, paragraph 35 “I do not however accept that the processing of sensitive categories of personal data on the basis of Article 9 GDPR consent falls within the scope of this Inquiry. Facebook undoubtedly does process special category data on the basis of explicit consent under Article 9 GDPR on its platform including in terms of the separate consent collected for its facial recognition feature. The Complaint is one about whether the Terms of Service (which is the contract with the user) are a deliberately veiled and inadequate means of forcing consent under GDPR, or whether they are, as Facebook contends, a contract with the user for which certain data processing is necessary in order to perform that contract.”

³⁵⁴ Composite Response, paragraph 39.

³⁵⁵ Such as the Facebook profile fields containing information on religious views, political views or health to which Facebook’s Data Policy refers. Facebook’s Data Policy, Section “Things you and others do and provide”.

special categories of personal data, as defined by the GDPR and EU case-law³⁵⁶, are treated under the Facebook Terms of Service.

190. The CJEU asserted recently that the purpose of Article 9(1) GDPR is to ensure an enhanced protection of data subjects for processing, which, because of the particular sensitivity of the data processed, is liable to constitute a particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, guaranteed by Articles 7 and 8 of the Charter³⁵⁷. The CJEU adopts a wide interpretation of the terms “*special categories of personal data*” and “*sensitive data*” that includes data liable indirectly to reveal sensitive information concerning a natural person³⁵⁸. Advocate General Rantos reiterates the importance for the protection of data subjects of Article 9 GDPR and applies the same interpretation to the data processing in the Facebook service for behavioural advertising by stating that “*the prohibition on processing sensitive personal data may include the processing of data carried out by an operator of an online social network consisting in the collection of a user’s data when he or she visits other websites or apps or enters such data into them, the linking of such data to the user account on the social network and the use of such data, provided that the information processed, considered in isolation or aggregated, make it possible to profile users on the basis of the categories that emerge from the listing in that provision of types of sensitive personal data*”³⁵⁹.
191. Therefore, the GDPR and the case-law pay especial attention to the processing or potential processing of special categories of personal data under Article 9 GDPR to ensure the protection of the data subjects. In this connection, the Complainant alleges in the complaint, among others, a violation of Article 9 GDPR and expressly requests the IE SA to investigate Meta IE’s processing operations in the Facebook service covered by this Article³⁶⁰. In a subsequent submission on the preliminary Draft Decision, the Complainant criticises the scope that the IE SA decided to give to the complaint and its lack of investigation of Meta IE’s processing activities and alleges that the IE SA failed to give due consideration to processing under Article 9 GDPR and other cases in which Meta IE relies on consent³⁶¹.
192. In the present case, the IE SA limited its facts and legal assessment in the Draft Decision to the general questions of whether Facebook has (a) sought to rely on consent in order to process personal data to deliver the Facebook Terms of Service and (b) if it is legally obliged to rely on consent in order to do so. The IE SA categorically concludes on these questions. At the same time, the IE SA acknowledges a serious lack of transparency by Meta IE as regards the information provided concerning the processing being carried out in reliance on Article 6(1)(b) GDPR and does not clarify which data categories are being processed for behavioural advertising, if Meta IE processes special categories of data for behavioural advertising, and if it does, if Meta IE complies with the conditions of Article 9 GDPR and others relevant to the application of this provision (for example Article 6(1)(a) and Article 7 GDPR).
193. By deciding not to investigate, further to the complaint, the processing of special categories of personal data in the Facebook service, the IE SA leaves unaddressed the risks this processing poses for

³⁵⁶ See Art. 9 GDPR and C-184/20 Vyriausioji tarnybinės etikos komisija.

³⁵⁷ C-184/20 Vyriausioji tarnybinės etikos komisija, paragraph 126.

³⁵⁸ C-184/20 Vyriausioji tarnybinės etikos komisija, paragraph 127.

³⁵⁹ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704. paragraph 46.

³⁶⁰ Complaint, pp.1-2, 7, 14.

³⁶¹ Draft Decision, paragraph 2.20 and Complainant Submission on Preliminary Draft Decision of 11 June 2021, pp.11-13.

the Complainant and for Facebook users. First, there is the risk that the Complainant's special categories of personal data are processed in the Facebook service to build intimate profiles of them for behavioural advertising purposes without a legal basis and in a manner not compliant with the GDPR and the strict requirements of its Article 9 and other GDPR provisions relevant thereto. Second, there is also the risk that Meta IE does not consider as special categories of personal data (in line with the GDPR and the CJEU case law³⁶²) certain categories of personal data it processes and consequently, that Meta IE does not treat them as required by EU law. Third, the Complainant and other Facebook users, whose special categories of data are processed, may be deprived of certain special protections derived from the use of consent, such as the possibility to specifically consent to certain processing operations and not to others and to the further processing of personal data (Article 6(4) GDPR), the freedom to withdraw consent (Article 7 GDPR) and the subsequent right to be forgotten³⁶³. Fourth, given the great size and dominant market share of Meta IE in the social media market, leaving unaddressed its current ambiguity in the processing of special categories of personal data, and its limited transparency vis-à-vis Facebook users, may set a precedent for controllers to operate in the same manner and create legal uncertainty hampering the free flow of personal data within the EU.

194. The EDPB further considers, also in view of these risks to the Complainant and to other Facebook users, that the IE SA did not handle the complaint with all due diligence³⁶⁴. The EDPB sees the lack of any further investigation into the processing of special categories of personal data as an omission, and -in the present case- finds it relevant that the Complainant alleged infringements of Article 9 GDPR in the complaint³⁶⁵. The EDPB contends that, in the present case, the IE SA should have verified on the basis of the contract and the data processing actually carried out on which legal bases each data processing operation at issue relies.
195. The EDPB also highlights that in limiting excessively the scope of its inquiry despite the scope of the complaint in this cross-border case and systematically considering the objections made in this regard not relevant and/or reasoned and thus denying their formal admissibility, the IE SA as LSA in this case, constrains the capacity of CSAs to act and tackle the risks to data subjects in sincere and effective cooperation. As ruled by the CJEU, the LSA must exercise its competence within a framework of close cooperation with other supervisory authorities concerned and cannot "*eschew essential dialogue with and sincere and effective cooperation with the other supervisory authorities concerned*"³⁶⁶. The limited scope the IE SA gave to the inquiry and its consideration of all the objections made as inadmissible for being not relevant or reasoned also impairs the EDPB's capacity to conclude on the matter pursuant to Article 65 GDPR and thus ensure a consistent application of EU data protection law, especially considering that the complaint was introduced more than four years ago.
196. As a result of the limited scope of the inquiry and the fact that the IE SA did not assess in its Draft Decision Meta IE's processing of special categories of personal data in its Facebook service, the EDPB does not have sufficient factual evidence on Meta IE's processing operations to enable it to make a

³⁶² See C-184/20 *Vyriausioji tarnybinės etikos komisija* and more recently on the processing in Facebook: C-252/21 *Oberlandesgericht Düsseldorf request*, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704.

³⁶³ Art. 17 GDPR.

³⁶⁴ C-311/18 *Schrems II*, paragraph 109; Judgement of the Court of Justice of 6 October 2015, *Schrems*, C-362/14, ECLI:EU:C:2015:650, paragraph 63; Judgement of the Court of Justice of 4 April 2017, *European Ombudsman v Staelen*, C-337/15, ECLI:EU:C:2017:256, paragraphs 12, 34, 43, 114.

³⁶⁵ Complaint, pp.1-2, 7, 14.

³⁶⁶ Judgement of the Court of Justice of 15 June 2021, *Facebook Ireland Ltd v Gegevensbeschermingsautoriteit*, C-645/19, ECLI:EU:C:2021:483, (hereinafter '*C-645/19 Facebook v Gegevensbeschermingsautoriteit*'), paragraphs 53 and 63.

finding on any possible infringement by Meta IE of its obligations under Article 9 GDPR and other GDPR provisions relevant thereto.

197. In conclusion, the EDPB decides that the IE SA cannot categorically conclude at this stage through its Finding 1 that Meta IE is not legally obliged to rely on consent to carry out the personal data processing activities involved in the delivery of the Facebook service, including behavioural advertising, as set out in the Facebook Terms of Service, without further investigating its processing operations, the categories of data processed (including to identify special categories of personal data that may be processed), and the purposes they serve.
198. The EDPB instructs the IE SA to remove from its Draft Decision its conclusion on Finding 1. The EDPB decides that the IE SA shall carry out a new investigation into Meta IE's processing operations in its Facebook service to determine if it processes special categories of personal data (Article 9 GDPR), and complies with the relevant obligations under the GDPR, to the extent that this new investigation complements the findings made in the IE SA's Final Decision adopted on the basis of this Binding Decision, and based on the results of this investigation, issue a new draft decision in accordance with Article 60(3) GDPR³⁶⁷.

6 ON THE POTENTIAL ADDITIONAL INFRINGEMENT OF THE PRINCIPLE OF FAIRNESS

6.1 Analysis by the LSA in the Draft Decision

199. The IE SA in its Draft Decision addresses the Complainant's allegations that the unclear and misleading nature of Facebook's updated Terms of Service and Data Policy, together with the mode of acceptance of the Facebook Terms of Service, have made Facebook users believe that all processing operations were based on consent under Article 6(1)(a) GDPR and thus constituted a breach of the controller's transparency obligations under Articles 5(1)(a) and 13(1)(c) GDPR³⁶⁸. The IE SA analyses the submissions provided by the controller and, noting the Complaint's focus on the alleged "*forced consent*"³⁶⁹, concludes that Meta IE has breached Articles 5(1)(a), 13(1)(c) and 12(1) GDPR due to the lack of transparency in relation to the processing for which Article 6(1)(b) GDPR has been relied on³⁷⁰. The IE SA explains that, while an infringement of Article 5(1)(a) GDPR does not necessarily or automatically flow from findings of infringement under Articles 12 and/or 13 GDPR, there is an important link between these provisions³⁷¹. Nevertheless, the IE SA takes the view that "*the factual question of whether Facebook 'misled' the data subject*" is not "*a separate legal question from whether Facebook complied with its transparency obligations in the context of processing allegedly carried out pursuant to Article 6(1)(b) GDPR*"³⁷². It concludes that "*there is no distinct legal issue raised by the question whether, as a matter of fact, the Complainant did or did not believe that the processing was based on Article 6(1)(a) GDPR (i.e. consent) and not on Article 6(1)(b) GDPR (i.e. necessity for the*

³⁶⁷ Section 4.2.3 and paragraphs 79 - 80 of the EDPB Guidelines on Article 65(1)(a) GDPR.

³⁶⁸ Draft Decision, paragraphs 5.6 and 5.7

³⁶⁹ See also paragraph 3 of this Binding Decision.

³⁷⁰ Draft Decision, paragraphs 5.59-5.76

³⁷¹ Draft Decision, paragraph 5.74.

³⁷² Draft Decision, paragraph 2.19.

performance of a contract)”³⁷³. The IE SA points out that Article 5(1)(a) GDPR links transparency to the overall fairness of the activities of the controller³⁷⁴ and concludes on the breach of this provision in relation to the infringement of the transparency obligations³⁷⁵.

6.2 Summary of the objection raised by the CSAs

200. The IT SA objects to the scope of Finding 3 of the Draft Decision and to the assessment leading up to it. The IT SA agrees to a large extent with the Draft Decision’s Finding 3 on the infringement of Article 12(1), Article 13(1)(c), and Article 5(1)(a) GDPR in terms of transparency³⁷⁶. However, the IT SA argues that Meta IE has also failed to comply with the more general principle of fairness under Article 5(1)(a) GDPR, which, in the view of the IT SA, entails separate requirements from those relating specifically to transparency³⁷⁷.
201. According to the IT SA, the relationship between Meta IE and Facebook users is markedly unbalanced³⁷⁸ and an infringement of the fairness principle resulted, first of all, from the misrepresentation of the legal basis for processing by the controller³⁷⁹, considering that *“Facebook presented its service to users in a misleading manner”* and *“without taking due account of users’ right to the protection of their personal data”*³⁸⁰. The IT SA argues that *“the controller leaves its users in the dark as they are expected to tell or actually ‘figure out’, from time to time, the possible connections between purpose sought, applicable legal basis and relevant processing activities”*³⁸¹.
202. Secondly, such infringement also stems from the *“high-level and all-encompassing reference to Article 6(1)(b) GDPR as relied upon to enable the massive collection of personal data [...] and their reuse for multifarious, distinct purposes”*, considering the *“pervasive as well as prolonged analysis of [the users’] online behaviour”* amounting to a disproportionate interference with their private lives compared to the pursuit of freedom of enterprise³⁸².
203. The IT SA thus considers that the IE SA should have found an **infringement of the fairness principle under Article 5(1)(a) GDPR**, in addition to the infringement of the transparency obligations derived from this provision, without any need for supplementary investigations³⁸³. According to the IT SA, should the objection be followed, it would also impact the exercise of corrective powers by the IE SA, i.e. the measures to be imposed on the controller in order to bring the processing into conformity with the GDPR³⁸⁴.

³⁷³ Draft Decision, paragraph 2.19.

³⁷⁴ Draft Decision, paragraph 5.76.

³⁷⁵ Draft Decision, paragraphs 5.59-5.76 and Finding 3.

³⁷⁶ IT SA Objection, paragraph 1.

³⁷⁷ IT SA Objection, paragraph 2.4.

³⁷⁸ IT SA Objection, paragraph 2.2.

³⁷⁹ IT SA Objection, paragraph 2.4.

³⁸⁰ IT SA Objection, paragraph 2.3.

³⁸¹ IT SA Objection, paragraph 2.4.

³⁸² IT SA Objection, paragraph 2.5.

³⁸³ IT SA Objection, paragraph 3.

³⁸⁴ IT SA Objection, paragraph 2.2.(i).

6.3 Position of the LSA on the objection

204. The IE SA does not consider the IT SA objection to be relevant and reasoned and does not follow it³⁸⁵. The IE SA examines it together with the other objections relating to the scope and conduct of the inquiry and contends that introducing novel issues not raised by the Complainant or otherwise put to the parties would represent a significant departure in terms of the scope of the inquiry³⁸⁶.
205. The IE SA highlights the legal consequences that would flow from making material changes concerning infringements outside of the complaint and Draft Decision, namely the likelihood that Meta IE would succeed in arguing before the Irish Courts that it has been denied an opportunity to be heard on additional and extraneous findings that are adverse to it³⁸⁷. The IE SA's concern arose from the fact that, according to the IE SA, Meta IE was never invited to be heard in response to an allegation that it had infringed the fairness principle set out in Article 5(1)(a) GDPR. The IE SA notes, in this regard, that a respondent has the right to be heard in response to the particulars of the case being made against it and that this is a core element of a fair procedure pursuant to Irish law. The IE SA takes the view that expanding the material scope of the inquiry is not possible under Irish procedural law and that, considering the seriousness of the transparency infringements, it would not be appropriate to delay the resolution of the matter³⁸⁸.

6.4 Analysis of the EDPB

6.4.1 Assessment of whether the objection was relevant and reasoned

206. The IT SA objection concerns "*whether there is an infringement of the GDPR*"³⁸⁹.
207. The EDPB takes note of Meta IE's view that the objections categorised by the IE SA as relating to the scope and conduct of the inquiry, among which the IT SA objection regarding the infringement of the fairness principle, are not reasoned and relevant³⁹⁰. According to Meta IE, the requests to expand the defined scope of the inquiry are inappropriate in circumstances where the scope of the Inquiry has been confined to assessing the matter of "*forced consent*", as opposed to a wider assessment of the lawfulness or fairness of Meta IE's processing activities under other possible legal bases³⁹¹.
208. Meta IE further contends that the IT SA's justification for the existence of an infringement of the fairness principle under Article 5(1)(a) GDPR (rather than the transparency principle protected by the same provision) is not based on any detailed factual or legal reasoning and fails to address the significance of the alleged risks to fundamental rights posed by the Draft Decision³⁹².
209. As it was previously explained, the EDPB does not share the understanding that CSAs may not disagree with the scope of the inquiry as decided by the LSA by way of an objection³⁹³. The EDPB recalls that an objection could go as far as identifying gaps in the draft decision justifying the need for further investigation by the LSA, for example in situations where the investigation carried out by the LSA

³⁸⁵ IE SA Composite Response, paragraph 30.

³⁸⁶ IE SA Composite Response, paragraph 25.

³⁸⁷ IE SA Composite Response, paragraph 26.

³⁸⁸ IE SA Composite Response, paragraph 29.

³⁸⁹ Guidelines on RRO, paragraph 24.

³⁹⁰ Meta IE Article 65 Submissions, p. 15, paragraph 4.2.

³⁹¹ Meta IE Article 65 Submissions, p. 19, paragraph 4.20.

³⁹² Meta IE Article 65 Submissions, Annex 1, p. 124.

³⁹³ See paragraphs 72 and 73 of this Binding Decision.

unjustifiably fails to cover some of the issues raised by the complainant³⁹⁴. In this regard, the EDPB observes that, in their complaint, the Complainant alleges that the information provided in Meta IE's Privacy Policy "*is inherently non-transparent and unfair within the meaning of Articles 5(1)(a) and 13(c) GDPR*"³⁹⁵. This is also noted by the IE SA³⁹⁶. In addition, the Complainant alleges that "*Asking for consent to 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*"³⁹⁷. Therefore, the EDPB disagrees with the IE SA's finding that assessing Meta IE's compliance with the principle of fairness would amount to introducing "*novel issues which have not been raised by the complainant*"³⁹⁸.

210. The EDPB notes that the IT SA agrees with the IE SA's finding with regard to the infringement of the principle of transparency under Article 5(1)(a) GDPR³⁹⁹. As this finding is not subject to a dispute, the EDPB will not examine this matter.
211. After analysing the IT SA objection, the EDPB finds that the objection is **relevant**, as it refers to a specific part of the Draft Decision (Finding 3⁴⁰⁰), and if followed would lead to the conclusion that there is an infringement of the general principle of fairness under Article 5(1)(a) GDPR, in addition to the breach of the transparency obligations derived from this provision⁴⁰¹. The objection, if followed, would also entail the exercise of corrective powers, i.e. the measures to be imposed on the controller in order to bring the processing into conformity with the GDPR⁴⁰².
212. The IT SA objection is also **reasoned** because it includes several specific legal and factual arguments in support of finding an additional infringement of the principle of fairness under Article 5(1)(a) GDPR⁴⁰³. For example, the IT SA explains that "*transparency and fairness are two separate notions*" and that "*transparency relates to clarity of the information provided to users via the ToS and the privacy policy*", while "*fairness relates to how the controller addressed the lawfulness of the processing activities in connection with its social networking service*"⁴⁰⁴. The IT SA contends that the "*overall relationship between Facebook and its users is markedly unbalanced*"⁴⁰⁵. According to the IT SA, the first way in which Meta IE has infringed the principle of fairness was by misrepresenting the legal basis for processing "*without taking due account of users' right to the protection of personal data*"⁴⁰⁶ and leaving "*its users in the dark*"⁴⁰⁷. Meta IE has also breached the fairness principle, in the IT SA's view, by justifying via the broad reference to the legal basis of performance of contract a massive collection of personal data and their reuse for a wide range of purposes, disproportionately interfering with users' private life⁴⁰⁸.

³⁹⁴ Guidelines on RRO, paragraph 27.

³⁹⁵ Complaint, paragraph 2.3.1.

³⁹⁶ Draft Decision, paragraph 5.7.

³⁹⁷ Complaint, paragraph 2.3.4.

³⁹⁸ IE SA Composite Response, paragraph 25.

³⁹⁹ IT SA Objection, paragraph 1.

⁴⁰⁰ IT SA Objection, paragraph 1.

⁴⁰¹ IT SA Objection, paragraph 3.

⁴⁰² IT SA Objection, paragraph 2.2.(i).

⁴⁰³ See paragraphs 200-202 of this Binding Decision.

⁴⁰⁴ IT SA Objection, paragraph 2.3.

⁴⁰⁵ IT SA Objection, paragraph 2.2.

⁴⁰⁶ IT SA Objection, paragraph 2.3.

⁴⁰⁷ IT SA Objection, paragraph 2.4.

⁴⁰⁸ IT SA Objection, paragraph 2.5. See also paragraph 202 of this Binding Decision.

213. The IT SA objection also identifies the **risks** posed by the absence in the Draft Decision of a finding on the infringement of the fairness principle, namely setting a dangerous precedent for future decisions regarding other controllers relying on the same business model and weakening the safeguards that must be provided through the effective, comprehensive implementation of the data protection framework, including the fairness of the processing principle⁴⁰⁹.
214. Therefore, the EDPB considers that the IT SA objection is **relevant** and **reasoned** (cf. Article 4(24) GDPR).

6.4.2 Assessment on the merits

215. 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.
216. 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.
217. As previously mentioned, the EDPB takes note of Meta IE's view that the IT SA objection is not relevant and reasoned⁴¹⁰. The EDPB also notes that Meta IE does not provide further submissions on the content of the IT SA objection⁴¹¹.
218. Before proceeding with the assessment, the EDPB recalls that the basic principles relating to processing listed in Article 5 GDPR can, as such, be infringed⁴¹². 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.
219. 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, Articles 6(2) and 6(3)(b) GDPR refer to lawful and fair processing, while Recitals 60 and 71 GDPR, as well as Articles 13(2), 14(2) and 40(2)(a) GDPR refer to fair and transparent processing.
220. 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*"⁴¹³ 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.

⁴⁰⁹ IT SA Objection, p. 12

⁴¹⁰ See paragraph 207 of this Binding Decision.

⁴¹¹ Meta IE Article 65 Submissions, Annex 1, pp. 123-124.

⁴¹² See also EDPB Binding Decision 1/2021, paragraph 191.

⁴¹³ Draft Decision, paragraph 5.76.

221. The EDPB recalls that, in data protection law, the concept of fairness stems from the EU Charter of Fundamental Rights⁴¹⁴. 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 *“Fairness 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”*⁴¹⁵.
222. 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 processing⁴¹⁶. 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”*⁴¹⁷.
223. 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 GDPR⁴¹⁸. 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”*⁴¹⁹, 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 processed⁴²⁰. 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 data⁴²¹, which is in contrast with the element of *“autonomy”* of data subjects as to the processing of their personal data⁴²².
224. 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

⁴¹⁴ Art. 8 EU Charter of Fundamental Rights states as follows: *“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”* (emphasis added).

⁴¹⁵ EDPB Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, Version 2, Adopted on 20 October 2020 (hereinafter “EDPB Guidelines on Data Protection by Design and by Default”), paragraph 69.

⁴¹⁶ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴¹⁷ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 12.

⁴¹⁸ On the balance between the different interests at stake see for example: Judgement of the Court of Justice of 12 December 2013, X, C-486/12, ECLI:EU:C:2013:836; Judgement of the Court of Justice of 7 May 2009, *College van burgemeester en wethouders van Rotterdam v M. E. E. Rijkeboer*, C-553/07, ECLI:EU:C:2009:293; Judgment of the Court (Grand Chamber) of 9 November 2010, *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen*, ECLI:EU:C:2010:662.

⁴¹⁹ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴²⁰ On “online services”, see further EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 3-5.

⁴²¹ further EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 4.

⁴²² EDPB Guidelines on Data Protection by Design and by Default, paragraph 70. According to this element of fairness, *“data subjects should be granted the highest degree of autonomy possible to determine the use made of their personal data, as well as over the scope and conditions of that use or processing”*.

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.

225. The EDPB has previously emphasised that the identification of the appropriate lawful basis is tied to the principles of fairness and purpose limitation⁴²³. 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 Facebook Terms of Service and Privacy 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”*⁴²⁴. 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 Facebook service users. 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 advertising⁴²⁵.
226. 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 Facebook users by confusing them on whether clicking the “Accept” 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”*⁴²⁶.
227. As the IE SA itself notes, the Complainant argues that Meta IE relied on “forced consent” for the processing simply because it did in fact believe that the legal basis for processing the controller was relying upon was consent⁴²⁷. This is illustrated by the multiple arguments that the Complainant presents in order to demonstrate the *“forced consent”*, including the reference to the use by Meta IE of *“additional ‘tricks’ to pressure the users”*⁴²⁸. For example, the Complainant refers to the inclusion in the user interface page of *“two fake red dots (violation against Article 5(1)(a) – neither ‘fair’, nor ‘transparent’), that indicated that the user has new messages and notifications, which he/she cannot access without consenting – even if the user did not have such notifications or messages in reality”*⁴²⁹. The EDPB considers that the LSA should have taken into account the use of such practices by Meta IE 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 Facebook Terms of Service⁴³⁰.
228. In addition, and as previously mentioned in paragraph 97 of this Binding Decision, the Complainant presents the results of a poll according to which only 1.6% to 2.5% of the 1000 Facebook users who responded to the poll understood the request to accept the Facebook Terms of Service to be a

⁴²³ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 1.

⁴²⁴ IT SA Objection, paragraph 2.3.

⁴²⁵ See Draft Decision, paragraph 4.44 where the IE SA holds that *“targeted advertising forms a core element of Facebook’s business model”* and Meta IE Article 65 Submissions, paragraph 6.32 where Meta IE claims that *“It would be impossible to provide the Facebook Service in accordance with the Terms of Service without providing behavioural advertising”*.

⁴²⁶ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴²⁷ Draft Decision, paragraph 3.2.

⁴²⁸ Complaint, paragraph 1.4.

⁴²⁹ Complaint, paragraph 1.4.

⁴³⁰ Draft Decision, Finding 1.

contract⁴³¹. In the EDPB's view, there are clear indications that Facebook users' expectations with regard to the applicable legal basis have not been fulfilled⁴³².

229. As recognised by the IE SA itself, *"the user is left to guess as to what processing is carried out on what data"*⁴³³. Therefore, the EDPB shares the IT SA's concern that Facebook users are left *"in the dark"*⁴³⁴ and considers that the processing by Meta IE cannot be regarded as ethical and truthful⁴³⁵ 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 Facebook users' possibility to exercise their data subjects' rights.
230. 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 Facebook users in a misleading manner⁴³⁶, 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 transparency⁴³⁷ should extend to the principle of fairness too.
231. This is all the more supported by the fact that, in the circumstances of the present case as demonstrated above⁴³⁸, the overall effect of the infringements by Meta IE of the transparency obligations under Articles 5(1)(a), 12(1), 13(1)(c) GDPR and the infringement of Article 6(1) GDPR⁴³⁹ further intensifies the imbalanced nature of the relationship between Meta IE and the Facebook 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 Facebook 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 Facebook 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.
232. 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

⁴³¹ See paragraph 97 of this Binding Decision.

⁴³² According to the fairness element of "expectation", *"processing should correspond with data subjects' reasonable expectations"* - EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴³³ Draft Decision, paragraph 5.63.

⁴³⁴ IT SA Objection, paragraph 2.4.

⁴³⁵ See EDPB Guidelines on Data Protection by Design and by Default, paragraph 70, where the EDPB explains that "ethical" means that *"[t]he controller should see the processing's wider impact on individuals' rights and dignity"* and "truthful" means that *"[t]he controller must make available information about how they process personal data, they should act as they declare they will and not mislead the data subjects"*.

⁴³⁶ IT SA Objection, paragraph 2.3.

⁴³⁷ Draft Decision, paragraphs 5.59-5.76.

⁴³⁸ See paragraphs 221-230 of this Binding Decision.

⁴³⁹ See paragraph 133 of this Binding Decision.

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.

7 ON THE POTENTIAL ADDITIONAL INFRINGEMENT OF THE PRINCIPLES OF PURPOSE LIMITATION AND DATA MINIMISATION

7.1 Analysis by the LSA in the Draft Decision

233. The IE SA refers to Article 5(1)(b)⁴⁴⁰ and Article 5(1)(c) GDPR⁴⁴¹ when analysing the extent of the controller's obligation under Article 13(1)(c) GDPR and whether Meta IE has infringed this provision. More specifically, the IE SA highlights that Article 13 GDPR requires that the purposes and legal bases must be specified in respect of the intended processing and cannot just be cited in the abstract⁴⁴². After explaining why Meta IE's view that there is no specific obligation for the legal basis to be mapped to the purpose of processing cannot be reconciled with a literal reading of the GDPR, the IE SA, for completeness, also engages in a systemic reading based on the legislator's objective and the contents of the GDPR as a whole⁴⁴³.
234. In this context, the IE SA's points out that both Article 5(1)(b) and (c) GDPR focus quite closely on the purposes for processing and further stresses that the six principles laid down under Article 5 GDPR are interconnected and operate in combination to underpin the whole GDPR⁴⁴⁴. However, the IE SA does not assess whether Facebook's processing activities entail a separate infringement of the principles of purpose limitation and data minimisation under Article 5(1)(b) and Article 5(1)(c) GDPR.

7.2 Summary of the objection raised by the CSAs

235. According to the IT SA, there is an additional infringement of points (b) and (c) of Article 5(1) GDPR on account of Meta IE's failure to comply with the purpose limitation and data minimisation principles. It considers that such infringement should be found without the need for any further investigation and should result into a substantial increase of the proposed administrative fine⁴⁴⁵.
236. The IT SA puts forward several factual and legal arguments for the proposed change to the Draft Decision. First, it points out that the IE SA confines its assessment to only one of the contract's purposes (the provision of online behavioural advertising), while Facebook's service would actually be composed of several processing activities pursuing several purposes⁴⁴⁶. According to the IT SA, the fact that Meta IE inappropriately based its multifarious processing activities only on Article 6(1)(b) GDPR entails an infringement of the purpose limitation and data minimisation principles⁴⁴⁷. The IT SA stresses the relevance of these principles in online services contracts, as they are not negotiated on an individual basis, and refers to pages 15 and 16 of the WP29 Opinion 03/2013 on purpose

⁴⁴⁰ Draft Decision, paragraphs 5.32 - 5.40.

⁴⁴¹ Draft Decision, paragraph 5.32.

⁴⁴² Draft Decision, paragraph 5.29.

⁴⁴³ Draft Decision, paragraph 5.30.

⁴⁴⁴ Draft Decision, paragraph 5.32.

⁴⁴⁵ IT SA Objection, p. 9, paragraph 2.

⁴⁴⁶ IT SA Objection, p. 7, paragraph 1.1.

⁴⁴⁷ IT SA Objection, p.7.

limitation⁴⁴⁸. The IT SA also refers to the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR and recalls that, where the contract consists of several separate services or elements of a service that can be performed independently, the applicability of Article 6(1)(b) GDPR should be assessed for each of those services separately⁴⁴⁹.

237. On the **risks** posed by the Draft Decision, the IT SA refers to the risk identified by the WP29 in its Opinion 03/2013 on purpose limitation⁴⁵⁰, namely that “*data controllers seek to include processing terms in contracts to maximise the possible collection and uses of data without adequately specifying those purposes or considering data minimisation obligations*”⁴⁵¹. In addition, in the IT SA’s view, the failure to specify and communicate the purposes of the processing to the data subject creates a risk of artificially expanding the types of processing or the categories or personal data considered necessary for the performance of a contract under Article 6(1)(b) GDPR, which would nullify the safeguards afforded to data subjects under data protection law⁴⁵².

7.3 Position of the LSA on the objections

238. The IE SA does not consider that the IT SA’s objection is relevant and reasoned⁴⁵³. Categorising the objection as relating to the scope and conduct of the inquiry, the IE SA adopts the same approach as with regard to the alleged infringement of the principle of fairness. More specifically, the IE SA contends that introducing novel issues not raised by the Complainant or otherwise put to the parties would represent a significant departure in terms of the scope of the inquiry⁴⁵⁴ and highlights the legal consequences thereof, namely the likelihood that Meta IE would succeed in arguing before the Irish Courts that it has been denied an opportunity to be heard on additional and extraneous findings that are adverse to it⁴⁵⁵. The IE SA’s concern arose from the fact that, according to the IE SA, Meta IE was never invited to be heard in response to an allegation that it had infringed Articles 5(1)(b) and (c) GDPR. The IE SA notes, in this regard, that a respondent has the right to be heard in response to the particulars of the case being made against it and that this is a core element of a fair procedure pursuant to Irish law. The IE SA takes the view that expanding the material scope of the inquiry is not possible under Irish procedural law and that, considering the seriousness of the transparency infringements, it would not be appropriate to delay the resolution of the matter⁴⁵⁶. It further notes that a very significant risk of procedural unfairness, under Irish national law, would result from the proposal to assume, without any further factual examination, that Meta IE has infringed the purpose limitation principle⁴⁵⁷.

⁴⁴⁸ IT SA Objection, p. 7, paragraph 1.1.

⁴⁴⁹ IT SA Objection, p. 7, paragraph 1.1. The IT SA refers to EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, p. 12, paragraph 37.

⁴⁵⁰ WP29 Opinion 03/2013 on purpose limitation, adopted on 2 April 2013 (WP203).

⁴⁵¹ IT SA Objection, p.7.

⁴⁵² IT SA Objection, p. 7.

⁴⁵³ IE SA Composite Response, paragraph 30.

⁴⁵⁴ IE SA Composite Response, paragraph 25.

⁴⁵⁵ IE SA Composite Response, paragraph 26.

⁴⁵⁶ IE SA Composite Response, paragraph 29.

⁴⁵⁷ IE SA Composite Response, paragraph 27.

7.4 Analysis of the EDPB

7.4.1 Assessment of whether the objection was relevant and reasoned

239. The IT SA objection concerns “*whether there is an infringement of the GDPR*”⁴⁵⁸.
240. The EDPB takes note of Meta IE’s view that the IT SA’s objection does not meet the relevant and reasoned thresholds because it falls outside the defined scope of the inquiry. As previously explained, the EDPB does not share the understanding that CSAs may not disagree with the scope of the inquiry as decided by the LSA by way of an objection⁴⁵⁹.
241. Meta IE further argues that even if the objection satisfied the abovementioned thresholds, it should be disregarded because otherwise Meta IE’s right to fair procedures under both Irish and EU law would be contravened⁴⁶⁰. It points out that the objection concerns matters that have not been investigated and relates to theoretical findings on legal bases⁴⁶¹.
242. The EDPB considers that the IT SA objection is **relevant** as it refers to specific parts of the Draft Decision, namely Finding 2 and Finding 3⁴⁶², and argues that the IE SA should have found an infringement of Article 5(1)(b) and (c) GDPR which lay down the principles of data minimisation and purpose limitation.
243. The objection also includes arguments on legal and factual mistakes in the IE SA’s Draft Decision that require amending. According to the IT SA, the IE SA’s reasoning is inconsistent because the high-level, rather unclear information provided to the data subjects is a major criticality that should have led the IE SA not only to question the features of the information notice, but also to verify, in detail, the application of the principles of purpose limitation and data minimisation from a substantive perspective⁴⁶³. More specially, the IT SA takes the view that the IE SA should have had regard to the actual configuration of the processing operations performed in order to assess whether the controller had abided by the obligation to process personal data for specified, explicit and legitimate purposes both when collecting those data and thereafter⁴⁶⁴.
244. As regards the **risk** posed by the Draft Decision, the EDPB takes note of the IT SA’s reference to paragraph 16 of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR and reiterates the particular relevance of Articles 5(1)(b) and (c) GDPR in the context of contracts for online services, in view of the risk that data controllers may seek to include general processing terms in contracts in order to maximise the possible collection and uses of data, without adequately specifying those purposes or considering data minimisation obligations⁴⁶⁵. Nevertheless, the EDPB stresses that a mere reference to the EDPB Guidelines is not sufficient to demonstrate the risks posed by the Draft Decision in this specific case and in these specific circumstances.

⁴⁵⁸ Guidelines on RRO, paragraph 24.

⁴⁵⁹ See paragraphs 72 and 73 of this Binding Decision.

⁴⁶⁰ Meta IE Article 65 Submissions, Annex 1, p. 123.

⁴⁶¹ Meta IE Article 65 Submissions, Annex 1, p. 123.

⁴⁶² The IT SA refers to the IE SA’s reasoning preceding Finding 2 and to paragraphs 5.52, 5.62 and 5.63 preceding Finding 3 of the Draft Decision.

⁴⁶³ IT SA Objection, p.8, paragraph 1.3.

⁴⁶⁴ IT SA Objection, p.8, paragraph 1.3.

⁴⁶⁵ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 16.

245. The IT SA also considers that the purposes for the processing “*must be clearly specified and communicated to the data subject, in line with the controller’s purpose limitation and transparency obligations*”, otherwise there is “*a risk that other data protection obligations might be evaded by artificially expanding the types of processing or the categories of personal data that are considered to be ‘necessary’ for performance of the contract under Article 6(1)(b) GDPR - which would in turn nullify the safeguards afforded to data subjects by personal data protection law*”⁴⁶⁶.
246. The EDPB recalls that the objection must put forward arguments or justifications concerning the consequences of issuing the decision without the changes proposed in the objection, and how such consequences would pose significant risks for data subjects’ fundamental rights and freedoms⁴⁶⁷. The CSA needs to advance sufficient arguments to explicitly show that such risks are substantial and plausible⁴⁶⁸. In addition, the demonstration of the significance of the risks cannot be implied from the legal and/or factual arguments provided by the CSA, but has to be explicitly identified and elaborated in the objection⁴⁶⁹.
247. The EDPB considers that the IT SA objection fails to meet these requirements as it does not demonstrate the significance of the risk stemming from an omission in the Draft Decision of a finding that the principles of purpose limitation and data minimisation have been infringed by Meta IE. The risk, as described by the IT SA objection, is not substantial and plausible enough. Moreover, the risk relates to the IE SA’s decision not to conclude on the inappropriate use of Article 6(1)(b) GDPR as a legal basis for Meta IE’s processing activities but fails to establish a clear link with the LSA decision not to make a finding on the infringement of Article 5(1)(b) and (c) GDPR.
248. Therefore, the EDPB considers that the abovementioned objection by the IT SA is **not reasoned** (cf. Article 4(24) GDPR) and will not assess it on the merits.

8 ON CORRECTIVE MEASURES OTHER THAN ADMINISTRATIVE FINES

8.1 Analysis by the LSA in the Draft Decision

249. The IE SA considers that an order to bring processing into compliance (Article 58(2)(d) GDPR) should be imposed on Meta IE, requiring them to bring their Data Policy and Facebook Terms of Service into compliance with Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR as regards processing carried out on the basis of Article 6(1)(b) GDPR within three months of the date of notification of any final decision⁴⁷⁰.
250. The LSA considers an order is necessary and proportionate, contrary to the controller’s position⁴⁷¹. Regarding the necessity, the IE SA explains that this order is the only way to guarantee that Meta IE amends the infringements outlined in the Draft Decision, which is essential for the protection of data subjects’ rights. Concerning the proportionality, the LSA points out that the proposed measure is the minimum action required to ensure the future compliance of the controller. Further, the IE SA recalls

⁴⁶⁶ IT SA Objection, p. 7, paragraph 1.1.

⁴⁶⁷ Guidelines on RRO, paragraph 18.

⁴⁶⁸ Guidelines on RRO, paragraph 37.

⁴⁶⁹ Guidelines on RRO, paragraph 37.

⁴⁷⁰ Draft Decision, paragraphs 8.2 and 8.5.

⁴⁷¹ Meta IE Submissions on Preliminary Draft Decision, paragraph 12; Draft Decision, paragraph 8.2.

Meta IE's available resources, the specificity of the LSA's order, and the importance of the data subject's rights concerned to conclude that such measure is proportionate⁴⁷².

8.2 Summary of the objections raised by the CSAs

251. The NL SA objects to the choice of the corrective measures of the LSA in their Draft Decision⁴⁷³. The NL SA notes that the IE SA is proposing to impose an order pursuant to Article 58(2)(d) GDPR alongside an administrative fine, and that this objection concerns the first of these two measures⁴⁷⁴. More specifically, the NL SA objects to the order to bring processing into compliance (Article 58(2)(d) GDPR) within three months proposed by the LSA, arguing that it is not appropriate, not necessary, nor proportionate to ensure compliance with Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR, as well as the additional infringement of Article 6(1)(b) and Article 9(2) GDPR raised in its objection⁴⁷⁵. The NL SA takes the view that the proposed order is insufficient to remedy the serious situation of non-compliance arising from these infringements, since it does not remedy the illegality of the conduct carried out during the transition period (i.e. the time between the issuance of the decision and the expiration date of the order), bearing in mind that *"every day the service continues operations as described in the Terms of Use and Data Policy"*, it does so in an illegal way harming the rights and freedoms of millions of data subjects in the EEA⁴⁷⁶. According to the NL SA, the Draft Decision should be modified to include a temporary ban on processing (Article 58(2)(f) GDPR), as it would be the *"only measure suitable to make sure that the expansive violation of the fundamental rights and freedoms of data subjects is not continued"*⁴⁷⁷. The NL SA also argues that the breaches of the GDPR established by the LSA, combined with the additional breaches put forward by the NL SA, are of a very grave nature and justify halting processing operations during the time the controller needs to remedy its severe lack of compliance⁴⁷⁸. In essence, the NL SA identifies the risk posed by the Draft Decision in that it allows the company to resume operations as usual while amending the compliance deficits (with regard to transparency), which they argue essentially deprives data subjects of their rights during a transition period⁴⁷⁹.
252. According to the IT SA, the finding of the additional infringement of Article 6(1)(b) GDPR should *"result in the taking of appropriate corrective measures under Article 58(2)(d) GDPR"*⁴⁸⁰.
253. The AT SA argues the use of corrective measures is necessary at hand in order to bring the processing operations of the controller in line with the GDPR⁴⁸¹ and remedy the infringement⁴⁸² of

⁴⁷² Draft Decision, paragraph 8.7.

⁴⁷³ NL SA Objection, paragraph 54.

⁴⁷⁴ NL SA Objection, paragraph 55.

⁴⁷⁵ NL SA Objection, paragraphs 54-55.

⁴⁷⁶ NL SA Objection, paragraph 56.

⁴⁷⁷ NL SA Objection, paragraph 58.

⁴⁷⁸ NL SA objection, paragraph 64.

⁴⁷⁹ NL SA objection, paragraph 56, 57, 64.

⁴⁸⁰ IT SA Objection, paragraph 2.7.

⁴⁸¹ AT SA Objection, section C.2, p. 7-8. The AT SA also highlights that according to the CJEU where an infringement is found during a complaint-based procedure, the SA is under an obligation to take appropriate action by exercising corrective powers, and cites C-311/18 *Schrems II*, paragraph 111. Additionally, the AT SA clarifies that although it takes the position that a complainant does not have a subjective right to request from the respective supervisory authority the exercise of a specific corrective power and it is up to the authority only to decide which action is appropriate and necessary (referring to C-311/18 *Schrems II*, paragraph 112), it finds the exercise of corrective powers to be necessary in the current case.

⁴⁸² AT SA Objection, section C.4, p. 8.

Article 6(1)(b) GDPR. According to the AT SA, the IE SA should exercise “*specific corrective powers*” so as to ensure that Meta IE could not continue to unlawfully rely on Article 6(1)(b) GDPR for the processing of users’ personal data for behavioural advertising⁴⁸³. More specifically, the AT SA suggests that the IE SA prohibits Meta IE “*the processing of a user’s data for behavioural advertising by relying on Article 6(1)(b) GDPR*”⁴⁸⁴. In the absence of additional corrective measures, the AT SA considers that if corrective measures are not imposed, there is a risk “*that Facebook continues to unlawfully rely on Article 6(1)(b) GDPR for the processing of a user’s data for behavioural advertising and continues to undermine or bypass data protection principles*”, which would affect hundred of millions of data subjects within the EEA and bear vast consequences⁴⁸⁵.

254. The FR SA notes that reversing the findings concerning the infringements of Article 6(1) GDPR also affects the scope of the corrective actions proposed by the IE SA, in addition to the administrative fine⁴⁸⁶. Moreover, the PT SA considers that the proposed additional infringement in relation to the breach of the lawfulness obligation (Article 5(1)(a) GDPR) should lead to the application of an additional corrective measure which is not now envisaged in the Draft Decision⁴⁸⁷.
255. Finally, according to the NO and DE SAs, the IE SA should take concrete corrective measures in relation to the additional infringement of Meta IE with Article 6(1)(b) GDPR, namely to order Meta IE to delete personal data that has been unlawfully processed on Article 6(1)(b) GDPR and to prohibit the use of this legal basis for such processing activities⁴⁸⁸.
256. The PL SA objects to the content of the order to bring processing into compliance with the GDPR (Article 58(2)(d) GDPR) contained in the Draft Decision, arguing that it should be more precise. The PL SA specifically argues that the order should also include a reference to the EDPB Transparency Guidelines to ensure the controller is aware that compliance requires differentiating between the content of the contract with the user and the content of information on data processing⁴⁸⁹. The PL SA considers the interpretation of the rules provided in the EDPB Transparency Guidelines crucial in the present case and, if the Draft Decision is left unchanged, sees a risk the order to bring into compliance might not be properly applied, which in turn would limit the possibilities of data subjects to assert their rights⁴⁹⁰.

8.3 Position of the LSA on the objections

257. The IE SA does not consider the objections above to be relevant and/or reasoned and does not follow them⁴⁹¹. Given that these objections were premised upon the requirement for the Draft Decision to include a finding of infringement of Article 6(1)(b), on which the IE SA expressed its disagreement –

⁴⁸³ AT SA Objection, section C.1, p. 7.

⁴⁸⁴ AT SA Objection, section C.4, p. 8.

⁴⁸⁵ AT SA Objection, section C.3, p. 8.

⁴⁸⁶ FR SA objection, paragraph 53.

⁴⁸⁷ PT SA objection, paragraphs 66 and 73.

⁴⁸⁸ NO SA Objection, p.7; DE SA Objection, p. 10, point 4.

⁴⁸⁹ PL SA Objection, p. 3. The PL SA refers to paragraph 7 of the EDPB Transparency Guidelines.

⁴⁹⁰ PL SA Objection, p. 3.

⁴⁹¹ Composite Response, paragraphs 37-41 (in response to the NL and DE SAs), paragraph 103 (in response to AT SA). See also paragraphs 48-51, 63-72, 76-80, 89-91 where the IE SA responds to the NO SAs objections leading to the NO SAs request to modify the order.

the IE SA does not consider the objections requesting exercise of a corrective power in response to a finding of infringement of Article 6(1)(b) as being relevant and reasoned⁴⁹².

258. The IE SA considers the PL SA's objection is not relevant insofar as *"the GDPR does not prescribe specific formalities for the provision of information under Article 13(1)(c) GDPR"*⁴⁹³.

8.4 Analysis of the EDPB

8.4.1 Assessment of whether the objections were relevant and reasoned

259. The objections raised by the AT, DE, FR, IT, NL, NO, PL and PT SAs concern *"whether the action envisaged in the Draft Decision complies with the GDPR"*⁴⁹⁴.
260. In addition to the primary argument levelled against all CSA's objections⁴⁹⁵, Meta IE provides arguments on why it considers these objections to be not relevant and/or reasoned. Meta IE argues that the AT and NL SAs' objections cannot be considered relevant because they are dependent on another objection, which Meta IE deems inadmissible and without merit⁴⁹⁶. On the same basis, Meta IE refutes that the AT SAs objection is adequately reasoned⁴⁹⁷. As stated above in Section 4, the EDPB finds the AT and NL SAs' objections on the subject of Article 6(1)(b) GDPR relevant and reasoned⁴⁹⁸.
261. Additionally, Meta IE argues that the AT and NL SAs' objections fail to set out how the Draft Decision would pose a direct and significant risk to fundamental rights and freedoms. First, Meta IE refers to their arguments put forward in response to the AT and NL SAs' objections on the matter of compliance with Article 6(1)(b) GDPR⁴⁹⁹. The EDPB has taken this line of reasoning into consideration above in Section 4⁵⁰⁰. Second, Meta IE puts forward that the AT and NL SAs appear to consider that the *"Draft Decision provides Meta Ireland with a mandate to engage in unlawful processing or that it would prevent the DPC (or the CSAs) from investigating and prohibiting any unlawful processing in the future"*⁵⁰¹. Meta IE points out that no such inference can be drawn from the Draft Decision, going on to draw the conclusion that no risks or consequences *"would arise if the Draft Decision was finalised*

⁴⁹² Composite Response, paragraphs 41 and 103.

⁴⁹³ Composite Response, paragraphs 95-96.

⁴⁹⁴ EDPB Guidelines on RRO, paragraph 32.

⁴⁹⁵ Meta IE argues that *"Objections which raise matters which are not within the Defined Scope of Inquiry are not 'relevant and reasoned' within the meaning of Article 4(24) GDPR"* and such objections *"ought to be disregarded in their entirety by the EDPB"*. The EDPB does not share this understanding, as explained above. See Section 4.4.1.

⁴⁹⁶ Meta IE Article 65 Submissions, Annex 1, p. 75 : *"the Austrian SA's Objection fails to satisfy the Sufficiently Relevant Threshold, because it is itself based on an Objection grounded in a mistaken allegation of infringement of Article 6(1)(b) GDPR, which as explained in Meta Ireland's response at No. 1.a of this Annex 1, does not satisfy the Thresholds and lacks merit. Therefore, this Objection is not sufficiently relevant as it has no direct connection with the Draft Decision."* Analogous wording is used in response to the NL SA's objection in Meta IE Article 65 Submissions, Annex 1, p. 101.

⁴⁹⁷ Meta IE Article 65 Submissions, Annex 1, p. 76 : *"the Austrian SA's Objection fails to satisfy the Adequately Reasoned Threshold because it is premised on its Objection that a finding of infringement should be found regarding Article 6(1) GDPR, which itself does not satisfy the Thresholds and lacks merit."* Analogous wording is used in response to the NL SA's objection in Meta IE Article 65 Submissions, Annex 1, p. 101.

⁴⁹⁸ Paragraph 78 above.

⁴⁹⁹ Meta IE Article 65 Submissions, Annex 1, p. 76 referring back to p. 73 and p. 101 referring back to p. 99-100.

⁵⁰⁰ Paragraph 79 - 80 above.

⁵⁰¹ Meta IE Article 65 Submissions, Annex 1, p. 101. Analogous wording is used in response to the AT SA, Meta IE Article 65 Submissions, Annex 1, p. 76.

*in its current form*⁵⁰². As to this second line of reasoning, the EDPB fails to see wording by which the AT SA or NL SA might have suggested it understands the Draft Decision as a mandate for Meta IE to unlawfully process data, thus limiting future investigations.

262. The NL SA disagrees with the corrective measure chosen by the IE SA in addition to the administrative fine, arguing that a temporary ban on processing (Article 58(2)(f) GDPR) should have been included in the Draft Decision instead of an order to bring processing into compliance. If followed, this objection would lead to a different conclusion as to the choice of corrective measures. In consequence, the EDPB considers the objection to be **relevant**.
263. The NL SA argues that an order to bring processing into compliance entails that Meta IE would maintain its illegal conduct while they amend their compliance deficits⁵⁰³. Conversely, a temporary ban on Meta IE's processing of data would ensure that data processing is halted during the time needed for the company to change its practices to comply with the GDPR⁵⁰⁴. In terms of risk, the NL SA puts forward that *"not temporarily banning this processing would undermine the effectiveness of the GDPR"*, and would continue to deprive data subjects of their rights during the transition period⁵⁰⁵. The NL SA considers the risk significant, as the controller processes data of 265 million monthly active users in the EEA, which amounts to approximately 50-55% of the population and also because the processing involves special categories of personal data⁵⁰⁶. Therefore, the EDPB considers the objection to be **reasoned** and to clearly demonstrate the significance of the risks posed by the Draft Decision.
264. The AT SA disagrees with a specific part of the IE SA's Draft Decision, namely Chapter 8 *"Order to bring processing into compliance"*, arguing that the LSA should have included corrective measures in order to remedy an infringement of Article 6(1)(b) GDPR⁵⁰⁷. More specifically, the AT SA suggests that the IE SA prohibits Meta IE from relying on Article 6(1)(b) GDPR⁵⁰⁸. Therefore, if followed, this objection would lead to a different conclusion as to the choice of corrective measures⁵⁰⁹. In consequence, the EDPB considers the objection to be **relevant**.
265. Furthermore, the AT SA argues that when an infringement is found - notably in light of other objections raised in the current case in relation to additional infringement of Article 6(1)(b) GDPR - the supervisory authority is under an obligation to issue appropriate corrective measures pursuant to Article 58(2) GDPR. In terms of risk, the AT SA argues that without this amendment of the Draft Decision, Meta IE *"could simply continue to unlawfully rely on Article 6(1)(b) GDPR and to undermine data protection principles"* which would continue to affect hundred of millions of data subjects within the EEA⁵¹⁰. Therefore, the EDPB considers the objection to be **reasoned** and to clearly demonstrate the significance of the risks posed by the Draft Decision.

⁵⁰² Meta IE Article 65 Submissions, Annex 1, p. 101. Analogous wording is used in response to the AT SA, Meta IE Article 65 Submissions, Annex 1, p. 76.

⁵⁰³ NL SA Objection, paragraph 56 - 57.

⁵⁰⁴ NL SA Objection, paragraph 64.

⁵⁰⁵ NL SA Objection, paragraph 57-58.

⁵⁰⁶ NL SA Objection, paragraph 57-58.

⁵⁰⁷ AT SA Objection, p. 7-8.

⁵⁰⁸ AT SA Objection, paragraph C.3.

⁵⁰⁹ AT SA Objection, p. 7-8.

⁵¹⁰ AT SA Objection, p. 8.

266. Considering the above, the EDPB finds that the objections of the AT and NL SAs requesting additional and/or alternative specific corrective measures to be imposed are **relevant** and **reasoned** pursuant to Article 4(24) GDPR.
267. In addition, the EDPB recalls the analysis made in Section 4.4.1 above concerning the objections in relation to the additional breach by Meta IE of its lawfulness obligation made by the FR and PT SAs (requesting to take appropriate corrective measures) and by the IT SA (asking the LSA to take corrective measures in accordance with Article 58(2)(d) GDPR), which were found to be **relevant** and **reasoned**.
268. The EDPB recalls that the DE and NO SA called on the LSA to take specific corrective measures in the event the EDPB followed their objection on compliance with Article 6(1)(b) GDPR. The EDPB considers these to be reflections upon how, in their view, the LSA should give full effect to the binding direction(s) as set out in the EDPB's decision⁵¹¹. In the absence of legal or factual arguments provided by these objections that would justify including these specific corrective measures in the Draft Decision as opposed to others, the EDPB does not consider this aspect of the DE and NO SAs objections to meet the requirements of Article 4(24) GDPR as they **are not sufficiently reasoned**.
269. Meta IE argues that the PL SA *"raises abstract and broad concerns and does not concretely identify valid concerns with the Draft Decision"*. The EDPB finds that the objection is concrete and precise in the change proposed, namely including a particular reference to the EDPB Transparency Guidelines. However, the EDPB notes that the PL SA's objection presents a disagreement on the wording of the Draft Decision, without going so far as to allege that the envisaged action in relation to the controller does not comply with the GDPR. Therefore, the EDPB considers the PL SA's objection in relation to Chapter 8 of the Draft Decision to be **not sufficiently reasoned**.

8.4.2 Assessment on the merits

Preliminary matters

270. The EDPB considers that the objections found to be relevant and reasoned in this subsection require an assessment of whether the Draft Decision needs to be changed in respect of the corrective measures proposed. More specifically, the EDPB needs to assess the request to impose a ban of processing for both the infringements of the transparency obligations found by the LSA and the additional infringement of Article 6(1) GDPR established above in Section 4.4.2, and the connected issue of the corrective measure to be imposed for the infringement of Article 6(1) GDPR. When assessing the merits of the objections raised, the EDPB also takes into account Meta IE's position on the objection and its submissions.
271. By way of introduction, the EDPB highlights that the analysis carried out in this section does not refer to the content of the Draft Decision and of the objections in respect of the imposition of administrative fines, which are covered below in Section 9.

Meta IE's position on the objections and its submissions

272. Meta IE considers that the LSA has sole discretion to determine the appropriate corrective measures in the event of a finding of infringement⁵¹² and that Article 65(1) GDPR does not confer power to the

⁵¹¹ EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 50.

⁵¹² Meta IE Article 65 Submissions, paragraph 8.12 - 8.13.

EDPB to give instruction as to “*which (if any) of the corrective powers provided in Article 58 ought to be exercised*”⁵¹³.

273. While Meta IE acknowledges that “*Article 65(1) GDPR allows the EDPB to consider reasoned objections as to whether the envisaged corrective measures comply with the GDPR*”, it argues that CSAs are strictly limited to criticism of the corrective measures already put forward by the LSA. Therefore, according to Meta IE, “*should the EDPB find an infringement of Article 6(1)(b) GDPR, the appropriate course is for it to refer the matter back to the DPC, as LSA, to determine whether to impose any appropriate corrective measures. Were the EDPB to do otherwise, and direct the DPC to make a specific order in the terms proposed by certain of the objections, it would exceed its competence under Article 65 GDPR*”⁵¹⁴. In addition, Meta IE claims that, where an objection concerns corrective measures already included in the Draft Decision, this objection should only address whether the proposed measure complies with the GDPR, insofar that “*CSAs cannot seek, through an objection, to substitute their own view of the corrective measures which ought to be ordered for that of the LSA*”⁵¹⁵.
274. With respect to the issue of the corrective measure to be imposed for the infringement of Article 6(1) GDPR, if any, Meta IE argues that a temporary ban is not necessary to achieve the objective of ensuring compliance with the GDPR, as there exists alternative, less onerous measures to bring its processing operation into compliance with the GDPR⁵¹⁶. In particular, Meta IE puts forward the significant impact of a temporary ban not only on its activities but also on third parties’ business, such as SMEs, relying on the platform for behavioural advertising⁵¹⁷. In addition, Meta IE considers this measure disproportionate in comparison with other decisions taken under the Article 60 GDPR cooperation mechanism in similar circumstances⁵¹⁸. Meta IE also alleges the need to establish an “*urgent necessity*”⁵¹⁹ for imposing a temporary ban. Finally, Meta IE contends that it would be both unfair and disproportionate to order an immediate ban given that it relied upon a good faith understanding as to what it considered to be a valid legal basis⁵²⁰.

EDPB’s assessment on the merits

275. First of all, according to the EDPB, the views of Meta IE amount to a misunderstanding of the GDPR one-stop-shop mechanism and of the shared competences of the CSAs. The EDPB recalls that the GDPR requires supervisory authorities to cooperate pursuant to Article 60 GDPR to achieve a consistent interpretation of the Regulation⁵²¹. The fact that the LSA will be the authority that can ultimately exercise the corrective powers listed in Article 58(2) GDPR cannot neither limit the role of the CSAs within the cooperation procedure nor the one of the EDPB in the consistency procedure⁵²².

⁵¹³ Meta IE Article 65 Submissions, paragraph 8.14.

⁵¹⁴ Meta IE Article 65 Submissions, paragraphs 8.11.

⁵¹⁵ Meta IE Article 65 Submissions, paragraphs 8.7 and 8.14.

⁵¹⁶ Meta IE Article 65 Submissions, paragraph 8.21, p. 57.

⁵¹⁷ Meta IE Article 65 Submissions, paragraph 8.22 p. 57.

⁵¹⁸ Meta IE Article 65 Submissions, paragraph 8.23-24 p. 57-58.

⁵¹⁹ Meta IE Article 65 Submissions, paragraph 8.25.

⁵²⁰ Meta IE Article 65 Submissions, paragraph 8.25.

⁵²¹ See GDPR Art. 51(2), 60, 61(1), and C-645/19 *Facebook v Gegevensbeschermingsautoriteit*, paragraphs 53, 63, 68, 72.

⁵²² Art. 63 and 65 GDPR. In this regard it should be noted that Recital 11 GDPR stresses that “*effective protection of personal data throughout the Union requires [...] equivalent sanctions for infringements in the Member States*”. Therefore, in order to ensure this “*consistent monitoring and enforcement*” of the GDPR, the legislator has decided to provide supervisory authorities with the “*same corrective powers*” (Recital 129 GDPR).

276. More specifically, when raising an objection on the existing or missing corrective measure(s) in the Draft Decision, the CSAs should indicate which action they believe would be appropriate for the LSA to undertake and include in the final decision⁵²³. In case of a disagreement on these objections, the dispute resolution competence of the EDPB covers “*all the matters which are subject of the relevant and reasoned objection*” (emphasis added)⁵²⁴. Therefore, contrary to Meta IE’s views, the consistency mechanism may also be used to promote a consistent application by the supervisory authorities of their corrective powers, taking into account the range of powers listed in Article 58(2) GDPR⁵²⁵, when a relevant and reasoned objection questions the action(s) envisaged by the Draft Decision vis-a-vis the controller/processor, or the absence thereof.
277. In addition, the EDPB finds that Meta IE misunderstands the AT SA objection when it argues that it does acknowledge that it is for the LSA alone to decide which corrective measures are appropriate and necessary, by citing paragraph 112 of the Schrems II CJEU judgment⁵²⁶. In fact, the AT SA does not such thing: in its objection it stated “*a complainant does not have a subjective right to request from the respective supervisory authority (in this case: the DPC) the exercise of a specific corrective power and it is for the supervisory authority alone to decide which action is appropriate and necessary (see C-311/18, paragraph 112)*”⁵²⁷ and did not engage in an interpretation of how Article 58(2) GDPR is to be understood in cross-border cases in the sections referred to. The cooperation and consistency mechanism of the GDPR is not addressed in CJEU ruling C-311/18 (Schrems II) either.

278. Moving on to the analysis of the issue of corrective measures as required by the objections found to be relevant and reasoned above, the EDPB recalls that when a violation of the Regulation has been established, competent supervisory authorities are required to react appropriately to remedy this infringement in accordance with the means provided to them by Article 58(2) GDPR⁵²⁸. Article 58(2) GDPR provides a wide choice of effective tools for the authorities to take action against infringements of the Regulation and which can be imposed in addition to or instead of a fine. According to Recital 129 GDPR, every corrective measure applied by a supervisory authority under Article 58(2) GDPR should be “*appropriate, necessary and proportionate in view of ensuring compliance with the Regulation*” in light of all the circumstances of each individual case. Recital 148 GDPR shows the duty for supervisory authorities to impose corrective measures that are proportionate to the seriousness of the infringement⁵²⁹. This highlights the need for the corrective measures and any exercise of powers by supervisory authorities to be tailored to the specific case⁵³⁰.
279. Considering the nature and gravity of the infringement of Article 6(1)(b) GDPR established above in Section 4.4.2, as well as the number of data subjects affected, the EDPB shares the view of the AT, FR,

⁵²³ See EDPB Guidelines on RRO, paragraph 33.

⁵²⁴ Art. 65(1)(a) GDPR.

⁵²⁵ See EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 92.

⁵²⁶ AT SA Objection, Section C.2., p. 8. See also above footnote 481.

⁵²⁷ AT SA Objection, p. 8.

⁵²⁸ C-311/18 *Schrems II*, paragraph 111.

⁵²⁹ Recital 148 GDPR states, for instance: “*in a case of a minor infringement or if the fine likely to be imposed would constitute a disproportionate burden to a natural person, a reprimand may be issued instead of a fine*”. The EDPB confirmed that “*the indications provided by this Recital can be relevant for the imposition of corrective measures in general and for the choice of the combination of corrective measures that is appropriate and proportionate to the infringement committed*”. EDPB Binding Decision 1/2021, paragraph 256.

⁵³⁰ EDPB Binding Decision 1/2021, paragraph 256.

IT and PT SAs that it is particularly important that appropriate corrective measures be imposed, in addition to a fine, in order to ensure that Meta IE complies with this provision of the GDPR.

280. In respect of which measure should be imposed, as stated, the NL SA argues that the IE SA's proposal to order Meta IE to comply with Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR within a period of three months is not appropriate, considering these breaches in conjunction with the gravity of the additional breaches of Article 6(1)(b) and Article 9(2) GDPR identified in its objection⁵³¹. Instead, the NL SA is of the opinion that only a temporary ban imposed in respect of all these infringements can effectively protect the rights of the data subjects during the transition period in which the controller remedies to these violations⁵³². In addition, the AT SA calls on the IE SA to use its corrective powers under Article 58(2) GDPR in order to bring the processing operations of Meta IE into line with the GDPR, and suggests *“that the DPC prohibits Facebook the processing of a user’s data for behavioural advertising by relying on Article 6(1)(b)”* stating that *“otherwise, Facebook could simply continue to unlawfully rely on Article 6(1)(b) GDPR”*⁵³³. Finally, the IT SA argues that the finding of the new infringement of Article 6(1)(b) GDPR should result in the taking of appropriate corrective measures under Article 58(2)(d) GDPR by the LSA⁵³⁴.
281. Meta IE argues that a temporary ban would not be necessary as less onerous measures could be imposed, avoiding significant impact on its business and third parties⁵³⁵, and that it would be unfair and disproportionate⁵³⁶.
282. The EDPB agrees with the observations made by the NL SA that the infringement found in the case at hand constitutes a *“very serious situation of non-compliance”*⁵³⁷ with the GDPR, in relation to processing of *“extensive amounts of [...] data, which is essential to the controller’s business model”*, thus harming *“the rights and freedoms of millions of data subjects in the EEA”*⁵³⁸. As a result, the EDPB shares the NL SA’s concern that the corrective measure chosen in the circumstances of this case should aim to bring the processing into compliance with the GDPR thus minimising the potential harm to data subjects created by the violations of the GDPR.
283. In addition, the EDPB recalls that contrary to Meta IE’s contention, it is not necessary to establish an *“urgent necessity”*⁵³⁹ for imposing a temporary ban, in that nothing in the GDPR limits the application of Article 58(2)(f) GDPR to exceptional circumstances⁵⁴⁰.
284. At the same time, the EDPB notes that in assessing the appropriate measure to be applied, Recital 129 GDPR provides that consideration should be given to ensuring that the measure chosen does not create *“superfluous costs”* and *“excessive inconveniences”* for the persons concerned in light of the

⁵³¹ NL SA Objection, paragraph 56. In this respect, the EDPB recalls that, as stated in Sections 4.4.2 and 5.4.2 above, while the EDPB finds that the IE SA should have found an infringement of Art. 6(1)(b) GDPR in its Draft Decision, it does not have sufficient factual evidence allowing it to find a possible infringement by Meta IE of its obligations under Art. 9(2) GDPR.

⁵³² NL SA Objection, paragraphs 56-57.

⁵³³ AT SA Objection, p. 8.

⁵³⁴ IT SA Objection, paragraph 2.7.

⁵³⁵ Meta IE Article 65 Submissions, paragraph 8.21-8.22, p. 57.

⁵³⁶ Meta IE Article 65 Submissions, paragraph 8.25.

⁵³⁷ NL SA Objection, paragraph 53.

⁵³⁸ NL SA Objection, paragraph 57.

⁵³⁹ Meta IE Article 65 Submissions, paragraph 8.25.

⁵⁴⁰ See *a contrario* Art. 4 Implementing Decision 2010/87, in its version prior to the entry into force of Implementing Decision 2016/2297; C-311/18 *Schrems II*, paragraph 114.

objective pursued. When choosing the appropriate corrective measure, there is a need to assess whether the chosen measure is necessary to enforce the GDPR and achieve protection of the data subjects with regard to the processing of their personal data, which is the objective being pursued⁵⁴¹. Compliance with the principle of proportionality requires ensuring that the chosen measure does not create disproportionate disadvantages in relation to the aim pursued.

285. The EDPB takes note of the elements raised by the objections, particularly the NL SA, to justify the need for imposing a temporary ban, consisting in essence in the need to halt the processing activities that are being undertaken in violation of the GDPR until compliance is ensured in order to avoid further prejudicing data subject rights. However, the EDPB considers that the objective of ensuring compliance and bringing the harm to the data subjects to an end can, in this particular case, be adequately met also by amending the order to bring processing into compliance envisaged in the Draft Decision to reflect Meta IE's infringement of Article 6(1) GDPR identified in Section 4 of this Binding Decision. In addition to the fines that will be imposed, this measure would require Meta IE to put in place the necessary technical and operational measures to achieve compliance within a set timeframe.
286. In respect of the imposition of an order to bring processing into compliance, Meta IE submits that any such order should "*afford a reasonable period of time*" to Meta IE to comply⁵⁴². When determining the transition period for bringing Meta IE's processing into compliance with GDPR, the EDPB requests that the IE SA gives due regard to the harm caused to the data subjects by the continuation of Meta IE's infringement of Article 6(1) GDPR during this period. More specifically, the order should require Meta IE to restore compliance within a short period of time. In this respect, the EDPB notes that, in response to Meta IE's submission, the IE SA considered the three-month deadline for compliance for the infringements of Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR necessary and proportionate in light of the potential for harms to the data subjects rights that such a measure entails, considering that the interim period for compliance "*will involve a serious ongoing deprivation of their rights*"⁵⁴³. The IE SA also points out the significant financial, technological, and human resources, as well as the clear instructions provided to Meta IE to comply with GDPR⁵⁴⁴. The EDPB considers that this line of reasoning applies all the more to the corrective measures imposed in relation to Meta IE's infringement of Article 6(1) GDPR.
287. Finally, the EDPB recalls that non-compliance with an order issued by a supervisory authority can be relevant both in terms of it being subject to administrative fines up to 20.000.000 euros or, in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year in line with Article 83(6) GDPR, and in terms of it being an aggravating factor for the imposition of administrative fines⁵⁴⁵. In addition, the investigative powers of supervisory authorities allow them to

⁵⁴¹ C-311/18 *Schrems II*, paragraph 112: "*Although the supervisory authority must determine which action is appropriate and necessary and take into consideration all the circumstances [...] in that determination, the supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence*".

⁵⁴² Meta IE Article 65 Submissions, paragraph 8.37.

⁵⁴³ Draft Decision, paragraph 8.4. In this regard, Meta IE argues that this was not a reasonable period of time within which to make the necessary changes, as the changes would be resource-intensive and would require "*sufficient lead in time for preparing 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.*" Draft Decision, paragraph 8.3.

⁵⁴⁴ Draft Decision, paragraph 8.4

⁵⁴⁵ See Art. 83(2)(i) GDPR.

order the provision of all the information necessary for the performance of their tasks including the verification of compliance with one of their orders⁵⁴⁶.

288. The EDPB therefore instructs the IE SA to include in its final decision an order for Meta IE to bring its processing of personal data for the purpose of behavioural advertising in the context of the Facebook service into compliance with Article 6(1) GDPR within three months.
289. In addition, the EDPB notes that the current wording of the order “*to bring the Data Policy and Terms of Service into compliance with Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR as regards information provided on data processed pursuant to Article 6(1)(b) GDPR*” should be modified in order to reflect the EDPB’s findings in Section 4.4.2 that Meta IE is not allowed to rely on Article 6(1)(b) GDPR for the processing of personal data for the purpose of behavioural advertising.
290. The EDPB also instructs the LSA to adjust its order to Meta IE to bring its Facebook Data Policy and Terms of Service into compliance with Articles 5(1)(a), 12(1) and 13(1)(c) GDPR within three months, to refer not only to information provided on data processed pursuant to Article 6(1)(b) GDPR, but also to data processed for the purposes of behavioural advertising in the context of Facebook service (to reflect the finding of the EDPB in Section 4.4.2 that for this processing the controller cannot rely on Article 6(1)(b) GDPR).

9 ON THE DETERMINATION OF THE ADMINISTRATIVE FINE

291. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines⁵⁴⁷.

9.1 On the determination of the administrative fine for the transparency infringements

9.1.1 Analysis by the LSA in the Draft Decision

The application of the criteria under Article 83(2) GDPR

292. In its Draft Decision, the IE SA explains how it considered all the criteria in Article 83(2) GDPR in deciding whether to impose an administrative fine and determine its amount in the circumstances of this case⁵⁴⁸. The most pertinent criteria for the present dispute are summarised below.

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 level of damage suffered by them (Article 83(2)(a) GDPR)

293. The IE SA explains that it assesses the infringements of Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR identified in the Draft Decision simultaneously in the context of the

⁵⁴⁶ Art. 58(1) GDPR.

⁵⁴⁷ See GDPR, Recital 150; EDPB Guidelines on RRO, paragraph 34 and EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 91.

⁵⁴⁸ Draft Decision, paragraphs 9.3 - 9.44.

Article 83(2) GDPR criteria⁵⁴⁹. Further, the IE SA explains that *‘the processing concerned’* refers to *‘all of the processing operations that [Meta IE] carries out on the personal data under its controllership for which it relies on Article 6(1)(b) GDPR’*, in line with the scope of the inquiry (permissibility in principle of processing personal data for behavioural advertising)⁵⁵⁰.

294. In terms of the **nature of the infringements**, the Draft Decision explains that they concern a cornerstone of data subject rights, namely the right to information. The IE SA argues that *‘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’*⁵⁵¹. Further, the IE SA notes that the European legislator included infringements on the right to information in Article 83(5) GDPR, which carries the highest maximum fine⁵⁵².
295. In terms of the **gravity of the infringements**, the IE SA explains that Meta IE is found to also have infringed Article 12(1) and Article 5(1)(a) GDPR because the company has not provided the required information in the required manner under Article 13(1)(c) GDPR. The IE SA adds that *‘this 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’*⁵⁵³.
296. With regard to the **nature, scope or purpose of the processing** concerned, the IE SA considers that the *“personal data processing carried out by [Meta IE] pursuant to Article 6(1)(b) GDPR is extensive. [Meta IE] processes a variety of data in order to serve users personalised advertisements, tailor their ‘News Feed’, and to provide feedback to advertising partners on the popularity of particular 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”*⁵⁵⁴.
297. With reference to the **number of data subjects affected**, the IE SA points out that, as Meta IE confirmed, *“as of the date of the Complaint, [Meta IE] had approximately 235 million monthly active users and, as of May 2021, it had approximately 265 million monthly active users in the European Economic Area”*⁵⁵⁵ and that, while it is not possible to identify the precise number of users affected,

⁵⁴⁹ “While each is an individual ‘infringement’ of the relevant provision, they 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.” Draft Decision, paragraphs 9.3.

⁵⁵⁰ Draft Decision, paragraph 9.4.

⁵⁵¹ Draft Decision, paragraphs 9.6.

⁵⁵² Draft Decision, paragraph 9.7.

⁵⁵³ Draft Decision, paragraph 9.9.

⁵⁵⁴ Draft Decision, paragraph 9.14.

⁵⁵⁵ Draft Decision, paragraph 9.15.

approximately 50-55% of the population of the EEA (including the UK) seems to be potentially affected, by reference to the Eurostat⁵⁵⁶.

298. In terms of **damages suffered** by affected data subjects, the IE SA finds 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. This right is undermined by a lack of transparency on the part of a data controller”*⁵⁵⁷.
299. On Article 83(2)(a) GDPR, the IE SA concludes that *“[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”* and *“Over 50% of the population of the EEA seems to be impacted by the infringements. This is a very large figure”*⁵⁵⁸. The IE SA further notes *“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”*⁵⁵⁹.
300. The IE SA does not attach significant weight to the duration of the infringements⁵⁶⁰, considering that the complaint - and therefor the inquiry - was made against a specific set of documents (Facebook’s Data Policy and Terms of Service) and that more recent versions of the relevant documents are outside the scope of the inquiry⁵⁶¹.

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

301. The IE SA notes the Complainant’s view that the infringement arose from *“a decision made knowingly to present information in a particular way”*⁵⁶² but states that there is no evidence of an *“intentional and knowing breach”* of a provision of the GDPR⁵⁶³. The IE SA notes that the EDPB Guidelines on Administrative Fines refer to two requirements, “knowledge” and “willfulness”, adding *“this suggests a controller must infringe the GDPR both in full knowledge of the infringement’s characteristics and also in a deliberate manner. Having considered the nature of the infringements further in the context of the Fining Guidelines, [the IE SA] accept[s] [Meta IE’s] submissions, that any intentional breach must be an intentional and knowing breach of a provision of the GDPR.”* The IE SA finds there was no evidence of an intentional and knowing breach of a provision of the GDPR. In terms of the impact of this assessment on the decision whether or not to impose an administrative fine, the IE SA stated that

⁵⁵⁶ Draft Decision, paragraph 9.17.

⁵⁵⁷ Draft Decision, paragraph 9.20.

⁵⁵⁸ Draft Decision, paragraphs 9.17 and 9.45.

⁵⁵⁹ Draft Decision, paragraph 9.45.

⁵⁶⁰ Draft Decision, paragraph 9.45.

⁵⁶¹ Draft Decision, paragraphs 9.11 and 9.45. The IE SA notes, however, that *“In imposing corrective powers [...] the GDPR requires that the broader impact of infringements be considered”* (Draft Decision, paragraph 9.11).

⁵⁶² Draft Decision, paragraph 9.24.

⁵⁶³ Draft Decision, paragraph 9.25. In its analysis, the IE SA takes into consideration the EDPB Guidelines on Administrative Fines on the notions of ‘intentional’ and ‘negligent’. Draft Decision, paragraphs 9.22 - 9.23.

“While I am not calling into question Facebook’s right to come to a genuine view on this matter⁵⁶⁴, 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”⁵⁶⁵.

The action taken by the controller or processor to mitigate the damage suffered by data subjects (Article 83(2)(c) GDPR)

302. The IE SA notes Meta IE’s position that *“its approach to transparency, in the context in which infringements have been found, complies fully with the GDPR”*. Notwithstanding their disagreement with this position the IE SA *“accept[s] that it represents a genuinely held belief on [Meta IE’s] part. This does not alter the fact that infringements have occurred. On that basis, there has been no effort to mitigate the damage to data subjects, given [Meta IE’s] position was that no damage was taking place”⁵⁶⁶*. The IE SA is not swayed by Meta IE’s argument that their efforts to comply with the GDPR should be taken into consideration, as - in general - compliance with the GDPR is a duty imposed on each controller. In the present case, the IE SA finds this factor is neither mitigating nor aggravating insofar as *“beyond simply complying with the GDPR, there are no obvious mitigating steps that could have been taken”⁵⁶⁷*. Notwithstanding this, the IE SA identifies a mitigating factor in Meta IE’s willingness to engage in steps to bring its processing into compliance on a voluntary basis pending the conclusion of the inquiry⁵⁶⁸.

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)

303. The IE SA does not expressly mention whether it considers this factor as aggravating or mitigating in the Draft Decision⁵⁶⁹. The IE SA takes the view that *“[Meta IE]’s responsibility is certainly at a high level”*, noting Meta IE’s *“genuine effort to implement compliance based on [their] genuinely held belief”* which *“however, has ultimately fallen short in terms of compliance in significant respects”*. Moreover, the IE SA finds *“that it concerns serious data processing, and that it was deliberate act, in spite of the genuinely held belief that the modes of implementation were compliant”⁵⁷⁰*. On this basis, the IE SA concluded that the degree of responsibility on Meta IE’s part was therefore responsibility of a high level⁵⁷¹.

The categories of personal data affected by the infringements (Article 83(2)(g) GDPR)

304. The IE SA notes that *“[the] lack of transparency concerned broad categories of personal data relating to users who sign up to the service. I have set out several times in this Draft Decision that the assessment of data processing in this Inquiry was, by its nature, rather generalised. Indeed, the lack of*

⁵⁶⁴ In this regard, the IE SA noted Meta IE’s arguments that the infringements arose from a good faith difference of opinion but considered that this does not alter the infringements’ objectively serious character (Draft Decision, paragraph 9.8) and pointed out the *“clear inconsistencies between the [EDPB Transparency Guidelines] and the manner in which Facebook attempted to comply with its obligations”* (Draft Decision, paragraph 9.10).

⁵⁶⁵ Draft Decision, paragraph 9.45.

⁵⁶⁶ Draft Decision, paragraph 9.28.

⁵⁶⁷ Draft Decision, paragraph 9.29.

⁵⁶⁸ Draft Decision, paragraph 9.30.

⁵⁶⁹ Draft Decision, paragraphs 9.32-9.33.

⁵⁷⁰ Draft Decision, paragraph 9.33.

⁵⁷¹ Draft Decision, paragraph 9.33.

transparency on Meta IE's part has itself contributed to a lack of clarity on precisely what categories of personal data are involved"⁵⁷².

305. The IE SA concludes this factor is neither aggravating nor mitigating⁵⁷³.

The manner in which the infringements became known to the supervisory authority (Article 83(2)(h) GDPR)

306. The IE SA notes 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"⁵⁷⁴. The IE SA does not mention this factor as an aggravating or mitigating factor in the Draft Decision⁵⁷⁵.

Any other aggravating or mitigating factor (Article 83(2)(k) GDPR)

307. The IE SA considers whether the "lack of transparency has the potential to have resulted in financial benefits for Facebook" based on the view that a "more transparent approach to processing operations carried out on foot of that contract would represent a risk to Facebook's business model", which would be the case "if existing or prospective users were dissuaded from using the service by clearer explanations of the processing operations carried out, and their purposes"⁵⁷⁶. The IE SA concludes that this factor is neither aggravating nor mitigating, arguing that "any general consideration of this [factor] ultimately involves an element of speculation on both [Meta IE's and the Commission's part]"⁵⁷⁷.

The application of the criteria under Article 83(1) GDPR

308. The IE SA considers that administrative fines pursuant to Article 58(2)(i) and Article 83 GDPR, totalling an amount not less than €28 million and an amount not more than €36 million should be issued on Meta IE for the infringement of Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR⁵⁷⁸.
309. The LSA considers the proposed administrative fines are effective, proportionate and dissuasive taking into account all of the circumstances of the Inquiry⁵⁷⁹. Regarding the effectiveness, the IE SA argues that the "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

⁵⁷² Draft Decision, paragraph 9.39.

⁵⁷³ Draft Decision, paragraph 9.39. The IE SA notes their agreement with Meta IE's submission that this is not an aggravating factor. Draft Decision, paragraph 9.39.

⁵⁷⁴ Draft Decision, paragraph 9.40.

⁵⁷⁵ Draft Decision, paragraph 9.45.

⁵⁷⁶ Draft Decision, paragraph 9.43.

⁵⁷⁷ Draft Decision, paragraph 9.44.

⁵⁷⁸ Draft Decision, sections 9 and 10.

More specifically, the IE SA proposes the following administrative fines (Draft Decision, paragraph 9.47):

- a fine of between €18 million and €22 million for the failure to provide sufficient information in relation to the processing operations carried out on foot of Art. 6(1)(b) GDPR, thereby infringing Art. 5(1)(a) and 13(1)(c) GDPR;
- a fine of between €10 million and €14 million for the failure to provide the information that was provided on the processing operations carried out in foot of Art. 6(1)(b) GDPR, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, thereby infringing Art. 5(1)(a) and Art. 12(1) GDPR.

The proposed administrative fines are to be applied cumulatively, as they do not surpass the maximum provided for in Art. 83(5) GDPR. See Draft Decision, paragraphs 10.6, 10.41 and 10.42.

⁵⁷⁹ Draft Decision, paragraph 9.51.

*the failure to comply with the transparency requirements for users*⁵⁸⁰. Concerning the dissuasiveness, the LSA states that the fine must “*dissuade both the controller/processor concerned as well as other controllers/processors carrying out similar processing operations from repeating the conduct concerned*”⁵⁸¹. As regards the proportionality, the IE SA considers that the fines proposed “*do not exceed what is necessary to enforce compliance with the GDPR, taking into account the size of Facebook’s 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*”⁵⁸².

310. The IE SA refers to the need to take into account the undertaking’s turnover in the calculation of the fine amounts⁵⁸³. The notion of “*undertaking*” is determined to refer to Meta Platforms, Inc.⁵⁸⁴. The IE SA takes into consideration revenue reported by Meta Platforms, Inc. for the year ending 31 December 2020 (\$84.169 billion)⁵⁸⁵.

9.1.2 Summary of the objections raised by the CSAs

311. The DE, FR, NL, NO and PL SAs⁵⁸⁶ object to the envisaged action taken by the LSA with regard to the administrative fine proposed in the Draft Decision with respect to the infringements of the transparency obligations by asking the IE SA to impose **a significantly⁵⁸⁷ higher administrative fine with reference to the established infringements**.
312. The dispute arising from these objections concerns whether the proposed fine is effective, proportionate and dissuasive pursuant to Article 83(1) GDPR⁵⁸⁸. With reference to these three criteria, the above mentioned SAs, specifically, argue as follows.
313. The DE SAs argue that the envisaged fine of at most 36 million euros is not proportionate compared to the undertaking’s worldwide annual turnover and its profitability, which is higher than an average undertaking. Moreover, the fine cannot be deemed proportionate taking into account that a most relevant information was not provided to data subjects, also in light of the consideration that Meta IE acted with “*(only) negligence and any efforts of the controller to abide to the law after committing the infringements*”⁵⁸⁹. The DE SAs point out that “*The envisaged maximum fine is about 0.05 % of the global annual turnover, about 0.15 % of the year’s 2020 profit and about 1.29 % of the fining range. Thus, the envisaged fine moves at the lowest edge of the corridor. Converted to a single person of the about 265 million data subjects (section 9.15 DD) affected by the infringements, the fine would be EUR*

⁵⁸⁰ Draft Decision, paragraph 9.48.

⁵⁸¹ Draft Decision, paragraph 9.49.

⁵⁸² Draft Decision, paragraph 9.50.

⁵⁸³ Draft Decision, paragraph 10.7, referring to Binding Decision 1/2021.

⁵⁸⁴ Draft Decision, paragraphs 10.23 - 10.41. The Draft Decision refers to Facebook, Inc. The company has subsequently changed its name to Meta Platforms, Inc.

⁵⁸⁵ Draft Decision, paragraph 10.41

⁵⁸⁶ DE SAs Objection, pp. 10-16; FR SA Objection, paragraphs 38-51; NL SA Objection, paragraphs 38-52; NO SA Objection, pp. 8-11; PL SA Objection, pp. 4-5.

⁵⁸⁷ All SAs specified that the fine should be increased significantly except the NL SA (which stated the fine should be increased). See DE SAs Objection, p. 16; FR SA Objection, paragraph 48; NO SA Objection, p. 11; PL SA Objection, p. 4-5; NL SA Objection, paragraph 50.

⁵⁸⁸ DE SAs Objection, p. 12-14; FR SA Objection, paragraphs 50-51; NL SA Objection, paragraph 45 and following; NO SA Objection, p. 9-10; PL SA Objection, p. 5.

⁵⁸⁹ DE SAs Objection, pp. 13.

0.14”⁵⁹⁰. With regard to effectiveness, the DE SAs consider that the fine proposed by the LSA would be hardly noticeable for Meta IE due to its business situation⁵⁹¹. Lastly, with respect to dissuasiveness, the DE SAs state that the envisaged fine would not have neither special nor general preventive effect. With reference to this latter, the DE SAs state that the envisaged fine would likely have the opposite effect, as *“Other controllers may orientate their compliance with data protection law taking into account such a low fine. They will relate their own turnover and profit to those of the Facebook Group and find that there would be little risk, if at all, if they violate data subjects’ rights”*⁵⁹².

314. The FR SA argues that the amount of the envisaged fine *“seems low and hardly compatible with the objective set by Article 83(1) GDPR of ensuring to impose dissuasive fines”* taking into account *“the number of data subjects concerned, the particularly intrusive nature of the processing operations in question, the breaches observed, the position of Facebook Ireland Limited as a quasi-monopolist and its financial situation”*⁵⁹³. Moreover, the FR SA notes that the fine proposed by the IE SA is not proportionate since *“the cumulative amount of the two breaches of the provisions of Articles 5-1-a) and 13-1-c) of the GDPR, on the one hand, and the provisions of Articles 5-1-a) and 12-1 of the GDPR, on the other hand, represents only about 0.04% of the turnover of Facebook Inc. and about 1% of the maximum fine”*⁵⁹⁴.
315. The NL SA doubts, also referring to the WP29 Guidelines on Administrative Fines, that the fines proposed by the IE SA meet the objective to be effective *“particularly considering the strong financial position of the controller and the finding that the identified lack of transparency likely has had financial benefits for the controller”*⁵⁹⁵. As regard to dissuasiveness, the NL SA argues, also referring to the established CJEU case law, that Meta IE *“generates a turnover of over 83 billion dollars (approximately 72 billion euros) per annum, therefore it would be able to generate a daily revenue of approximately 228 million dollars. Instead of dissuading future behaviour, the penalty would be simply regenerated in a few hours”* (specific deterrence)⁵⁹⁶. With reference to proportionality, the NL SA questions the lack of reasoning in the Draft Decision as to why the amounts proposed are commensurate to the seriousness of the infringements⁵⁹⁷.
316. The NO SA argues that the envisaged amount of the fine is not effective nor dissuasive neither to Meta IE nor to other controllers, considering the financial benefits accrued because of the violations and the worldwide annual turnover of Meta Platform Inc. for 2020, NO SA points out that Meta IE *“would likely have no issue paying the proposed fine, and the amount of the fine it is not likely to affect [it] in such a way that it would see a need to substantially change its practices.”*⁵⁹⁸.
317. The PL SA states that *“in order to ensure that the administrative fine is effective, proportionate and dissuasive, the proposed amount of administrative fine should be adapted to the very high turnover of the Controller and the large amount of cash it saved”*⁵⁹⁹ and it argues that *“taking into account the high turnover of the company, it is difficult to conclude that the proposed financial penalty in such a*

⁵⁹⁰ DE SAs Objection, pp. 12-13.

⁵⁹¹ DE SAs Objection, p. 13.

⁵⁹² DE SAs Objection, p. 13-14.

⁵⁹³ FR SA Objection, paragraph 40.

⁵⁹⁴ FR Objection, paragraph 42.

⁵⁹⁵ NL SA Objection, paragraph 47.

⁵⁹⁶ NL SA Objection, paragraph 48.

⁵⁹⁷ NL SA Objection, paragraph 49.

⁵⁹⁸ NO SA Objection, p. 10.

⁵⁹⁹ PL SA Objection, p. 4.

low amount can effectively deter the punished entity from committing similar violations in the future. Moreover, for other entities achieving a similar turnover, a fine in this amount will be a clear signal that it is not worth paying much attention to compliance with the provisions of the GDPR, because the costs of implementing appropriate technical and organizational measures may exceed the amount of a possible fine”⁶⁰⁰.

318. In addition, the objections raise arguments with regard to the weight afforded to some of the criteria listed in Article 83(2) GDPR.
319. The DE SAs argue that the significant level of non-compliance established by the LSA⁶⁰¹ and the number of data subjects⁶⁰² should by themselves have resulted in a fine in the range of at least some permille of the annual turnover⁶⁰³. Moreover, the DE SAs argue that an even higher number of data subjects may be affected than the number taken into consideration in the Draft Decision considering that *“Whilst Facebook reported 2.80 billion monthly active users, they report 3.30 billion ‘family monthly active people’ for 2020. Applying this increase of about 18 % there could be about 312 million affected data subjects (256 million plus 18 % = 312 million)”* as a consequence *“the possibility of almost 50 million (the difference between 312 million and 265 million) more affected data subjects should have considerable weight regarding the calculation”⁶⁰⁴.*
320. The FR SA argues that the fine is in contradiction with the seriousness of the violations identified and the nature of the processing (Article 83(2)(a) GDPR)⁶⁰⁵
321. The NL SA argues that the fine is not commensurate with the seriousness of the infringements established (Article 83(2)(a) GDPR) and is inconsistent with the IE SA's qualifications as such⁶⁰⁶.
322. The NO SA argues that *“the suggested fine is not proportionate to the seriousness of the violations and the aggravating factors identified”*, the *“number of data subjects affected in the EEA amounts to hundreds of millions”* and agrees with the LSA that the controller's *“level of responsibility is high”⁶⁰⁷.*
323. The PL SA considers that *“In determining the gravity of the infringements identified in the draft decision by the LSA, account must be taken not only of the massive nature of the data processing carried out by Controller, but also of the fact that the data processing is the essential part of Controller's business activity”* (Article 83(2)(a) GDPR)⁶⁰⁸. Moreover, the PL SA states that the mitigating factor concerning the fact that Meta IE expressed its willingness to engage in steps to bring its processing into compliance on a voluntary basis during the inquiry stage, *“should not result in the reduction of the proposed administrative fine, due to the fact that the cooperation with the LSA is a legal obligation of the controller and its intention to bring the processing operations into the compliance with the provisions of GDPR, as a future and uncertain event, should not be taken into account during the assessment of the administrative fine”* (Article 83(2)(c) GDPR)⁶⁰⁹.

⁶⁰⁰ PL SA Objection, p. 5.

⁶⁰¹ The DE SAs refer to paragraphs 9.9, 9.19, 9.21, 9.33 of the Draft Decision (DE SAs Objection, p.14)

⁶⁰² The DE SAs quote paragraph 9.15 of the Draft Decision indicating 265 million monthly users (DE SAs Objection, p. 14).

⁶⁰³ DE SAs Objection, pp. 14-15.

⁶⁰⁴ DE SAs Objection, p. 15.

⁶⁰⁵ FR SA Objection, paragraph 50.

⁶⁰⁶ NL SA Objection, paragraphs. 40, 43 and 49.

⁶⁰⁷ NO SA Objection, p. 10.

⁶⁰⁸ PL SA Objection, p. 4.

⁶⁰⁹ PL SA Objection, p. 4.

324. The DE and FR SAs put forward some further factual and legal arguments for the proposed change in legal assessment.
325. Specifically the DE SAs raise that the profitability of the undertaking is one of the elements that should be relied upon to calculate the amount of the fine⁶¹⁰. The DE SAs highlight that *“the Facebook Group is an extreme profitable undertaking. The group has an annual profit (net income) of USD 29.146 billion (EUR 23.752 billion per 31st December 2020) with a turnover of USD 85.965 billion (EUR 70.055 billion) in 2020. According to the financial report for the second quarter of 2021, the turnover and net income are further increasing rapidly (+56% turnover and +101 % net income compared to the equivalent second quarter of 2020)”* and that *“Facebook’s return is significantly better than the return in the overall economic field; in relation to German/European companies by a factor of about 9 or higher”*⁶¹¹.
326. The DE SAs also argue that Meta Platforms, Inc.’s total turnover should be taken into account for the determination of the fine. This total turnover amounts to USD 85.965 billion in 2020 and it is higher than the USD 84.169 billion (turnover generated through advertising) referred to by the LSA⁶¹².
327. The FR SA notes that the amount of the fine proposed by the IE SA “seems to be underestimated in comparison with the amount retained in the deliberation of the CNIL’s restricted committee No. SAN-2019-001 of 21 January 2019 imposing a penalty of 50 million euros on the company Google LLC, adding that *“this case is comparable because it is also based on a referral filed by the association ‘NOYB’ with the CNIL, relating to a similar issue and formulated against Google, and that the restricted committee has identified a breach of Article 6 of the GDPR and a breach of the provisions of Articles 12 and 13 of the GDPR. However, the amount retained against Google LLC is close to that proposed by the Irish data protection authority, even though the processing operations in question concern all European users, which was not the case in the above-mentioned CNIL’s decision, for which only French users were taken into account”*⁶¹³. The FR SA states that the amount proposed appears low also in comparison with the one retained by the LU SA in its decision of 15 July 2021 against the company Amazon Europe Core, where an administrative fine of 746 million euros has been imposed for the infringement of Articles 6, 12 and 13 GDPR. This case was also based on a complaint that the processing operations carried out by the companies of the Amazon group relating to behavioural advertising did not have a valid legal basis⁶¹⁴. Also, the FR SA argues that expressing the proposed fine as a range and not as a fixed amount is not in line with Article 60 GDPR⁶¹⁵.
328. On **risks** posed by the Draft Decision, the DE, FR, NL, NO and PL SAs consider that, if adopted, the Draft Decision would lead to a significant risk for the protection of the fundamental rights and freedoms of the data subjects⁶¹⁶. The DE, FR, NL, NO and PL SAs explain that it would not ensure an effective enforcement of the GDPR, as the proposed fine is unable to create a deterrent effect (either specifically towards the controller, or in general towards other controllers)⁶¹⁷. The NO SA considers this would mean *“that the complainant and the affected data subjects would in practice be denied the*

⁶¹⁰ DE SAs Objection, p. 11.

⁶¹¹ DE SAs Objection, p. 12.

⁶¹² DE SAs Objection, p. 14.

⁶¹³ FR SA Objection, paragraph 43.

⁶¹⁴ FR SA Objection, paragraph 45.

⁶¹⁵ FR SA Objection, paragraph 47.

⁶¹⁶ DE SAs Objection, pp. 15 and 16; FR SA Objection, paragraph 50; NL SA Objection paragraph 51; PL SA Objection, p. 5.

⁶¹⁷ DE SAs Objection, pp. 12, 15-16; FR SA Objection paragraph 40, 49 and 50 - 51; NL SA Objection, paragraphs 48 and 51; NO SA Objection, pp. 10-11; PL SA Objection, p. 5.

*level of data protection set out in the GDPR*⁶¹⁸. The FR SA argues the Draft Decision as it stands would “lead to a levelling down of the level of administrative fines imposed by European data protection authorities, thereby reducing the authorities’ coercive power and, consequently, their ability to ensure effective compliance with the protection of the personal data of European residents”⁶¹⁹. The DE SAs add that the Draft Decision does not promote a consistent application of administrative fines⁶²⁰ and argue that “using of the incorrect turnover figure would create a dangerous precedent since other controllers could ‘choose’ that supervisory authorities use a lower turnover figure as well”, undermining the effectiveness of sanctions and resulting eventually in a significant risk to the rights and fundamental freedoms of the data subjects concerned “since controllers could adjust their level of compliance to the data protection”⁶²¹.

9.1.3 Position of the LSA on the objections

329. The LSA considers none of the objections relating to the *quantum* of the proposed administrative fine as relevant and reasoned⁶²².
330. In relation to objections calling for an increase of the amount of the fine set out in the Draft Decision, the LSA states it is “satisfied that it has fully taken into account the criteria at Article 83(2) GDPR, and that the proposed administrative fines meet the requirements of Article 83(1) GDPR, taking into account all the circumstances of this matter, and as set out Part 10 of the Draft Decision” and considers that “the proposal as to the fine to be meaningful in terms of both the financial significance of it on any view, as well as the significant publicity that a fine in this region will attract”⁶²³. The LSA refutes that including a fining range in the Draft Decision is incompatible with Article 60 GDPR⁶²⁴.
331. With reference to the objections relating to the mode of calculating the proposed administrative fine (assessment of the Article 83(2) GDPR criteria), the LSA does not accept that these objections are relevant⁶²⁵. The LSA refutes that for the purposes of Article 83(2) GDPR it should have considered a larger number of users, namely the reported number of users for the wider Facebook “family” of apps insofar such apps are not covered by the Facebook Terms of Service, and so are not relevant to the present circumstances⁶²⁶.
332. While agreeing that “the full turnover figure should be used when calculating the administrative fine”, the IE SA considers the objection not relevant “as the turnover figure in the final decision will in any event refer to the 2021 turnover for Meta Platforms, Inc. and Meta Ireland”⁶²⁷.

⁶¹⁸ NO SA Objection, p. 11.

⁶¹⁹ FR SA Objection, paragraph. 51.

⁶²⁰ DE SAs Objection, p. 14.

⁶²¹ DE SAs Objection, p. 14.

⁶²² Composite Response, paragraph 114-115.

⁶²³ Composite Response, paragraph 115.

⁶²⁴ Composite Response, paragraphs 112-113.

⁶²⁵ Composite Response, paragraph 118.

⁶²⁶ Composite Response, paragraph 118.

⁶²⁷ Composite Response, paragraph 114.

9.1.4 Analysis of the EDPB

9.1.4.1 Assessment of whether the objections were relevant and reasoned

333. The objections raised by the DE, FR, NL, NO and PL SAs concern “whether the action envisaged in the Draft Decision complies with the GDPR”⁶²⁸.
334. The EDPB takes note of Meta IE’s view that not a single objection put forward by the CSAs meets the threshold of Article 4(24) GDPR⁶²⁹.
335. With specific regard to these objections on the determination of the administrative fine for the transparency infringements, Meta IE acknowledges that objections as to whether envisaged corrective measures comply with the GDPR fall within the scope of the dispute resolution mechanism⁶³⁰, however in their view objections solely protesting the amount of a fine are out of its scope⁶³¹. Meta IE argues that *“in the context of a matter relating to cross-border processing, the power to impose an administrative fine under the GDPR lies within the sole competence of the LSA, in this case the DPC, and not the CSAs or the EDPB”*⁶³². Moreover, in their view only the LSA is competent to determine whether the administrative fine is effective, proportionate and dissuasive⁶³³. The EDPB does not share this reading of the GDPR, as explained above (see Section 8.4.2, paragraphs 275 - 277) and considers that CSAs may object to the fine amount proposed by an LSA in its Draft Decision⁶³⁴.

⁶²⁸ EDPB Guidelines on RRO, paragraph 32.

⁶²⁹ Meta IE Article 65 Submissions, Annex 1, p. 70.

⁶³⁰ Meta IE Article 65 Submissions, paragraphs 8.14 and 9.2.

⁶³¹ Meta IE Article 65 Submissions, paragraph 9.2.

⁶³² Meta IE Article 65 Submissions, paragraph 9.2.

⁶³³ Meta IE Article 65 Submissions, paragraph 9.2. Meta IE adds that *“the EDPB may not give instructions as to whether a fine ought to be imposed or as to its amount (including, for the avoidance of doubt, any instruction to the LSA to increase the fine)”* The argument is reiterated in Meta IE Article 65 Submissions, Annex I - Response to each of the objections, see p. 85 (SE SA), p. 91 (NO SA), p. 110 (FR SA), p. 123 (IT SA), p. 129-130 and 132 (DE SAs).

⁶³⁴ In this regard, Recital 150 GDPR can be recalled, as it states that the consistency mechanism may also be used to promote a consistent application of administrative fines. Consequently, an objection can challenge the elements relied upon to calculate the amount of the fine, and if the assessment of the EDPB within this context identifies shortcomings in the reasoning leading to the imposition of the fine at stake, the LSA will be instructed to re-assess the fine and remedy the identified shortcomings (EDPB Guidelines on Art. 65(1)(a), paragraph 91; EDPB Guidelines on RRO, paragraph 34. The EDPB found several objections on this subject matter admissible in the past, see e.g. Binding Decision 1/2020, paragraphs 175-178 and 180-181, Binding Decision 1/2021, paragraphs 310-314, Binding Decision 1/2022 paragraphs 53-55, Binding Decision 2/2022, paragraphs 186-190. Consequently, within its mission of ensuring a consistent application of the GDPR, the EDPB is fully competent to resolve the dispute arisen among supervisory authorities and remedy the shortcomings in the Draft Decision concerning the calculation of the amount of the fine, which will in any event be quantified and imposed by the LSA in its national decision adopted on the basis of the EDPB’s binding decision.

336. The EDPB takes note of further arguments put forward by Meta IE, aiming to demonstrate lack of relevance of the objections raised by the DE⁶³⁵, FR⁶³⁶, NL⁶³⁷, NO⁶³⁸ and PL⁶³⁹ SAs. Meta IE disagrees with the content of these objections, which concerns its merits and not its admissibility.
337. The EDPB finds that the DE, FR, NL, NO and PL SAs disagree with a specific part of the IE SA's Draft Decision, namely Chapter 9 "*Administrative fine*" and Chapter 10 "*Other relevant factors*", arguing that the fine proposed for the transparency infringements identified is too low⁶⁴⁰. If followed, these objections would lead to a different conclusion in terms of the corrective measures imposed⁶⁴¹. In consequence, the EDPB considers the objections raised by the DE, FR, NL, NO and PL SAs to be **relevant**.

⁶³⁵ Meta IE dismisses the DE SAs Objection to the fine proposed in the Draft Decision as not relevant nor reasoned, because it "*does not challenge the factors relied upon to calculate the amount of the fine, given turnover is relevant only to determining the maximum fine that can be lawfully imposed and not the fine amount*". See Meta IE Article 65 Submissions, p. 129.

⁶³⁶ Meta IE dismisses the FR SA's objection as not relevant, because it criticises the amount of the proposed fine, "*rather than the factors the DPC relied on to calculate the fine - which are the relevant legal and factual content of the Draft Decision*". See Meta IE Article 65 Submissions, p. 110. Besides noting that the FR SA does criticise the weight given to the gravity of the infringement and the nature and scope of the processing (see FR SA Objection, paragraph 50) the EDPB recalls it is entirely possible to argue an administrative fine is not 'effective, proportionate and dissuasive' in the meaning of Art. 83(1) GDPR without referring to a specific criterion listed in Art. 83(2) GDPR. Thus, Meta IE disagrees with the content of the objection, which concerns the merits and not the admissibility of the objection.

⁶³⁷ Meta IE argues the NL SA's objection "*raises general criticisms of the DPC's approach but fails to engage with the specific factual and legal content of the Draft Decision*" as articulated in paragraphs 9.47 to 9.52 therein. Meta IE Article 65 Submissions, p. 99. The EDPB notes that the IE SA explains in paragraphs 9.48 to 9.50 why it is "*satisfied that the fines proposed above would, if imposed on Facebook, be effective, proportionate and dissuasive, taking into account all of the circumstances of the Inquiry*", which the NL SA expressly disagrees with in their objection. See NL SA Objection, paragraphs 37 - 52.

⁶³⁸ Meta IE reiterates its position that "*the LSA has sole competence and discretion to determine the level of the fine*" to conclude the NO SA's objection is not relevant. See Meta IE Article 65 Submissions, p. 91. The EDPB responds to this argument above (Section 8.4.2, paragraphs 275 - 277 as well as footnote 634).

⁶³⁹ Meta IE rejects that turnover is relevant for determining the fine amount, to conclude on this basis the PL SA's objection "*does not challenge the elements relied upon to calculate the amount of the fine*" and this is not relevant. Meta IE Article 65 Submissions, p. 105.

⁶⁴⁰ DE SAs Objection, p. 11; FR SA Objection, paragraph 40; NL SA Objection, paragraphs 37-52; NO SA Objection, p. 8-11; PL SA Objection, p. 4.

⁶⁴¹ DE SAs Objection, p. 16; FR SA Objection, paragraph 48; NL SA Objection, paragraphs 50 - 52; NO SA Objection, p. 8 and 11; PL SA Objection, p. 5.

338. Meta IE dismisses as unsubstantiated the reasoning put forward by the DE⁶⁴², FR⁶⁴³, NL⁶⁴⁴, NO⁶⁴⁵ and PL⁶⁴⁶ SAs. In doing so, Meta IE disagrees with the content of the objections, which concerns their merits and not their admissibility. Meta IE argues that the FR and NL SAs' objections do not demonstrate they could lead to a different conclusion in the Draft Decision⁶⁴⁷, thus not recognising an increase of the administrative fine proposed as constituting a different conclusion.
339. Meta IE further argues that the DE, FR, NO and PL objections lack sufficient reasoning because they introduce 'additional' criteria for the determination of the fine that have no basis in Article 83 GDPR⁶⁴⁸. The EDPB understands that Meta IE disagrees with the reasoning provided in the objection, which thus concerns the merits and not the admissibility of the objection.
340. The EDPB finds that the DE, FR, NL, NO and PL SAs argue why they propose amending the Draft Decision and how this leads to a different conclusion in terms of administrative fine imposed, i.e. why they propose to impose a higher fine for the transparency breaches⁶⁴⁹.

⁶⁴² Meta IE disagrees with DE SAs argument that profitability should have been considered as an aggravating factor (under Art. 83(2)(k) GDPR), takes issue with the DE SAs calculating the size of the fine on a per data subject basis, and rejects the DE SAs argument that a fine should have a general preventative effect. In addition, Meta IE argues the DE SAs did not challenge the elements the IE SA relied on to determine the fine, while also repeating the IE SA has sole discretion on this matter. See Meta IE Article 65 Submissions, p. 129-130.

⁶⁴³ Meta IE considers the FR SA's objections to contain "*unsubstantiated and theoretical reasons*", which "*do not provide sound and substantiated factual and legal reasoning as to why the DPC should alter its determination of the fines*". At the same time, Meta IE cites specific reasoning from the FR SA's, namely "*the number of data subjects concerned, the particularly intrusive nature of the processing operations in question, the breaches observed, the position of Facebook Ireland Limited as a quasi-monopolist and its financial situation*" (FR SA Objection, paragraph 40) and the comparison the FR SA makes with other cases (FR SA Objection, paragraph 43). See Meta IE Article 65 Submissions, p. 110.

⁶⁴⁴ Meta IE acknowledges that the NL SA provides reasoning as well as alleges inconsistencies in the Draft Decision, but dismisses the objection as being unsubstantiated, speculative and insufficient to satisfy Article 4(24) GDPR. In particular, Meta IE takes issue with the NL SA "*noting that it 'doubts' the fines meet the required objectives - without more concrete reasoning being provided*". First, the NL SA provides two reasons for its 'doubt', namely "*particularly considering the strong financial position of the controller and the finding that the identified lack of transparency likely has had financial benefits for the controller (See paragraph 9.43 of the Draft Decision)*". Second, the EDPB finds that using the verb 'doubt' does not void the reasoning that follows, especially read in conjunction with the affirmative sentences laying out the grounds for the disagreement. See Meta IE Article 65 Submissions, p. 99.

⁶⁴⁵ Meta IE's arguments mainly concern the administrative fine the NO SA asks for processing without a valid legal basis. These arguments are addressed below (see paragraph 420 and following). In connection with the reasoning of the NO SA asking for an increase of the administrative fine for transparency infringements, Meta IE disagrees "*that Meta Ireland would not be affected by the fine in a way to substantially change its practices, and that neither would other controllers*" by stating this is mere speculation by the NO SA. Meta IE Article 65 Submissions, p. 92.

⁶⁴⁶ Meta IE considers the objection 'entirely speculative' alleging the PL SA "*speculates, without providing any factual basis, that Meta's profits depend on the volume of data processed*". Meta IE Article 65 Submissions, p. 106.

⁶⁴⁷ Meta IE Article 65 Submissions, p. 99 (NL SA); p. 110 (FR SA).

⁶⁴⁸ Meta IE Article 65 Submissions p. 92 (NO SA), p. 106 (PL SA), p. 110-111 (FR SA), p. 129 (DE SAs).

⁶⁴⁹ The DE, FR, NL, NO and PL SAs argue the fine proposed for the transparency infringements is too low. DE SAs Objection, p. 17-20; FR SA Objection, paragraph 40; NL SA Objection, paragraphs 37-52; NO SA Objection, p. 8-11; PL SA Objection, p. 4.

341. In terms of risks, Meta IE claims the Draft Decision does not pose any risk, let alone a significant risk to fundamental rights and argues the objections of the DE⁶⁵⁰, FR⁶⁵¹, NL⁶⁵², NO⁶⁵³ and PL⁶⁵⁴ SAs fail to demonstrate the contrary, as required.
342. Meta IE argues not every GDPR infringement is likely to pose a significant risk to fundamental rights, alleging the NO and PL SAs fail to address this⁶⁵⁵. The EDPB notes the NO and PL SAs actually do not refer to ‘any infringement’ but advance their objection in relation to the transparency infringements identified in the Draft Decision⁶⁵⁶, which the NO SA adds are considered serious by the IE SA⁶⁵⁷.
343. Meta IE argues the NO and PL SA’s objections rest on unsubstantiated potential future behaviour of controllers, which could only be an indirect and remote risk⁶⁵⁸. The EDPB notes that any risk assessment addresses future outcomes, which are to some degree uncertain. Contrary to Meta IE’s view⁶⁵⁹, the objections reflect specifically on the likely effects to be generated by the Draft Decision in the event it is adopted as it stands and thus go beyond mere speculation about controllers at large⁶⁶⁰.
344. Meta IE takes issue with the DE SA’s argument that the proposed fine would be “*hardly noticeable for the undertaking*” and thus lack special preventive effect⁶⁶¹ as well as with the similar argument raised by the PL SA⁶⁶². Further, Meta IE dismisses the concerns the DE, FR, NL SAs articulate about the precedent the Draft Decision sets in terms of use of corrective powers in terms of general deterrent. Meta IE claims a significant risk should be demonstrated in the context of the case at hand⁶⁶³, adding that fines require “*a case-by-case assessment under Article 83 GDPR, which in respect of cross-border cases will be subject to the cooperation and consistency mechanism*” (apparently contradicting Meta IE’s position that determining the fine lies “*within the sole competence of the LSA*”)⁶⁶⁴. Finally, Meta IE

⁶⁵⁰ Meta IE argues the risks identified by the DE SAs are ‘abstract and unsubstantiated’. See Meta IE Article 65 Submissions, p. 130-132.

⁶⁵¹ Meta IE Article 65 Submissions, p. 112.

⁶⁵² Meta IE argues that the NL SA “*vaguely refers to the risk for data subjects remaining subject to illegal processing in the future, rather than showing the significance of such risks based on the facts of this case*”. Meta IE Article 65 Submissions, p. 100.

⁶⁵³ Meta IE Article 65 Submissions, p. 92-93.

⁶⁵⁴ Meta IE Article 65 Submissions, p. 106.

⁶⁵⁵ Meta IE Article 65 Submissions, p. 92 (NO SA) ; p. 106 (PL SA).

⁶⁵⁶ See PL SA Objection, p. 4. NO SA Objection, p. 10.

⁶⁵⁷ NO SA Objection, p. 10. See also Draft Decision, paragraph 9.45.

⁶⁵⁸ Meta IE Article 65 Submissions, p. 92 (NO SA), p. 106 (PL SA).

⁶⁵⁹ Meta IE Article 65 Submissions, p. 106 (PL SA).

⁶⁶⁰ Meta IE Article 65 Submissions, p. 92 (NO SA), p. 106 (PL SA). See NO SA Objection, p. 10, PL SA Objection, p. 5.

⁶⁶¹ On the one hand, Meta IE “*submits the German SA is operating under the misconception that turnover is not only a relevant factor to consider when calculating a fine under GDPR, but that unless turnover is calculated in the manner the German SA suggests, the fining system will be weakened to such an extent that fines are not effective, proportionate, and dissuasive. This is incorrect and untenable as Article 83(2) GDPR does not mention, let alone require consideration of turnover for setting the fine amount*” On the other hand, Meta IE appears to argue the fine is dissuasive as it is, due to reputational costs of fines. See Meta IE Article 65 Submissions, p. 130-131. See DE SAs Objection, p. 12-16 on specific and general deterrence.

⁶⁶² See Meta IE Article 65 Submissions, p. 106 in response to the PL SA’s argument that it is “*difficult to conclude that the proposed financial penalty in such a low amount can effectively deter the punished entity from committing similar violations in the future*”, PL SA Objection, p. 5.

⁶⁶³ In response to the FR SA. See Meta IE Article 65 Submissions, p. 113

⁶⁶⁴ In response to the DE SA. See Meta IE Article 65 Submissions, p. 131. The ‘sole competence’ argument is put forward in Meta IE Article 65 Submissions, paragraphs 8.3, 9.2 and reiterated in Annex I - Response to each of the objections. The EDPB responds in Section 8.4.2, paragraphs 275 - 277 as well as in footnote 634.

dismisses these objections as not based on any facts or legal demonstration⁶⁶⁵, going so far as to claim “‘precedent’ is a concept foreign to EU law”⁶⁶⁶.

345. First, the EDPB notes that any risk assessment addresses future outcomes, which are to some degree uncertain, and finds there is no basis in the GDPR to limit the notion of risks to the boundaries of the particular case at hand. Article 4(24) GDPR refers to the risks posed to the “*fundamental rights and freedoms of data subjects*” and “*where applicable, the free flow of personal data within the Union*”. Both of these aspects are phrased in a general way. The wording of this provision does not in any way limit the demonstration of the risks to showing the risks posed to the data subjects affected by the concrete processing carried out by the specific controller, in light of the objective of guaranteeing a “*high level of protection in the EU for the rights and interests of the individuals*”⁶⁶⁷. Therefore, the risks posed by a draft decision to be demonstrated by a relevant and reasoned objection might also concern data subjects, whose personal data might be processed in the future, including by other controllers.
346. Second, the EDPB points out that final decisions taken by SAs belong to the realm of facts, as do court rulings. Moreover, Meta IE itself refers to specific pre-existing decisions to argue their current case⁶⁶⁸ and expresses its general expectation that SAs take into account pre-existing decisions in new cases⁶⁶⁹, thus illustrating the concern raised by the DE, FR, NL SA is rooted in the reality of legal practice and argument.
347. The EDPB notes that the DE and FR SA considered both of the aspects that are entailed by dissuasiveness of the fine, i.e. specific deterrence and general deterrence⁶⁷⁰.
348. The EDPB finds that the DE, FR, NL, NO, PL SAs articulate an adverse effect on the rights and freedoms of data subjects if the Draft Decision is left unchanged, by referring to a failure to guarantee a high level of protection in the EU for the rights and interests of the individuals⁶⁷¹.

⁶⁶⁵ In response to the FR SA (and using very similar wording in response to the NL SA) Meta IE adds that “[in] fact, no fine imposed by the DPC could prevent other SAs from imposing higher fines if they consider that this is appropriate and lawful given the specific circumstances of the case they are investigating and the evidence they have examined in the context of their investigation”. See Meta IE Article 65 Submissions, p. 112-113. In response to the NL SA, see Meta IE Article 65 Submissions, p. 100.

⁶⁶⁶ In response to the DE SA. See Meta IE Article 65 Submissions, p. 131.

⁶⁶⁷ Judgement of the Court of Justice of 6 November 2003, Lindqvist, Case C-101/01, ECLI:EU:C:2003:596, paragraph 95; C-524/06 *Huber*, paragraph 50; Judgement of the Court of Justice of 24 November 2011, *Asociación Nacional de Establecimientos Financieros de Crédito*, C-468/10 and C-469/10, ECLI:EU:C:2011:777, paragraph 28.

⁶⁶⁸ For instance, Meta IE argues a ban on processing would be disproportionate and refers to precedents, namely a Luxembourg court decision and decision taken by the BE SA. Meta IE Article 65 Submissions, p. 57.

⁶⁶⁹ Meta IE states that “the DPC itself has the possibility to impose higher amounts in other cases, **provided it explains why such other cases would warrant such higher fines**” (emphasis added). At the same time, Meta IE dismisses the FR SA’s objection for not indicating “why any fine imposed by the DPC could prevent other SAs from imposing higher fines if they consider that this is more appropriate given the specific circumstances of the case they are investigating and the evidence they have examined in the context of their investigation.” See Meta IE Article 65 Submissions, p. 112-113.

⁶⁷⁰ The CJEU has consistently held that a dissuasive fine is one that has a genuine deterrent effect, encompassing both specific deterrence (discouraging the addressee of the fine from committing the same infringement again) and general deterrence (discouraging others from committing the same infringement in the future). See, *inter alia*, Judgement of the Court of Justice of 13 June 2013, *Versalis Spa v European Commission*, C-511/11 P, ECLI:EU:C:2013:386, (hereinafter ‘C-511/11 *Versalis*’), paragraph 94.

⁶⁷¹ DE SAs Objection, p. 14-16, FR SA Objection, paragraphs 50-51; NL SA Objection, paragraph 51; NO SA Objection, p. 10-11; PL SA Objection, p. 4-5. See also EDPB Guidelines on RRO, paragraph 37.

349. Therefore, the EDPB considers the DE, FR, NL, NO, PL SAs objections to be **reasoned**.

9.1.4.2 Assessment on the merits

350. In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters that are the subject of the relevant and reasoned objections, in particular whether the envisaged action in relation to the controller complies with the GDPR.
351. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines⁶⁷². A fine should be effective, proportionate and dissuasive, as required by Article 83(1) GDPR, taking account of the facts of the case⁶⁷³. In addition, when deciding on the amount of the fine, the LSA shall take into consideration the criteria listed in Article 83(2) GDPR.
352. 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 275 - 277 as well as footnote 634).
353. 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 involved⁶⁷⁴, 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) GDPR⁶⁷⁵, including for the purposes of behavioural advertising. This is without prejudice to the fact that Meta IE inappropriately relied on 6(1)(b) as a legal basis to process personal data for the purpose of behavioural advertising as part of the delivery of its Facebook service under the Facebook Terms of Service. 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 retroactively 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.
354. 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 look into a preliminary matter, then assess the disputes arisen in respect of the analysis of specific criteria under Article 83(2) 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.

⁶⁷² 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"*).

⁶⁷³ EDPB Guidelines on Administrative Fines, p. 7. EDPB Guidelines on calculation of fines, paragraphs 132-134.

⁶⁷⁴ Draft Decision, paragraph 5.72.

⁶⁷⁵ Draft Decision, paragraph 9.4.

Preliminary matter: the total turnover of the undertaking

355. The DE SAs does not contest the identification of the relevant undertaking in the IE SAs Draft Decision, but contests the turnover figure cited in the Draft Decision. Though the IE SA deems the objection not relevant, in the Composite Response the IE SA agrees with the DE SAs on the principle that the total turnover figure should be used when calculating the administrative fine⁶⁷⁶. Moreover, the IE SA adds that *“the turnover figure in the final decision will in any event refer to the 2021 turnover for Meta Platforms, Inc. and Meta Ireland”*⁶⁷⁷.
356. For the avoidance of doubt, the EDPB instructs the IE SA to take into consideration the total turnover of all the entities composing the single undertaking, i.e. the consolidated turnover of the group of companies headed by Meta Platforms, Inc.⁶⁷⁸. On the notion of ‘preceding financial year’, the EDPB recalls the decision taken in its Binding Decision 1/2021 (paragraph 298) and takes note of the IE SA’s intention to take the same approach in the current case.
357. On the notion of *“preceding financial year”*, the EDPB recalls the decision taken in its Binding Decision 1/2021 (paragraph 298) and takes note of the IE SA’s intention to take the same approach in the current case.
358. In addition, the EDPB agrees with the approach taken by the IE SA for the present case to include in the Draft Decision a provisional turnover figure based on the most up to date financial information available at the time of circulation to the CSAs pursuant to Article 60(3) GDPR. The final decision will have to refer to the whole undertaking’s annual turnover corresponding to the financial year preceding the date of the final decision.

The number of data subjects affected (Article 83(2)(a) GDPR)

359. The DE SAs puts forward that the number of affected data subjects may be even higher⁶⁷⁹ than the 265 million monthly users as of May 2021 in the European Economic Area confirmed by Meta IE to the IE SA⁶⁸⁰. The DE SAs refer to a Meta Platforms, Inc. press release of 27 January 2021, inferring from that *“whilst [Meta Platforms, Inc.] reported 2.80 billion monthly active users, they report 3.30 billion ‘family monthly active people’ for 2020. Applying this increase of about 18 % there could be about 312 million affected data subjects (256 million plus 18 % = 312 million)”*⁶⁸¹.
360. The IE SA is *“satisfied that the reference to the number of users of the ‘family’ of apps refers to the total number of users across all apps owned by Meta Platforms Inc., (i.e. also including users of WhatsApp and Instagram) and not solely the number of users of the Facebook App. Such apps are not covered by the Facebook Terms of Service, and so are not relevant to the present circumstances”*⁶⁸².

⁶⁷⁶ Composite Response, paragraph 114.

⁶⁷⁷ Composite Response, paragraph 114. Meta IE argues that *“[turnover] is not a relevant consideration when determining the amount of the fine under Article 83(2) GDPR”*, see Meta IE Article 65 Submissions, paragraph 9.4. On principle, this matter is not within the scope of the dispute as no CSA raised an objection disputing the consideration of turnover as such.

⁶⁷⁸ Binding Decision 01/2021, paragraph 291.

⁶⁷⁹ DE SAs Objection, p. 15.

⁶⁸⁰ Draft Decision, paragraph 9.15.

⁶⁸¹ DE SAs Objection, p. 15, citing Meta Platforms, Inc.’s press release dated 27 January 2021 (*“Facebook Reports Fourth Quarter and Full Year 2020 Results”*).

⁶⁸² Composite Response, paragraph 118.

Meta IE confirms the IE SA's response, adding that the 2020 figures cited in the DE SAs' objection "*relate to the global number of unique people using at least one of the Meta Family of Apps*"⁶⁸³.

361. From the elements put forward, the EDPB sees no reason to question the response given by the IE SA on this objection. Therefore, the EDPB is of the view that the Draft Decision does not need to be amended with regard to the number of data subjects affected. This is without prejudice to the conclusions reached below on whether the fine is in line with Article 83, taking into consideration all the circumstances of the case, including the number of data subjects.

On any action taken by the controller to mitigate the damage suffered by data subjects (Article 83(2)(c) GDPR)

362. The PL SA disagrees with the mitigating factor identified by the IE SA by reference to Meta IE's willingness to engage in steps to bring its processing into compliance on a voluntary basis pending the conclusion of the inquiry⁶⁸⁴.
363. The IE SA states that "[Meta IE]'s willingness to engage in steps to bring its processing into compliance on a voluntary basis" should be understood as actions taken to mitigate the damage to data subjects, distinct from actions taken to comply⁶⁸⁵. In the present case, the EDPB fails to see how such a distinction can be made. Additionally, drawing this distinction seems inconsistent with the IE SA's position that the negative impact on data subjects lies precisely in the transparency infringements and thus in the "*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*"⁶⁸⁶. In other words, the damage caused to data subjects is, in these circumstances, consubstantial with the finding of the infringement itself⁶⁸⁷.
364. In addition, the EDPB agrees with the PL SA that the expression of an "*intention to bring the processing operations into the compliance with the provisions of GDPR*" as such cannot serve as evidence of actions already taken to mitigate damage suffered. In order for this element to serve as a mitigating factor, further evidence would be necessary for instance demonstrating that the controller did whatever they could in order to reduce the consequences of the breach for the individuals concerned⁶⁸⁸.
365. The EDPB agrees with the IE SA that "[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". In any case, Meta IE's "*decision to begin preparation for voluntary compliance on the basis of the views set out in the Preliminary Draft Decision*" is merely a first step of a longer process towards full compliance with the GDPR. The information available in the file does not include indications that the actions taken by the

⁶⁸³ Meta IE Article 65 Submissions, paragraph 10.2.

⁶⁸⁴ PL SA Objection, p. 4, in response to Draft Decision, paragraph 9.30. Meta IE does not address this aspect of the PL SA's objection in particular, but argues the PL SA's objection in relation to administrative fines is not relevant or reasoned, see Meta IE Article 65 Submissions, p. 105 - 106.

⁶⁸⁵ Draft Decision, paragraph 9.29.

⁶⁸⁶ Draft Decision, paragraph 9.10. The IE SA refers also to Section 5 of the Draft Decision.

⁶⁸⁷ Non-material damage is explicitly regarded as relevant in Recital 75, which states 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*".

⁶⁸⁸ EDPB Guidelines on calculation of fines, paragraph 75, referring to EDPB Guidelines on Administrative Fines, p. 12.

controller have gone beyond willingness to prepare to change its practices in case this appeared necessary.

366. The EDPB finds the IE SA does not provide sufficient justification for the mitigating factor identified, and instructs the IE SA to modify its Draft Decision on this matter, by considering this factor as neither aggravating nor mitigating.

On other factors and the non-exhaustive nature of the criteria in Article 83(2) GDPR

367. Meta IE argues some CSAs “introduce criteria that are not provided for by Article 83(2) GDPR”⁶⁸⁹, which “amounts to a breach of the principle of legal certainty, which is of particular importance with respect to the imposition of administrative fines which are criminal in nature”⁶⁹⁰. Meta IE acknowledges that Article 83(2)(k) GDPR is open-ended as it refers to any other aggravating or mitigating factor applicable to the circumstances of the case, arguing however that the criteria of Article 83(2) GDPR focus only on the data controller or processor, or on the infringement⁶⁹¹.
368. The EDPB does not share such a restrictive reading of Article 83(2)(k) GDPR, which it deems leaves room for “*all the reasoned considerations regarding the socio-economic context in which the controller or processor operates, those relating to the legal context and those concerning the market context*”⁶⁹². The EDPB considers this provision “*of fundamental importance for adjusting the amount of the fine to the specific case*” and that “*it should be interpreted as an instance of the principle of fairness and justice applied to the individual case*”⁶⁹³. The EDPB recalls that Article 83(2) GDPR contains a non-exhaustive list of assessment criteria to be considered, if appropriate, by the LSA in determining the amount of the fine corresponding to what is necessary to be effective, proportionate, and dissuasive in accordance with Article 83(1) GDPR.
369. Given the open-ended nature of Article 83(2), the EDPB disagrees with the argument by Meta IE contending that the principle of legal certainty was breached. In any case, the EDPB recalls that it is settled case law that legal certainty is not absolute⁶⁹⁴. All cases of application of a general norm can “*not be determined in advance by the legislature*”⁶⁹⁵. Therefore, legal certainty “*cannot be interpreted as prohibiting the gradual clarification of rules of criminal liability by means of interpretations in the*

⁶⁸⁹ Meta IE Article 65 Submissions, paragraphs 8.4, 9.1, 10.2, Annex 1, p. 85-86, 92, 105-106.

⁶⁹⁰ Meta IE Article 65 Submissions, paragraph 9.1.

⁶⁹¹ Meta IE Article 65 Submissions, paragraph 9.4 and 9.5. This acknowledgement is put forward as part of Meta IE’s reasoning that “*[turnover] is not a relevant consideration when determining the amount of the fine under Article 83(2) GDPR*”. On principle, this matter is not within the scope of the dispute as no CSAs raised an objection on the consideration of turnover, other than the DE SAs objection on the turnover figure used.

⁶⁹² EDPB Guidelines on calculation of fines, paragraph 109.

⁶⁹³ EDPB Guidelines on calculation of fines, paragraph 108.

In this regard, the EDPB also notes that at the same time “*given the overarching nature of Article 83(1) GDPR, the LSA must ensure that the circumstances taken into account when calculating the fine are not counted twice*”, meaning that for instance if a factor is already to be considered within the assessment under Art. 83(1) GDPR, the LSA should not take it into account under Art. 83(2)(k) GDPR too. Binding Decision 1/2022, paragraph 70.

⁶⁹⁴ Judgement of the Court of Justice of 14 April 2005, *Belgium v. Commission*, C-110/03, ECLI:EU:C:2005:223, paragraph 31; Judgement of the General Court of 17 May 2013, *Trelleborg Industrie SAS*, T-147/09, ECLI:EU:T:2013:259, paragraph 96; Judgement of the General Court of 13 July 2011, *Schindler*, T-138/07, ECLI:EU:T:2011:362, paragraph 99.

⁶⁹⁵ Judgement of the Court of Justice of 20 July 2017, *Marco Tronchetti Provera SPA a.o. v Commissione Nazionale per le Società e la Borsa (Consob)*, C-206/16, ECLI:EU:C:2017:572, paragraph 42; Judgement of the General Court of 5 October 2020, *HeidelbergCement AG*, T-380/17, ECLI:EU:T:2020:471, paragraph 130.

*case-law*⁶⁹⁶ and undertakings are expected to take appropriate legal advice to anticipate the possible consequences of a rule and to assess the risk of infringement with “*special care*”⁶⁹⁷. Finally, even if were the case that supervisory authorities had previously issued conflicting views, such a circumstance would not be relevant when assessing the predictability of an infringement⁶⁹⁸. The ECtHR has also ruled that the fact that a point of law is ruled on for the first time does not undermine legal certainty “*if the meaning given is both foreseeable and consistent with the essence of the offence*”⁶⁹⁹.

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

370. 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. When applying this provision, the supervisory authorities must “*assess all the facts of the case in a manner that is consistent and objectively justified*”⁷⁰⁰. 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 GDPR⁷⁰¹.
371. The aim of Article 83(2)(k) is to ensure that the sanction applied is effective, proportionate and dissuasive in each individual case⁷⁰². With regard to the financial benefits obtained from the infringement, the EDPB considers that when there is a benefit, the sanction should aim at “*counterbalancing the gains from the infringement*” while keeping an effective, dissuasive and proportionate fine⁷⁰³.
372. The financial benefit obtained by Meta IE was considered by the IE SA in the Draft Decision with regard to the transparency infringements⁷⁰⁴. The IE SA found it had insufficient elements to conclude - beyond speculating - that Meta IE benefited from the infringement⁷⁰⁵.
373. The DE SAs disagree with the IE SA’s decision to set aside this factor. The DE SA describes a counterfactual - where there would be 1 million less monthly users (= 0,38 % of the monthly

⁶⁹⁶ Judgement of the Court of Justice of 25 March 2021, *H. Lundbeck A/S*, C-591/16 P, ECLI:EU:C:2021:243, (hereinafter ‘C-591/16 *Lundbeck*’), paragraph 166.

⁶⁹⁷ Judgement of the Court of Justice of 22 October 2015, *AC-Treuhand AG*, C-194/14 P, ECLI:EU:C:2015:717, paragraph 42. The AG Campos Sanchez-Bordona also recently emphasized that there are domains where “*legal advice tends to be the rule and not the exception*” (Opinion of the Advocate-General of 9 December 2021, *French Court of Cassation*, C-570/20, ECLI:EU:C:2021:992, paragraph 81), which is the case of data protection. See also, ECtHR (Gd ch.), *Kononov v. Latvia*, 17 May 2010, paragraphs 185 and 215.

⁶⁹⁸ C-591/16 P, *H. Lundbeck A/S*, paragraph 170.

⁶⁹⁹ ECtHR, *Georgouleas and Nestoras v. Greece*, 26 May 2020, paragraph 57; *Khodorkovskiy and Lebedev v. Russia* (No. 2), 14 January 2020, paragraph 570. Judgement of the General Court of 12 December 2018, *Servier SAS*, T-691/14, ECLI:EU:T:2018:922, paragraph 1660.

⁷⁰⁰ EDPB Guidelines on Administrative Fines, p. 6 (emphasis added), quoted in Binding Decision 1/2021, paragraph 403.

⁷⁰¹ EDPB Guidelines on calculation of fines, paragraph 110.

⁷⁰² EDPB Guidelines on calculation of fines, paragraph 107.

⁷⁰³ EDPB Guidelines on calculation of fines, examples 7c and 7d.

⁷⁰⁴ Draft Decision, paragraphs 9.43 - 9.44.

⁷⁰⁵ The IE SA finds this factor is neither aggravating nor mitigating. Draft Decision, paragraph 9.44. Initially, in the Preliminary Draft Decision, the IE SA had indicated the lack of transparency had the potential to have resulted in financial benefits for Meta IE (see Draft Decision, paragraph 9.44). The DE SAs expressed their agreement with this conclusion (see DE SAs objection, p. 13).

265 million users according to paragraph 9.15 of the Draft Decision if the transparency violations had not occurred) - which would amount to an estimated 25.020.000 EUR less in turnover⁷⁰⁶.

374. Considering the need to have fines that are effective, proportionate and deterrent, and in light of common accepted practice in the field of EU competition law⁷⁰⁷, which inspired the fining framework under the GDPR, the EDPB is of the view that, when calculating the administrative fine, the supervisory authority could take account of the financial benefits obtained from the infringement, in order to impose a fine that exceeds that amount.
375. In the present case, neither the IE SA nor the DE SAs have provided an estimation of the financial benefit gained by Meta IE with the transparency infringements. The DE SAs' calculation presents an example and is still largely based on assumptions on a lower number of monthly users. Due to this, the EDPB does not have sufficiently precise information to evaluate the specific weight of the financial benefit obtained from the infringement.
376. Therefore, the EDPB considers that it does not have objective elements to conclude whether the fine envisaged in relation to the transparency infringements takes sufficient account of the financial benefit obtained from the infringement and, therefore, has a deterrent effect in this respect.
377. Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionally low compared to the benefits obtained with the infringement. The EDPB considers that the IE SA should ascertain if further estimation of the financial benefit from the infringement of transparency obligations 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.

The profitability of the undertaking - other factor (Article 83(2)(k) GDPR)

378. The DE SAs request the IE SA to consider, in addition to turnover, the annual profit of the undertaking in its assessment⁷⁰⁸. The DE SAs position is that the undertaking's sensitivity to administrative fines is significantly influenced by profitability, not only turnover. The DE SAs argue that the Draft Decision does not demonstrate that profitability was taken into account to assess "sensitivity to administrative fines" and does not ensure the fine is effective, proportionate and dissuasive⁷⁰⁹.
379. Meta IE argues Article 83(2) GDPR does not identify annual profit as a factor to which the LSA should have regard in calculating the amount of the administrative fine⁷¹⁰. The EDPB has explained its view on the open-ended character of Article 83(2)(k) GDPR above (see paragraphs 367-369).
380. The EDPB recalls that in determining administrative fines under Article 83 GDPR the total worldwide annual turnover of the undertaking should be considered, as this "*gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power*"⁷¹¹. The EDPB

⁷⁰⁶ The DE SA notes that "[per] worldwide monthly active user (2.80 billion) Facebook generates a turnover of about EUR 25.02" (on the basis of a report from Meta Platforms, Inc.) and - for the sake of the argument - makes the assumption that this value is applicable for European data subjects using facebook.com . See DE SAs objection, p. 13.

⁷⁰⁷ See the CJEU rulings cited in Binding Decision 2/2022, paragraph 219.

⁷⁰⁸ DE SAs objection, p. 12-13.

⁷⁰⁹ DE SAs objection, p. 12-13.

⁷¹⁰ Meta IE Article 65 Submissions, Annex 1, p. 105-106, p. 128-130.

⁷¹¹ Judgement of the Court of Justice of 7 June 1983, *Musique Diffusion*, Joined Cases C-100-103/80, ECLI:EU:C:1983:158, paragraph 121.

does not find that in the case at hand the LSA should be requested to amend its Draft Decision to additionally consider the annual profit of the undertaking. At the same time, the EDPB reiterates that the imposition of an appropriate fine cannot be the result of a simple calculation based on the total turnover⁷¹² and that as stated above all the circumstances of the specific case have to be considered in order to assess if the administrative fine is effective, proportionate and dissuasive as required by Article 83(1) GDPR.

381. Moreover, the size of the undertaking concerned and its financial capacity⁷¹³ are elements that should be taken into account in the calculation of the amount of the fine in order to ensure its dissuasive nature⁷¹⁴. Taking into consideration the size and global resources of the undertaking in question is justified by the impact sought on the undertaking concerned, in order to ensure that the fine has sufficient deterrent effect, given that the fine must not be negligible in the light, particularly, of its financial capacity⁷¹⁵. The EDPB recalls that a fine to be imposed on an undertaking may need to be increased to take into account a particularly large turnover of the undertaking, so the fine is sufficiently dissuasive⁷¹⁶. In this respect, the EDPB further notes that in order to ensure a sufficiently deterrent effect, the global turnover of the undertaking can be considered also in light of the undertaking's ability to raise the necessary funds to pay its fine⁷¹⁷.

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

382. 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 both⁷¹⁸. 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)⁷¹⁹. 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

⁷¹² See, *inter alia*, judgement of the General Court of 22 September 2021, *Altice Europe NV v Commission*, T-425/18, ECLI:EU:T:2021:607, (hereinafter 'T-425/18 *Altice Europe*'), paragraph 362; judgement of the General Court of 5 October 2011, *Romana Tabacchi v Commission*, T-11/06, ECLI:EU:T:2011:560, (hereinafter 'T-11/06 *Romana Tabacchi*'), paragraph 266.

⁷¹³ Judgement of the Court of Justice of 17 June 2010, *Lafarge v European Commission*, C-413/08 P, ECLI:EU:C:2010:346, (hereinafter, 'C-413/08 P *Lafarge*'), paragraph 104.

⁷¹⁴ Binding Decision 1/2021, paragraphs 408-412.

⁷¹⁵ Judgement of the Court of Justice of 4 September 2014, *YKK and Others v Commission*, C-408/12 P, ECLI:EU:C:2014:2153, paragraph 85; C-413/08 P *Lafarge*, paragraph 104. In addition, the EDPB recalls that in some circumstances the imposition of a deterrence multiplier can be justified and that the exceptional financial capacity of an undertaking may be one such circumstance (see EDPB Guidelines on Administrative Fines, paragraph 144; and Judgement of the Court of Justice of 29 June 2006, *Showa Denko v Commission*, C-289/04 P, ECLI:EU:C:2006:431, paragraphs 29, 36-38).

⁷¹⁶ The same approach is suggested in the European Commission Guidelines on the method of setting fines imposed pursuant to Art. 23(2)(a) of Regulation No 1/2003, C210/02, 1.9.2006, paragraph 30.

⁷¹⁷ C-413/08 P *Lafarge*, paragraph 105.

⁷¹⁸ EDPB Guidelines on Administrative Fines, p. 6.

⁷¹⁹ See, *inter alia*, C-511/11 *Versalis*, paragraph 94.

objective⁷²⁰. 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 effect⁷²¹.

383. 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 circumstances⁷²². Further, the EDPB recalls that the setting of a fine is not an arithmetically precise exercise⁷²³, and supervisory authorities have a certain margin of discretion in this respect⁷²⁴.
384. The DE, FR, NL, NO and PL 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)⁷²⁵. These SAs 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) GDPR⁷²⁶.
385. Specifically, the DE, FR, NL and NO SAs refer to the nature and gravity of the infringement and the number of data subjects concerned⁷²⁷. The PL SA adds that the gravity of the infringement is compounded by the fact that the data processing is an essential part of Meta IE's business model⁷²⁸. The DE SAs also refer to the infringement's duration and the negligence identified by the IE SA⁷²⁹.
386. The EDPB takes note Meta IE's disagreement with the fine proposed by the IE SA⁷³⁰ and their view that any objections aiming to increase the quantum of fines are not compatible with Article 83 GDPR⁷³¹.

⁷²⁰ *MT v Landespolizeidirektion Steiermark* (Case C-231/20, judgment delivered 14 October 2021, 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*").

⁷²¹ Meta IE Article 65 Submissions, Annex 1, p. 113, 130 and 133.

⁷²² 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*".

⁷²³ See T-425/18 *Altice Europe*, paragraph 362; T-11/06 *Romana Tabacchi*, paragraph 266.

⁷²⁴ 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.

⁷²⁵ DE SAs Objection, p. 11-14; FR SA Objection, paragraph 38 - 51, in particular paragraph 50; NL SA Objection, paragraph 38, 45 and following; NO SA Objection, pp. 8-10; PL SA Objection, pp. 4-5.

⁷²⁶ DE SAs Objection, p. 14-15; FR SA Objection, paragraph 50; NL SA Objection, paragraph 40 and 49; NO SA Objection, p. 8-9; PL SA Objection, p. 4.

⁷²⁷ DE SAs Objection, p. 13 -15; FR SA Objection, paragraph 40 ; NL SA Objection, paragraph 40- 41 and 49; NO SA Objection, p. 10.

⁷²⁸ PL SA Objection, p. 4.

⁷²⁹ DE SAs Objection, p. 13.

⁷³⁰ Meta IE Article 65 Submissions, 10.1

⁷³¹ Meta IE Article 65 Submissions, paragraphs 9.2-9.11. Meta IE's argument that the LSA has sole competence to determine corrective measures including administrative fines is addressed above. See Section 8.4.2, paragraphs 275 - 277 as well as footnote 634. 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, other than the DE SAs objection on the turnover

387. The EDPB notes that in the Draft Decision the IE SA indicates being satisfied the proposed fine is effective, proportionate and dissuasive, taking into account all the circumstances of the IE SA's inquiry⁷³². The IE SA assessed the different criteria of Article 83(2) GDPR in relation to the transparency infringements found⁷³³. The IE SA considered the infringements as serious in nature⁷³⁴, and in terms of gravity of the infringements found a significant level of non-compliance⁷³⁵. Furthermore, the EDPB underlines that, as established by the IE SA, the infringements affect a significant number of data subjects⁷³⁶ and are extensive⁷³⁷. The EDPB also observes that the infringements is considered negligent in character⁷³⁸. Further, the IE SA considered the level of damage suffered by data subjects as being significant⁷³⁹. In addition, the IE SA identifies only one mitigating factor, however without articulating the weight accorded to it⁷⁴⁰.
388. 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"*⁷⁴¹. On principle, the EDPB agrees that reputation costs could be taken into consideration to some extent, if credible arguments are be put forward about the grave detriment that would ensue. Meta IE does not present such arguments⁷⁴². 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 Facebook Service is also the reason why it has been instrumental in the success of small and medium sized businesses ('SMEs') worldwide, including across the EU. Personalisation on the Facebook Service enables SMEs to compete for customers through 'customizing 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'"*⁷⁴³. As far as users of the Facebook 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 others⁷⁴⁴.
389. The FR SA compares the proposed fine 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 transparency infringements (breaches of Articles 12 and 13 GDPR)⁷⁴⁵. The FR SA also compares with the fine of 746 million euros

figure used. Meta's argument that there is no *"evidence in this Inquiry that Meta Ireland gained financial benefits or avoided losses"* has been taken into consideration above.

⁷³² Draft Decision, paragraphs 9.48 - 9.51.

⁷³³ Draft Decision, paragraphs 9.3 - 9.44.

⁷³⁴ Draft Decision, paragraphs 9.6 - 9.8.

⁷³⁵ Draft Decision, paragraphs 9.9 - 9.10.

⁷³⁶ Draft Decision, paragraphs 9.15 - 9.17.

⁷³⁷ Draft Decision, paragraph 9.14.

⁷³⁸ Draft Decision, paragraphs 9.22 - 9.27.

⁷³⁹ 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, paragraphs 9.22 - 9.21.

⁷⁴⁰ Draft Decision, paragraph 9.30 and 9.45.

⁷⁴¹ Composite Response, paragraph 115. See Meta IE Article 65 Submissions, p. 131.

⁷⁴² 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, p. 131.

⁷⁴³ Meta IE Article 65 Submissions, paragraph 6.18.

⁷⁴⁴ NO SA Objection, p. 5. In the same vein, the FR SA argues Meta IE is a quasi-monopolist. See FR SA Objection, p. 40.

⁷⁴⁵ FR SA objection, paragraph 44. The IE SA's decision in this case (case IN-18-12-2) is under appeal before the Irish courts.

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)⁷⁴⁶. While the EDPB agrees with both the IE SA and Meta IE that imposing fines requires a case-by-case assessment under Article 83 GDPR⁷⁴⁷, the EDPB notes that the cases cited by the FR SA 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 regard to the infringements involved. Thus, these cases can give an indication on the matter.

390. The DE SAs calculate that the envisaged upper limit of the fine range is about 0.05 % of the global annual turnover⁷⁴⁸, which it notes is 80 times lower than the maximum ceiling provided for in Article 83(5) GDPR. For illustrative purposes, the DE SAs add that this upper limit would amount to a fine of EUR 0.14 per person (on the basis of 265 million data subjects affected according to paragraph 9.15 of the Draft Decision)⁷⁴⁹. Also illustrative is the amount of time, on average, it took Meta IE to generate 36 million euros in turnover in 2020, which was about 4 hours and 30 minutes⁷⁵⁰.
391. 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 effect⁷⁵¹. 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 business⁷⁵². As behavioural advertising is at the core of Meta IE's business model⁷⁵³, the risk of this occurring is all the greater⁷⁵⁴. By bearing the cost 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 adjustment⁷⁵⁵.
392. Though the IE SA touches upon the notions of effectiveness, proportionality and dissuasiveness in relation to the proposed fine⁷⁵⁶, 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) GDPR⁷⁵⁷, the Draft Decision does not articulate how and to what extent the turnover of this undertaking is considered to ascertain that the

⁷⁴⁶ FR SA objection, paragraph 45.

⁷⁴⁷ Draft Decision, paragraph 9.12-9.13.

⁷⁴⁸ DE SAs objection, p. 13. The DE SAs explain that that they have converted dollar amounts into euro using the ECB euro reference exchange rate of USD 1.2271 per EUR 1 per 31st December 2020.

⁷⁴⁹ DE SAs objection, p. 13. Meta IE protests that this *"'per affected data subject' logic has no basis in the GDPR (nor is it an element that is present in the Draft Decision)"*, see Meta IE Article 65 Submissions, paragraph 10.2. The EDPB notes that no basis in law is needed for the DE SA to illustrate their argument in this way.

⁷⁵⁰ Based on the total annual turnover of 2020 being EUR 70,055 billion, this is on average EUR 7 975 295,99 turnover generated per hour. Thus, a fine of EUR 36 million would have taken 4h30m50s to generate. The NL SA provides an estimate of 'daily revenue', see NL SA Objection, paragraph 48.

⁷⁵¹ DE SAs objection, p. 12-13 and 15-16. NO SA Objection, p. 8-11. FR SA Objection, paragraph 50.

⁷⁵² NO SA Objection, p. 10.

⁷⁵³ Draft Decision, paragraph 4.41 and 4.44. DE SAs objection, p. 5. NO SA Objection, p. 6. PL SA Objection, p. 4.

⁷⁵⁴ NO SA Objection, p. 10.

⁷⁵⁵ PL SA Objection, p. 5.

⁷⁵⁶ Draft Decision, paragraphs 9.48 - 9.51.

⁷⁵⁷ Draft Decision, paragraph 10.41.

administrative fine meets the requirement of effectiveness, proportionality and dissuasiveness⁷⁵⁸. In this regard the EDPB recalls that 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) GDPR⁷⁵⁹. The EDPB therefore instructs the IE SA to elaborate on the manner in which the turnover of the undertaking concerned is considered for the calculation of the fine.

393. While a single mitigating factor identified by the IE SA is mentioned⁷⁶⁰, there is no indication the weight that has been attributed to this factor in the context of the Article 83(2) assessment. As indicated above (see paragraph 366), the EDPB finds the Draft Decision does not sufficiently justify this mitigating factor, hence it should not be considered an aggravating or mitigating factor.
394. 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.

9.2 On the determination of an administrative fine for further infringements

9.2.1 Analysis by the LSA in the Draft Decision

395. The IE SA in the Draft Decision concludes that Meta IE has not sought to rely on consent in order to process personal data to deliver its service as outlined in the Facebook Terms of Service and it is not legally obliged to rely on consent in order to do so (Finding 1)⁷⁶¹. Alongside, the IE SA concludes that Meta IE can rely on Article 6(1)(b) GDPR as a legal basis to carry out the personal data processing activities involved in the provision of its service to users, including behavioural advertising insofar as that forms a core part of the service (Finding 2)⁷⁶². In these terms, the IE SA did not propose to establish an infringement of Article 6(1) GDPR.
396. In addition, no infringement of Article 9(1) GDPR has been found as the IE SA has not identified and separately assessed any processing of special categories of personal data by Meta IE in the context of the Facebook Terms of Service.
397. The IE SA in its Draft Decision concludes that Meta IE has infringed Article 5(1)(a), Article 13(1)(c) and Article 12(1) GDPR due to the lack of transparency in relation to the processing for which Article 6(1)(b) GDPR has been relied on (Finding 3)⁷⁶³.

⁷⁵⁸ EDPB Guidelines on calculation of fines, paragraph 120.

⁷⁵⁹ Binding Decision 01/2021, paragraphs 405-412.

⁷⁶⁰ Draft Decision, paragraphs 9.30 and 9.45.

⁷⁶¹ Draft Decision, p. 23.

⁷⁶² Draft Decision, paragraph 4.52 and 4.55 and p. 39.

⁷⁶³ Draft Decision, p. 67.

9.2.2 Summary of the objections raised by the CSAs

398. The AT, DE, FR, IT, NO, PL and SE SAs⁷⁶⁴ object to the LSA's failure to take action with respect to one or more specific infringements they deem should have been found and ask the IE SA to impose a **higher administrative fine as a result of these additional infringements**.

Objections requesting the imposition of a fine for the additional infringement of Article 6(1) GDPR or Article 6(1)(b) GDPR

399. The DE, FR and PL SAs ask for the administrative fine to be increased⁷⁶⁵ as a consequence of the proposed finding of infringement of Article 6(1) GDPR⁷⁶⁶. The AT, NO and SE SAs argue that the fine should be increased following the proposed finding of an infringement of Article 6(1)(b) GDPR⁷⁶⁷.
400. The DE SAs state that the fact that Article 6(1) GDPR was infringed is not properly reflected in the calculation of the fine in the Draft Decision⁷⁶⁸. The DE SAs list a variety of arguments concerning the criteria provided for in Article 83(2) GDPR concerning the infringement of Article 6(1)(b) GDPR⁷⁶⁹. Specifically, the DE SA argues that several factors are to be considered as aggravating, namely: the gravity and duration of the infringement⁷⁷⁰, taking into account it regards *"personal data of about 265 million data subjects were affected over a period of at least three years"*⁷⁷¹ (Article 83(2)(a) GDPR), the categories of personal data affected by the infringement (Article 83(2)(g) GDPR)⁷⁷², the manner in which the infringement became known (Article 83(2)(h) GDPR)⁷⁷³, and other factors, namely financial benefits gained from the infringement as well as profitability and turnover (Article 83(2)(k) GDPR)⁷⁷⁴. The DE SA also highlights that the fine imposed needs to aim to prevent further infringements of the GDPR; first, it should be *"special preventive"* meaning that the amount imposed needs to be such that *"it is not to be expected that the specific controller will commit similar infringements again"* by having *"such a noticeable impact on the profits of the undertaking that future infringements of data protection law would not be 'discounted' into the processing performed by the undertaking lightly"*; second, it should be *"general preventive"* by leading other controllers to *"make a significant effort to avoid similar violations"*⁷⁷⁵.
401. The FR SA considers that some violations are wrongly not included in the Draft Decision⁷⁷⁶ and argues that *"since it considers that breaches of Articles 6 and 9 of the GDPR have been committed, which are added to the other breaches found by the Irish data protection authority, the amount proposed by the*

⁷⁶⁴ AT SA Objection, pp. 11-12; DE SAs Objection, pp. 16-21; FR SA Objection, pp. 9-10; IT SA Objection, paragraph 2.7 ; NO SA Objection, pp. 7-8; PL SA Objection, p. 4 ; SE SA Objection, pp. 4-5.

⁷⁶⁵ FR SA Objection, paragraph 46; DE SAs Objection, p.17, PL SA Objection, p. 4.

⁷⁶⁶ DE SAs Objection, pp. 1-6 and pp.9-10; FR SA Objection, paragraphs 5-14, 33 and 52; PL SA Objection, pp. 1-2.

⁷⁶⁷ AT SA Objection, pp. 11-12 ; NO SA Objection, pp. 7-8 ; SE SA Objection, pp. 4-5.

In addition, also the IT SA (IT SA Objection, paragraph 2.7) argued that an administrative fine should be imposed for the infringement of Art. 6(1)(b) GDPR; however, this aspect of the objection raised by the IT SA was deemed to be not relevant and reasoned by the EDPB in paragraph 82 above.

⁷⁶⁸ DE SAs Objection, p. 17.

⁷⁶⁹ DE SAs Objection, pp. 18-19.

⁷⁷⁰ DE SAs Objection, p. 18.

⁷⁷¹ DE SAs Objection, p. 17.

⁷⁷² DE SAs Objection, p. 18.

⁷⁷³ DE SAs Objection, p. 19.

⁷⁷⁴ DE SAs Objection, p. 19.

⁷⁷⁵ DE SAs Objection, p. 20.

⁷⁷⁶ FR SA Objection, paragraph 53.

*latter should be increased accordingly*⁷⁷⁷. The FR SA recalls that the same approach of cumulating the amounts of the fine has been adopted by the EDPB in points 324 to 327 of its Binding Decision 01/2021⁷⁷⁸.

402. The PL SA believes that the proposed amount of the administrative fine is too low, also because the PL SA proposed the establishment of the additional infringement of Article 6(1) GDPR, which means *“the administrative fine should be significantly increased by the LSA”*⁷⁷⁹.
403. On risks posed by the Draft Decision, the DE SAs explain that without an effective, proportionate and dissuasive fine, the Draft Decision would lack any deterrent effect with regard to Meta IE in such a way that it would see a need to substantially change its practices⁷⁸⁰. Moreover, the DE SAs raise that it would induce controllers to consider - from an economical point of a view - that non-compliance with the GDPR could be a reasonable option⁷⁸¹ and this would lead to a significant risk for the protection of the fundamental rights and freedoms of the data subjects⁷⁸². The DE SAs argue that an administrative fine is, in the present case, essential in order to achieve a deterrent effect (either specifically towards the controller, or in general towards other controllers)⁷⁸³. The DE SAs add that not imposing a fine would have the opposite effect on controllers in general⁷⁸⁴. The FR SA considers that adopting the IE SA's Draft Decision as it stands *“presents a risk to the fundamental rights and freedoms of the data subjects, in accordance with Article 4(24) of the GDPR”*⁷⁸⁵ and *“would lead to a levelling down of the level of administrative fines imposed by European data protection authorities, thereby reducing the authorities' coercive power and, consequently, their ability to ensure effective compliance with the protection of the personal data of European residents”*⁷⁸⁶. The PL SA highlights that *“the unchanged draft decision entails a risk for the fundamental rights and freedoms of data subjects, and in particular the risk of violation of Art. 8 of the Charter of Fundamental Rights”*, and that *“the failure to apply a proportionate, dissuasive and effective remedy may prevent the controller from being discouraged from committing further breaches”*⁷⁸⁷.

404. The AT, NO and SE SAs, considering that the IE SA should have found an infringement of Article 6(1)(b) GDPR⁷⁸⁸, ask for the administrative fine to be increased as a consequence of that infringement.
405. The AT SA argues that *“the additional infringement [of Article 6(1)(b) GDPR] must be properly reflected in the envisaged amount of the administrative fine”* and that the IE SA's Draft Decision is not in

⁷⁷⁷ FR SA Objection, paragraph 46.

⁷⁷⁸ FR SA Objection, paragraph 46.

⁷⁷⁹ PL SA Objection, p. 4.

⁷⁸⁰ DE SAs Objection, p. 20.

⁷⁸¹ DE SAs Objection, p. 20.

⁷⁸² DE SAs Objection, pp. 17 and 20

⁷⁸³ DE SAs Objection, pp. 17 and 20.

⁷⁸⁴ DE SAs Objection, p. 17.

⁷⁸⁵ FR SA Objection, paragraph 50.

⁷⁸⁶ FR SA Objection, paragraph 51.

⁷⁸⁷ PL SA Objection, p. 5.

⁷⁸⁸ AT SA Objection, pp. 1-7; IT SA Objection, pp 1-7; NL SA Objection, paragraphs 4, 25-36; NO SA Objection, pp.1-2 and 7; PT SA Objection, paragraphs 65-68; SE SA Objection, pp. 2-3.

compliance with Article 83 GDPR insofar as it does not consider the additional infringement of Article 6(1)(b) GDPR when calculating the amount of the administrative fine⁷⁸⁹.

406. The NO SA states that an administrative fine should be imposed for Meta IE's processing of personal data in the context of online behavioural advertising without a valid legal basis⁷⁹⁰. The NO SA analyses several of the criteria listed in Article 83(2) GDPR in order to prove the need of the imposition of an administrative fine⁷⁹¹. Specifically, the NO SA argues that an administrative fine of a substantial amount is needed, in light of the nature and gravity of the infringement (given that *"the principle of lawfulness [...] is a fundamental pillar of the GDPR"* and *"processing personal data without a legal basis is a clear violation of the data subjects' fundamental right to data protection because no one should have to tolerate processing of their personal data save for when it is legitimised by the legislators"*⁷⁹²), as well as the scope of the processing (*"wide"*, as it took place *"on and off the Facebook platform"*), the number of data subjects affected in the EEA (*"hundreds of millions"*) and the intangible damage suffered by them (Article 83(2)(a) GDPR), the high level of responsibility of Meta IE (Article 83(2)(d) GDPR), the categories of personal data involved (*"of a very personal and private nature"*, able to *"reveal intimate details of the data subjects' lifestyle, mindset, preferences, psychological wellbeing et cetera"*) (Article 83(2)(g) GDPR) and an additional aggravating factor (high likelihood of contribution to development of harmful algorithms, Article 83(2)(k) GDPR)⁷⁹³.
407. The SE SA argues that *"the Draft Decision is not in compliance with Article 83 insofar as the additional infringement of Article 6(1)(b) is not considered in calculating the administrative fine"* and that *"[an] administrative fine pursuant to Article 83 GDPR cannot be regarded as 'effective, proportionate and dissuasive' when the provision that the processing is based on, namely Article 6(1)(b) GDPR, was infringed and when this infringement is not properly reflected in the envisaged amount of the administrative fine"*⁷⁹⁴. The SE SA takes the view that the intentional character of the infringement (Article 83(2)(b) GDPR) and the financial benefits gained from the infringement (Article 83(2)(k) GDPR) must be found as aggravating factors⁷⁹⁵. As to intentionality, the SE SA argues that the switch from consent to Article 6(1)(b) in 2018 suggests this act was done with the intention of circumventing the new rights afforded to users by the GDPR when the processing relies upon consent, and that in any way the infringement needs to be considered as intentional at least as of the moment of adoption of the EDPB Guidelines on Article 6(1)(b) GDPR which *"clearly gives doubt to the legality of the processing"*⁷⁹⁶. As to the financial benefits gained, the SE SA argues *"[Meta IE] has made significant financial gain from being able to provide personal advertising as part of a whole take it or leave it offer for its social media platform service"* and that due to the unclear information provided to data subjects it can be reasonably assumed that more data subjects have been misled into being subject to the processing⁷⁹⁷. Furthermore, the SE SA considers that Meta IE's dominant market position (*"[It] is the provider of the largest social media network in the world"*) and its *"methods for collective and processing personal data relating to personalised advertising and profiling"* (which are *"vast,*

⁷⁸⁹ AT SA Objection, p. 11.

⁷⁹⁰ NO SA Objection, p. 8.

⁷⁹¹ NO SA Objection, p. 8-9.

⁷⁹² The NO SA also highlights that *"[behavioural advertising] entails profiling, which inherently constitutes risks for the data subjects' integrity"*.

⁷⁹³ NO SA Objection, p. 8-9.

⁷⁹⁴ SE SA Objection, p. 4.

⁷⁹⁵ SE SA Objection, p. 4.

⁷⁹⁶ SE SA Objection, p. 4.

⁷⁹⁷ SE SA Objection, p. 4.

aggressive and inadequate with regard to the fulfillment of data subjects' rights") should be properly taken into account⁷⁹⁸. Lastly, the SE SA considers it would be appropriate to take into account Meta IE's turnover for the calculation of the fine in order to make it effective and dissuasive⁷⁹⁹.

408. On risks posed by the Draft Decision, the AT SA argues that "[should] the Draft Decision be approved in its current version, the risks for the fundamental rights and freedoms of data subjects lie in the fact that the action envisaged in relation to the controller is likely to fall short of the proportionality and – above all – dissuasiveness requirements set forth in Article 83 GDPR" and that "ignoring infringements of the GDPR when calculating fines would lead to lesser compliance with the GDPR and ultimately to lesser protection of data subjects in relation to the processing of personal data"⁸⁰⁰. The NO SA explains that not imposing a fine for the lack of legal basis creates that risk that the violated provisions are not respected by Meta IE or other controllers and the LSA would not be able to effectively safeguard the data subjects' rights, and that "In absence of corrective measures that create the appropriate incentives for [Meta IE] and other controllers to change their behaviour, the same or similar violations are likely to reoccur to the detriment of the complainant and other data subjects" and argues that controllers will be induced to consider administrative fines as expected expenditure items in their budgets as the financial advantage gained through the violation would surpass the estimated value of an expected fine⁸⁰¹. The SE SA argues the infringement of Article 6(1)(b) GDPR "is not properly reflected in the envisaged amount of the administrative fine, it shows controllers (Facebook included) that enforcement of the GDPR and its provisions is not effective. This threatens compliance with the GDPR on a general level, seeing as how non-compliance could be a viable option for controllers when the costs for compliance are greater. Given the proposed changed findings regarding legal basis, there are significant risks to the fundamental rights of data subjects if these does not also merits a substantive increase in fines to dissuade Facebook and other controllers"⁸⁰².

Objections requesting the imposition of a fine for the additional infringement of Article 9 GDPR

409. As stated in Section 5.2, paragraph 141, the DE and FR SAs, considering that the IE SA should have identified and separately assessed any processing of special categories of personal data under Article 9 GDPR in the context of the Facebook Terms of Service⁸⁰³ and that Meta IE processes the entire amount of data it holds, including special categories of data, in breach of Articles 6 and 9 GDPR⁸⁰⁴, argue that the amount of the fine should be increased accordingly.
410. The DE SA states that "the infringement of Articles 5(1)(a), 6(1) and 9(1) GDPR [...] also entails an administrative measure and a fine according to Art. 83(2)(5) GDPR"⁸⁰⁵, and argues that these infringements are 'serious'⁸⁰⁶. The FR SA considers that the breaches of Articles 6 and 9 GDPR are wrongly not included in the Draft Decision⁸⁰⁷ and that the amount of the fine proposed by the LSA

⁷⁹⁸ SE SA Objection, p. 4.

⁷⁹⁹ SE SA Objection, p. 4.

⁸⁰⁰ AT SA Objection, p. 11.

⁸⁰¹ NO SA Objection, p. 10.

⁸⁰² SE SA Objection, p. 5.

⁸⁰³ AT SA Objection, pp.8-10; DE SAs Objection, pp.6-7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 10 and 33 ; PT SA Objection, paragraphs 45-47 ; SE SA Objection, pp.1 and 3.

⁸⁰⁴ DE SAs Objection, p.8 ; FR SA Objection, paragraph 33.

⁸⁰⁵ DE SAs Objection, p. 16.

⁸⁰⁶ DE SAs Objection, p. 17.

⁸⁰⁷ FR SA Objection, paragraph 53.

should be increased in light of the addition of such infringements to those already established⁸⁰⁸. The FR SA recalls that the same approach of cumulating the amounts of the fine has been adopted by the EDPB in points 324 to 327 of Binding Decision 01/2021⁸⁰⁹.

411. On risks posed by the Draft Decision, the DE SA explains that without an effective, proportionate and dissuasive fine, the Draft Decision would lack any deterrent effect with regard to Meta IE in such a way that it would see a need to substantially change its practices⁸¹⁰. Moreover, the DE SA raises that it would induce controllers to consider - from an economical point of a view - that non-compliance with the GDPR could be a reasonable option⁸¹¹ and this would lead to a significant risk for the protection of the fundamental rights and freedoms of the data subjects⁸¹². The DE SA argues that an administrative fine is, in the present case, essential in order to achieve a deterrent effect (either specifically towards the controller, or in general towards other controllers)⁸¹³. The DE SA adds that not imposing a fine would have the opposite effect on controllers in general⁸¹⁴. The FR SA considers that adopting the IE SA's Draft Decision as it stands *“presents a risk to the fundamental rights and freedoms of the data subjects, in accordance with Article 4(24) of the GDPR”*⁸¹⁵ and *“would lead to a levelling down of the level of administrative fines imposed by European data protection authorities, thereby reducing the authorities' coercive power and, consequently, their ability to ensure effective compliance with the protection of the personal data of European residents”*⁸¹⁶.

Objections requesting the imposition of a fine for the additional infringement of Article 5(1)(a) and 5(1)(b)-(c) GDPR

412. The IT SA⁸¹⁷ argues that the fine should be increased following the finding of an infringement of Article 5(1)(a) GDPR, and of Article 5(1)(b) and (c) GDPR⁸¹⁸. As stated in Section 6.2, the IT SA agrees to a large extent with the Draft Decision's Finding 3 on the infringement of Article 12(1), Article 13(1)(c), and Article 5(1)(a) GDPR in terms of transparency⁸¹⁹ but it argues that Meta IE has also failed to comply with the more general principle of fairness under Article 5(1)(a) GDPR, which, in the view of the IT SA, entails separate requirements from those relating specifically to transparency⁸²⁰. Moreover, as analysed in Section 7.2, the IT SA states that there is an additional infringement of points (b) and (c) of Article 5(1) GDPR on account of Meta IE's failure to comply with the purpose limitation and data minimisation principles⁸²¹. The IT SA asks for a fine to be issued for those two additional infringements. With regard to Article 5(1)(a) GDPR the IT SA argues that the finding of such infringement *“should result into the imposition of the relevant administrative fine as per Article 83(5)(a) GDPR”* as far as *“the infringement of the fairness principle in addition to the transparency one [...] should result into increasing the amount of the said fine substantially by having*

⁸⁰⁸ FR SA Objection, paragraph 53.

⁸⁰⁹ FR SA Objection, paragraph 46.

⁸¹⁰ DE SAs Objection, p. 20.

⁸¹¹ DE SAs Objection, p. 20.

⁸¹² DE SAs Objection, pp. 17 and 20

⁸¹³ DE SAs Objection, pp. 17 and 20.

⁸¹⁴ DE SAs Objection, p. 17.

⁸¹⁵ FR SA Objection, paragraph 50.

⁸¹⁶ FR SA Objection, paragraph 51.

⁸¹⁷ IT SA Objection, paragraph 2.7 on p 6-7, paragraph 2.4 on p. 10;

⁸¹⁸ IT SA Objection, paragraph 2.7 on p 6-7, paragraph 2 on p. 9. paragraph 3 on p. 11.

⁸¹⁹ IT SA Objection, paragraph 1 on p.9.

⁸²⁰ IT SA Objection, paragraph 2.4 on p. 10.

⁸²¹ IT SA Objection, paragraph 2 on p. 9.

*regard to the requirement that each fine should be proportionate and dissuasive. Indeed, the gravity of the infringement would be factually compounded*⁸²². With reference to Article 5(1)(b) and (c) GDPR, the IT SA considers that *“the infringement of purpose limitation and data minimisation principles [...] should result into increasing the amount of the said fine substantially by having regard to the requirement that each fine should be proportionate and dissuasive. Indeed, the gravity of the infringement would be factually compounded*⁸²³.

413. On the significance of risks posed by the Draft Decision, the IT SA argues that *“the failure to find an infringement of Article 5(1)(a) GDPR as for the fairness principle may become a dangerous precedent with a view to future decisions concerning other digital platform operators – more generally, other controllers that rely on the same business model – and markedly weaken the safeguards to be provided by way of the effective, comprehensive implementation of the data protection framework including the fairness of processing principle*⁸²⁴ and, with reference to Article 5(1)(b) and (c) GDPR, should the Draft Decision approved as its current version the infringement of two key principles of the whole data protection framework as introduced by the GDPR will not punished, *“which would seriously jeopardise the safeguards the data subjects (Facebook users) are entitled to*⁸²⁵.

9.2.3 Position of the LSA on the objections

414. The LSA considers none of the objections requesting the imposition of a fine for the proposed additional infringements as meeting the threshold set by Article 4(24) GDPR of being relevant and reasoned⁸²⁶. Given that these objections were premised upon the requirement for the Draft Decision to include findings of infringement of Article 6(1)(b), Article 9, Article 5(1)(a), Article 5(1)(b) and Article 5(1)(c) GDPR, on which the IE SA expressed its disagreement – the IE SA does not consider the objections requesting exercise of a corrective power in response to these findings of infringement as being relevant and reasoned⁸²⁷.

9.2.4 Analysis of the EDPB

9.2.4.1 Assessment of whether the objections were relevant and reasoned

415. The objections raised by the AT, DE, FR, IT, NO, PL, SE SAs concern *“whether the action envisaged in the Draft Decision complies with the GDPR*⁸²⁸.
416. The EDPB takes note of Meta IE’s view that not a single objection put forward by the CSAs meets the threshold of Article 4(24) GDPR⁸²⁹. In addition to the primary argument levelled against all CSA’s objections⁸³⁰, Meta IE rejects the objections in this section based on its view that the LSA has sole discretion to determine corrective measures⁸³¹. The EDPB responds to these arguments above (see

⁸²² IT SA Objection, paragraph 3 on p. 11.

⁸²³ IT SA Objection, paragraph 2 on p. 9.

⁸²⁴ IT SA Objection, paragraph 3 on p. 12.

⁸²⁵ IT SA Objection, paragraph 2 on p. 9.

⁸²⁶ Composite Response, paragraph 103.

⁸²⁷ Composite Response, paragraphs 30, 41 and 103.

⁸²⁸ EDPB Guidelines on RRO, paragraph 32.

⁸²⁹ Meta IE Article 65 Submissions, Annex 1, p. 70.

⁸³⁰ Meta IE argues that *“Objections which raise matters which are not within the Defined Scope of Inquiry are not ‘relevant and reasoned’ within the meaning of Article 4(24) GDPR”* and such objections *“ought to be disregarded in their entirety by the EDPB”*. The EDPB does not share this understanding, as explained above. See paragraphs 71 - 73.

⁸³¹ See Binding Decision 2/2022, paragraph 74.

Section 8.4.2, paragraphs 275 - 277 as well as footnote 634) and is of the view that CSAs may ask for specific corrective measures to be taken by the LSA, whether this concerns infringements already identified in the Draft Decision or identified by the CSA in an objection raised⁸³². Meta IE refutes the allegations of additional infringements put forward in the objections, and by consequence any demands for further corrective measures⁸³³. The EDPB recalls that the assessment of admissibility of objections and the assessment of the merits are two distinct steps⁸³⁴.

417. The EDPB finds that the objections concerning the increase of the administrative fine in connection with the additional infringement of Article 6(1)/6(1)(b) GDPR and/or Article 9 GDPR raised by the AT, DE, FR, NO, PL and SE SAs stand in direct connection with the substance of the Draft Decision, as they concern the imposition of a corrective measure for an additional infringement, which would be found as a consequence of reversing the conclusions in the Draft Decision also in scope of this dispute⁸³⁵. Clearly, the decision on the merits of the demands to take corrective measures for a proposed additional infringement is affected by the EDPB's decision on whether to reverse the findings in the Draft Decision and whether to instruct the LSA to establish additional infringements.
418. The EDPB takes note of further arguments put forward by Meta IE aiming to demonstrate lack of relevance of these objections, specifically with regard to the objections raised by the AT⁸³⁶ and DE⁸³⁷ SAs. However, the EDPB notes that Meta IE disagrees with the content of these objections, which

⁸³² EDPB Guidelines on RRO, paragraph 34. See also recital 150 GDPR. The EDPB found several objections on this subject matter admissible in the past, see Binding Decision 2/2022, paragraphs 186-190.

⁸³³ See Meta IE Article 65 Submissions, paragraph 8.2. Meta IE refutes the AT SA's allegation of infringement of Art. 6(1) GDPR as inadmissible and without merit, and argues by consequence that AT SA's demand for an *"amendment of the administrative fine to reflect such Article 6(1)(b) GDPR infringement has no direct connection with the Draft Decision"*. See Meta IE Article 65 Submissions, Annex 1, p. 79-80. Meta IE refutes the allegation of infringement of Art. 5(1), 6(1) and 9(1) GDPR, considering that aspect of the DE SA's objection inadmissible and without merit, and by consequence also their demand for an additional fine. See Meta IE Article 65 Submissions, p. 132.

⁸³⁴ EDPB Guidelines on Article 65(1)(a), paragraph 63.

⁸³⁵ AT SA Objection, p. 11-12; DE SAs Objection, p. 16-17; FR SA Objection, paragraph 46; NO SA Objection, p. 8-11; SE SA Objection, p. 4.

The EDPB also recalls that the aspect of the IT SA objection concerning the imposition of an administrative fine for the infringement of Art. 6(1)(b) GDPR has already been deemed to not meet the threshold set by Art. 4(24) GDPR above in paragraph 82.

⁸³⁶ Meta IE takes issue with additional reasoning provided by the AT SA under the heading 'relevance' of their objection. The AT SA states *"In addition, it must be taken into account that Facebook is the provider of the biggest social media network in the world. Not properly reflecting such an infringement in the envisaged amount of the administrative fine weakens the position of supervisory authorities and endangers compliance with the GDPR on a general level. Specifically, it shows controllers (including Facebook) that enforcement of the GDPR and its provisions is not as effective. Ultimately, lesser compliance with the GDPR results in lesser protection of data subjects in relation to the processing of personal data."* See AT SA Objection, p. 11. Meta IE responds *"While the Austrian SA has very briefly attempted to link this objection generally to requirements of Article 83(1) GDPR, it has not done so concretely, and this speculative and high level commentary cannot be considered sufficiently relevant."* Meta IE Article 65 Submissions, p. 80. The EDPB does not rely on this additional reasoning from the AT SA in order to assess whether the objection is relevant, as the aspect raised pertains to the significance of the risks posed by the Draft Decision to the fundamental rights and freedoms of data subjects.

⁸³⁷ Meta IE takes issue with the DE SA challenging *"the elements relied upon to calculate the amount of the fine"* stating - since no fine was imposed for any such infringements - *"there are no 'elements relied upon' for the calculation of the 'fine' to be challenged"*. See Meta IE Article 65 Submissions, p. 132.

concerns its merits and not its admissibility. The EDPB also notes Meta IE's arguments pertaining to the objection raised by the PL SA in this context⁸³⁸.

419. These objections set out how, if followed, they would lead to a different conclusion in terms of corrective measures imposed⁸³⁹. In consequence, the EDPB considers the objections raised by the AT, DE, FR, PL, NO and SE SAs in connection to imposing an administrative fine for the alleged breach of Article 6(1)(b) GDPR and/or Article 9 GDPR to be **relevant**.
420. Meta IE argues that the AT, DE, FR, NO, PL and SE SAs' objections lack sufficient reasoning because introduce 'additional' criteria for the determination of the fine that have no basis in Article 83 GDPR⁸⁴⁰. Where the SE SA does refer to criteria from Article 83(2) GDPR, Meta IE alleges is "*speculative with respect to the alleged facts on which it is premised*"⁸⁴¹. On the matter of profiling raised by the NO SA, Meta IE dismisses the concern as unsound as the NO SA "*does not explain on which legal basis it concludes that the advertising in question entails profiling*"⁸⁴². Meta IE alleges the DE SAs' objection is unsubstantiated, by referring back to the fact that no infringement of Article 6(1)(b) GDPR was found by the IE SA⁸⁴³ and thus "*there are no 'elements relied upon' for the calculation of the 'fine' to be challenged*"⁸⁴⁴. In contradiction to this, Meta IE argues the PL SA's objection is not reasoned, as it does not name "*any parameters that would have been misapplied*" by the IE SA⁸⁴⁵. The EDPB understands that Meta IE disagrees with the reasoning provided in the objections, which thus concerns their merits and not their admissibility of the objection.
421. Meta IE argues that the AT and FR SA's objections do not explain how the change would lead to a different conclusion in the Draft Decision⁸⁴⁶, thus not recognising a higher fine amount for the infringements identified as constituting a different conclusion⁸⁴⁷. Meta IE further argues the AT SAs and FR SAs reasoning is so brief that it is not possible to understand the legal arguments the AT or FR SAs wish to put forward in relation to the calculation of the fine. Meta IE takes issue with the AT SA's objection's argument that the Draft Decision is "*not in compliance with Article 83 GDPR*", without also

⁸³⁸ Meta IE argues the the Polish SA's objection in relation to administrative fines is irrelevant as it "*does not challenge the elements relied upon to calculate the amount of the fine, given that turnover is relevant only to determining the maximum fine that can be lawfully imposed and not the fine amount.*" See Meta IE Article 65 Submissions, p. 132. The EDPB notes this argument pertains to the PL SA's disagreement with the fine the IE SA proposed for the transparency infringements, and moreover recalls that whether turnover should be considered in the determination of the fine is out of scope of this dispute.

⁸³⁹ AT SA Objection, p. 11-12; DE SAs Objection, p. 16 and p. 20-21; FR SA Objection, paragraph 48; NO SA Objection, p. 8 and 11; SE SA Objection, p. 4.

⁸⁴⁰ Meta IE Article 65 Submissions, p. 80 (AT SA), p. 85-86 (SE SA), p. 92 (NO SA), p. 106 (PL SA), p. 110-111 (FR SA), p. 129 (DE SAs).

⁸⁴¹ Meta IE Article 65 Submissions, p. 86.

⁸⁴² Meta IE Article 65 Submissions, p. 92.

⁸⁴³ Meta IE submits that "*reasoning is unclear, given the fact that the DPC did not impose a fine because it found it would be inappropriate to find Meta Ireland infringed Article 6(1)(a) GDPR for processing data purposes of providing behavioural advertising*". See Meta IE Article 65 Submissions, p. 133. The EDPB responds to this argument above, see paragraph 417 above.

⁸⁴⁴ Meta IE Article 65 Submissions, p. 132.

⁸⁴⁵ Meta IE argues the PL SAs objection in relation to administrative fines "*is vague regarding the criteria for calculation of the fine proposed for the alleged additional infringement of Article 6(1) GDPR. It only concludes that the fine should be significantly increased, without naming any parameters that would have been misapplied by the DPC*" Meta IE Article 65 Submissions, p. 106.

⁸⁴⁶ Meta IE Article 65 Submissions, p. 80 (AT SA) and p. 110 (FR SA).

⁸⁴⁷ AT SA Objection, p. 11; FR SA Objection, paragraph 48.

specifying “a certain paragraph or criterion that would risk being infringed by the Draft Decision”⁸⁴⁸. The EDPB recalls that the criteria listed in Article 83(2) GDPR are not exhaustive, thus it is entirely possible to argue an administrative fine is not “effective, proportionate and dissuasive” in the meaning of Article 83(1) GDPR without referring to a specific criterion listed in Article 83(2) GDPR. In addition, as the objection raised by the AT SA refers to taking into account in the calculation of the final amount of the fine the finding of an additional infringement of Article 6(1)(b) GDPR and puts forward several arguments showing that not doing so would lead to a fine which is not effective, proportionate and dissuasive⁸⁴⁹.

422. Similarly, Meta IE argues the FR SA “does not substantiate how a fine for the additional purported infringements would be calculated, whether this fine would need to be added to the proposed fine and how this would affect the overall fine”⁸⁵⁰. First, CSAs are not required to engage in a full assessment of all the aspects of Article 83 GDPR in order for an objection on the appropriate administrative fine to be considered reasoned. It is sufficient to lay out which aspect of the Draft Decision that, in their view, is deficient/erroneous⁸⁵¹. Second, the EDPB recalls that the criteria listed in Article 83(2) GDPR are not exhaustive, thus it is entirely possible to argue an administrative fine is not “effective, proportionate and dissuasive” in the meaning of Article 83(1) GDPR without referring to a specific criterion listed in Article 83(2) GDPR. The AT and FR SA’s position is that a fine amount that does not reflect the lack of legal basis for the processing cannot possibly be “effective, proportionate and dissuasive”⁸⁵². The EDPB understands that Meta IE disagrees with the contents of the objections, which concerns its merits and not its admissibility.
423. The EDPB finds that the AT, DE, FR, NO and SE SAs adequately argue why they propose amending the Draft Decision and how this leads to a different conclusion in terms of administrative fine imposed⁸⁵³.
424. The EDPB considers that the PL SA’s reference to the increase of the administrative fine in connection to the establishment of the infringement of Article 6(1) GDPR⁸⁵⁴ as not being sufficiently detailed and articulated to be considered as ‘reasoned’ for the purposes of meeting the requirements set by Article 4(24) GDPR, in the absence of legal or factual arguments that would justify including this specific corrective measure in the Draft Decision for this proposed additional infringement⁸⁵⁵. Therefore, the EDPB does not consider this aspect of the PL SA’s objection to be relevant and

⁸⁴⁸ Meta IE Article 65 Submissions, p. 80.

⁸⁴⁹ AT SA Objection, p. 11.

⁸⁵⁰ Meta IE Article 65 Submissions, p. 111-112.

⁸⁵¹ EDPB Guidelines on RRO, paragraph 17.

⁸⁵² AT SA Objection, p. 11-12 in conjunction with p. 7-8 (on the infringement of Art. 6(1)(b) GDPR and the requirement to make use of corrective powers) and with FR SA Objection, paragraph 46, 48 and 53 in conjunction with paragraph 33.

⁸⁵³ The AT and SE SAs argue the LSA should have found an infringement of Art. 6(1)(b) GDPR and should have properly reflected this finding in the administrative fine, see AT SA Objection, p. 11-12 and SE SA Objection, p. 4. The DE SA argues that a fine should have been included following a finding of infringement of Art. 5(1), 6(1) and 9(1) GDPR to ensure an effective, proportionate and dissuasive fine is imposed taking into account the facts of the case, see DE SAs Objection, p. 17-20. The FR SA argues the administrative fine should be increased to reflect the breaches of Art. 6 and 9 GDPR, see FR SA Objection, paragraph 46 and 48. The NO SA argues that a fine should have been included following a finding of infringement of Art. 6(1)(b) GDPR, see NO SA Objection, p. 8-11.

⁸⁵⁴ PL SA Objection, p. 4.

⁸⁵⁵ Meta IE argues the PL SA’s objection is “vague regarding the criteria for calculation of the fine proposed for the alleged additional infringement of Article 6(1) GDPR”. Meta IE Article 65 Submissions, p. 106.

reasoned, without prejudice to the analysis of the admissibility of the other aspects of this objection carried out above.

425. In terms of risks, Meta IE claims the Draft Decision does not pose any risk, let alone a significant risk to fundamental rights and argues the objections of the AT⁸⁵⁶, DE⁸⁵⁷, FR⁸⁵⁸, NO⁸⁵⁹ and SE⁸⁶⁰ SAs fail to demonstrate the contrary, as required.
426. Meta IE dismisses the concerns the FR, NO, and SE SAs articulate about the precedent the Draft Decision sets in terms of use of corrective powers in terms of general deterrent. Meta IE claims a significant risk should be demonstrated in the context of the case at hand, dismissing the FR SA's concerns about *"reducing the authorities' coercive power"*⁸⁶¹. In this context, Meta IE argues the NO and SE SA's objections rest on unsubstantiated potential future behaviour of controllers, which could only be an indirect and remote risk⁸⁶². The EDPB notes that any risk assessment addresses future outcomes, which are to some degree uncertain. Contrary to Meta IE's view⁸⁶³, the objections reflect specifically on Meta IE's future approach in the event the Draft Decision is adopted as it stands and go beyond providing *"generalised assertions regarding notional controllers knowingly breaching GDPR for economic benefit"*⁸⁶⁴.
427. Meta IE further considers the NO SA's objection lacking because *"not every infringement carries a concrete, significant risk to fundamental rights and freedoms"*⁸⁶⁵. In the same vein, Meta IE dismisses the concerns put forward by the AT SA, because *"not every disagreement on a provision of the GDPR will necessarily pose a significant risk to fundamental rights and freedoms"*⁸⁶⁶. The EDPB notes these CSAs do not refer to *"any infringement"* or *"any disagreement"*, but specifically refer to a *"lack of legal basis"* and the consequences thereof⁸⁶⁷.

⁸⁵⁶ Meta IE considers the AT SA's objection merely speculative because it asserts *"that there would be a 'lesser protection of data subjects' without actually pointing towards a specific risk to fundamental rights or freedoms's arguments on risk"*. Meta IE Article 65 Submissions, p. 80-81.

⁸⁵⁷ Meta IE essentially argues *"no risks arise from the DPC's in principle finding related to Article 6(1)(b) GDPR"*. Meta IE further dismisses the risk identified by the DE SA on the basis that *"this risk is premised on the misconception that the Draft Decision permits Meta Ireland and others to engage in processing without a lawful basis, which is not correct as made clear from the Draft Decision"*. Meta IE Article 65 Submissions, p. 133. The EDPB fails to see wording by which the DE SA might have suggested it understands the Draft Decision as permission or as a mandate for Meta Ireland to unlawfully process data.

⁸⁵⁸ Meta IE Article 65 Submissions, p. 112.

⁸⁵⁹ Meta IE argues the NO SA *"states without any explanation that the risks would be 'substantial' and 'serious'"*. See Meta IE Article 65 Submissions, p. 92-93.

⁸⁶⁰ Meta IE Article 65 Submissions, p. 86.

⁸⁶¹ In response to the FR SA. See Meta IE Article 65 Submissions, p. 113.

⁸⁶² Meta IE Article 65 Submissions, p. 86-87 (SE SA), p. 92 (NO SA). 134.160. Meta IE also reiterates its argument that *"the Draft Decision does not provide a mandate for future controllers to breach the GDPR"* (Meta IE Article 65 Submissions, p. 87), a line of reasoning the EDPB does not find in the SE SAs objection and in any case concerns a different topic.

⁸⁶³ Meta IE Article 65 Submissions, p. 86-87 (SE SA).

⁸⁶⁴ Meta IE Article 65 Submissions, p. 86-87 (SE SA). See NO SA Objection, p. 10, SE SA Objection, p. 5, PL SA Objection, p. 5.

⁸⁶⁵ Meta IE Article 65 Submissions, p. 92.

⁸⁶⁶ Meta IE Article 65 Submissions, p. 80-81.

⁸⁶⁷ AT SA Objection, p. 11. NO SA Objection, p. 10.

428. The EDPB finds that the AT, DE, FR, NO, and SE SAs articulate an adverse effect on the rights and freedoms of data subjects if the Draft Decision is left unchanged, by referring to a failure to guarantee a high level of protection in the EU for the rights and interests of the individuals⁸⁶⁸.
429. Therefore, the EDPB considers the AT, DE, FR, NO, and SE SAs objections concerning the imposition of a fine for the alleged additional infringements of Article 6/6(1)(b) GDPR and/or Article 9 GDPR to be **reasoned**.

430. With respect to the objection raised by the IT SA concerning the imposition of an administrative fine for the infringement of the fairness principle enshrined in Article 5(1)(a), the EDPB finds that it stands in connection with the substance of the Draft Decision, as it concerns the imposition of a corrective measure for an additional infringement, which would be found as a consequence of incorporating the finding put forward by the objection. Clearly, the decision on the merits of the demand to take corrective measures for a proposed additional infringement is affected by the EDPB's decision on whether to instruct the LSA to include an additional infringement.
431. If followed, the IT SA's objection sets out how it would lead to a different conclusion in terms of corrective measures imposed⁸⁶⁹. Taking note of Meta IE's position⁸⁷⁰, the EDPB finds the objections raised by the IT SA to be **relevant**.
432. Meta IE argues the IT SA's objection is too brief to be considered sufficiently reasoned, adding that it is not possible to identify the legal arguments the IT SA wishes to put forward in respect of the fine⁸⁷¹. The EDPB finds that the IT SA adequately argues why they propose amending the Draft Decision and how this leads to a different conclusion in terms of administrative fine imposed⁸⁷².
433. Meta IE argues the objection of the IT SA fails to demonstrate the risk posed by the Draft Decision, as required⁸⁷³ and, in doing so, Meta IE dismisses the concerns articulated by the IT SA on the precedent the Draft Decision sets⁸⁷⁴.
434. The EDPB finds that the IT SA articulates an adverse effect on the rights and freedoms of data subjects if the Draft Decision is left unchanged, by referring to a failure to guarantee a high level of protection in the EU for the rights and interests of the individuals⁸⁷⁵.

⁸⁶⁸ AT SA Objection, p. 11-12; DE SAs Objection, p. 17 and 20; FR SA Objection, paragraphs 50-51; NO SA Objection, p. 10-11; SE SA Objection, p. 5. See also EDPB Guidelines on RRO, paragraph 37.

⁸⁶⁹ IT SA Objection, p.9-12.

⁸⁷⁰ Meta IE argues that the LSA has sole discretion to determine which corrective measures are appropriate, see Meta IE Article 65 Submissions, p. 123. The EDPB responds to this argument above (Section 8.4.2, paragraphs 275 - 277 as well as footnote 634).

⁸⁷¹ Meta IE Article 65 Submissions, p. 124.

⁸⁷² The IT SA argues that the finding of such infringement "*should result into the imposition of the relevant administrative fine as per Article 83(5)(a) GDPR*" as far as "*the infringement of the fairness principle in addition to the transparency one [...] should result into increasing the amount of the said fine substantially by having regard to the requirement that each fine should be proportionate and dissuasive. Indeed, the gravity of the infringement would be factually compounded*", see IT SA Objection, p. 11, paragraph 3.

⁸⁷³ Meta IE Article 65 Submissions, p. 125

⁸⁷⁴ Meta IE Article 65 Submissions, p. 125. On this, the EDPB has set out its position above (see paragraphs 345 - 346).

⁸⁷⁵ IT SA Objection, paragraph 3 on p. 12.

435. Therefore, the EDPB considers the IT SA's objection concerning the imposition of a fine for the additional infringement of the principle of fairness enshrined in Article 5(1)(a) GDPR to be **reasoned**.

436. The EDPB recalls its analysis of whether the objection raised by the IT SA in respect of the proposed additional infringements of Article 5(1)(b) and 5(1)(c) GDPR meets the threshold set by Article 4(24) GDPR (see Section 7.4.1 above). In light of the conclusion that such objection is not relevant and reasoned, the EDPB does not need to further examine this linked objection.

9.2.4.2 Assessment on the merits

437. In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters that are the subject of the relevant and reasoned objections, in particular whether the envisaged action in relation to the controller or processor complies with the GDPR.

438. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines⁸⁷⁶ and 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)⁸⁷⁷. The EDPB responds above to Meta IE's position that the LSA has sole discretion to determine which corrective measures are appropriate (see Section 8.4.2, paragraphs 275 - 277 as well as footnote 634).

9.2.4.2.1 Assessment of whether an administrative fine should be imposed for the infringement of Article 6(1) GDPR

439. The EDPB recalls its conclusion in this Binding Decision on the infringement of Article 6(1) GDPR⁸⁷⁸ and that the objections raised by the AT, DE, FR, NO and SE SAs found to be relevant and reasoned requested the IE SA to exercise its power to impose an administrative fine⁸⁷⁹.

440. The EDPB takes note of Meta IE's views that, even if an infringement is found, no additional fine is warranted⁸⁸⁰. Meta IE argues that the *"nature of the infringement cannot be regarded as serious in circumstances where Meta Ireland has in good faith relied on a legal basis openly"* and *"users have been on notice of such reliance and continued to use the Facebook Service without any harm or detriment being suffered (and none identified by the CSAs or the DPC) over and above what is alleged in respect of the transparency infringements"*⁸⁸¹

441. 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 one⁸⁸². In the case at hand, however,

⁸⁷⁶ 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"*). See also paragraph 351 above.

⁸⁷⁷ EDPB Guidelines on Administrative Fines, p. 6. See also paragraph 351 above.

⁸⁷⁸ Section 4.4.2 of this Binding Decision.

⁸⁷⁹ Paragraph 81 of this Binding Decision.

⁸⁸⁰ Meta IE Article 65 Submissions, paragraph 8.4.

⁸⁸¹ Meta IE Article 65 Submissions, paragraph 8.4.

⁸⁸² EDPB Guidelines on Administrative Fines, p. 6 (*"Like all corrective measures in general, 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. The assessment of what is effective, proportional and dissuasive in each case will have to also reflect the objective pursued by the corrective measure chosen, that is either to re-establish compliance with the rules, or to punish unlawful*

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 protection⁸⁸³.

442. 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)

443. As mentioned above and outlined below⁸⁸⁴, the **nature and gravity of the infringement** clearly tip the balance in favour of imposing an administrative fine.
444. 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 IE] processes a variety of data in order to serve users personalised advertisements, tailor their 'News Feed', and to provide feedback to advertising partners on the popularity of particular advertisements. The processing is central to and essential to the business model offered"⁸⁸⁵.
445. 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**⁸⁸⁶ and that the impact on them has to be considered.
446. 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) 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), a risk of damage caused to data subjects is, in such circumstances, consubstantial with the finding of the infringement itself.

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

447. 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 factor⁸⁸⁷.

behaviour (or both)"), p. 7 ("The Regulation requires assessment of each case individually"; "Fines are an important tool that supervisory authorities should use in appropriate circumstances. The supervisory authorities are encouraged to use a considered and balanced approach in their use of corrective measures, in order to achieve both an effective and dissuasive as well as a proportionate reaction to the breach. The point is to not qualify the fines as last resort, nor to shy away from issuing fines, but on the other hand not to use them in such a way which would devalue their effectiveness as a tool.").

⁸⁸³ Art. 8(2), EU Charter of Fundamental Rights. See NO SA objection, p. 8 - 9.

⁸⁸⁴ In particular, Section 4.4.2 of this Binding Decision as well as paragraphs 439, 444 - 446.

⁸⁸⁵ Draft Decision, paragraphs 9.14.

⁸⁸⁶ Draft Decision, paragraph 9.15 (referring to "265 million monthly active users in the EEA") and 9.17 (adding that this amounts to roughly 50% of the population). This aspect was also highlighted by the objections raised by the NO SA and DE SAs.

⁸⁸⁷ SE SA Objection, p. 4.

448. 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*"⁸⁸⁸. 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.
449. 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 act⁸⁸⁹. By contrast, an infringement is "*unintentional*" when there was a breach of the duty of care, without having intentionally caused the infringement.
450. 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 case⁸⁹⁰. 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 infringement⁸⁹¹. This provides an indication that non-compliance 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.
451. The SE SA argues that Meta IE "has continued to rely on Article 6(1)(b) for the processing, despite the aforementioned 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] – 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."
452. The EDPB recalls that even prior to the adoption Guidelines 2/2019, 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) 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*

⁸⁸⁸ Meta IE Article 65 Submissions, paragraph 8.25 and Annex 1, p. 86 and p. 134.

⁸⁸⁹ The main elements to be taken into account in this regard were already established in the EDPB Guidelines on Administrative Fines, endorsed by the EDPB. The EDPB Guidelines on calculation of fines rely heavily on the EDPB Guidelines on Administrative Fines in this respect. The EDPB Guidelines on calculation of fines, quoting the EDPB Guidelines on Administrative Fines, refer to the fact that "*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*".

⁸⁹⁰ EDPB Guidelines on calculation of fines, paragraph 57 and EDPB Guidelines on Administrative Fines, p. 12.

⁸⁹¹ The EDPB Guidelines on calculation of fines, paragraph 56 (Example 4) quote the EDPB Guidelines on Administrative Fines, which mention, among the circumstances indicative of negligence, "*failure to adopt policies (rather than simply failure to apply them)*".

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”⁸⁹².

453. 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.
454. 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 intentionality⁸⁹³. 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 intentionality⁸⁹⁴.
455. 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*”⁸⁹⁵. In this regard, 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 data⁸⁹⁶: this does not, however, per se change the nature of the infringement from negligent to intentional.
456. 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 Facebook was aware of the questionable legality of that basis and tried to conceal the infringement to avoid scrutiny by supervisory authorities and data subjects”⁸⁹⁷.
457. The EDPB considers the timing of the changes made by Meta IE to its Facebook Terms of Service 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,

⁸⁹² WP29 Opinion 06/2014 on the notion of legitimate interests, p. 16-17.

⁸⁹³ EDPB Guidelines on calculation of fines, paragraph 56, and EDPB Guidelines on Administrative Fines, p. 11.

⁸⁹⁴ See EDPB Guidelines on calculation of fines, paragraphs 56 and 57, and EDPB Guidelines on Administrative Fines, p. 12.

⁸⁹⁵ Judgement of the Court of Justice of 3 June 2008, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312), paragraph 77.

⁸⁹⁶ Binding Decision 01/2020, adopted on 9 November 2020, paragraph 195.

⁸⁹⁷ SE SA Objection, p. 4.

the combination of the timing of the change of legal basis with the lack of transparency is not sufficient to indicate intention either.

458. 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.
459. Therefore, the EDPB considers that the arguments put forward by the SE SAs 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.
460. 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 GDPR⁸⁹⁸.
461. 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 Guidelines 2/2019 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 paragraphs 452 - 453 above), which mean Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR, 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)

462. 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 regard to the transparency infringements⁸⁹⁹.

The manner in which the infringement became known (Article 83(2)(h) GDPR)

463. The DE SAs identify an aggravating factor in the fact that the "infringement became known by a complaint of a data subject, not by chance or report by the controller itself"⁹⁰⁰.
464. The EDPB considers that, as a rule, the circumstance that the infringement became known to the LSA by way of a complaint should be considered neutral⁹⁰¹. The DE SAs do not put forward reasons that would justify a departure from the rule in the present case.
465. Therefore, the EDPB is of the view that the Draft Decision does not need to include this element as an aggravating or mitigating factor.

⁸⁹⁸ See Binding Decision 01/2020, paragraph 195.

⁸⁹⁹ Draft Decision, paragraphs 9.32 - 9.33.

⁹⁰⁰ DE SAs Objection, p. 19.

⁹⁰¹ EDPB Guidelines on calculation of fines, paragraph 99. The EDPB Guidelines on Administrative Fines (p. 15) do not identify this element as being, as a rule, an aggravating element.

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

466. The DE SAs and SE SA argue 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 Facebook⁹⁰². The DE SAs engaged in a detailed calculation to justify their estimation of the benefit, although acknowledging it was based on assumptions⁹⁰³. 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 Facebook 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 Facebook pursuant to personal advertisement*”⁹⁰⁴.
467. The EDPB recalls 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 GDPR⁹⁰⁵.
468. 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.
469. Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionally 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.

The profitability of the undertaking - other factor (Article 83(2)(k) GDPR)

470. For the reasons stated above (paragraphs 378 - 381), the EDPB is of the view that the Draft Decision does not need to include this element as aggravating or mitigating factor as put forward by the DE SAs⁹⁰⁶.

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

471. 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 FIL. The algorithms may have contributed to giving FIL a competitive advantage vis-à-vis its competitors”⁹⁰⁷.
472. 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 GDPR⁹⁰⁸. 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

⁹⁰² DE SAs Objection, p. 19 in conjunction with p. 2-10; SE SA Objection, p. 4.

⁹⁰³ DE SAs Objection, p. 19.

⁹⁰⁴ SE SA Objection, p. 4.

⁹⁰⁵ EDPB Guidelines on calculation of fines, paragraph 110. See also paragraphs 370 - 377.

⁹⁰⁶ DE SAs Objection, p. 19.

⁹⁰⁷ NO SA Objection, p. 9

⁹⁰⁸ EDPB Guidelines on calculation of fines, paragraph 109. See also paragraphs 367-369.

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.

* * *

473. 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) GDPR⁹⁰⁹. 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.

9.2.4.2.2 Assessment of whether an administrative fine should be imposed for the infringement of the fairness principle under Article 5(1)(a) GDPR

474. The EDPB recalls its conclusion in this Binding Decision on the infringement by Meta IE of the fairness principle under Article 5(1)(a) GDPR⁹¹⁰ and that the objection raised by the IT SA, which was found to be relevant and reasoned, requested the IE SA to exercise its power to impose an administrative fine⁹¹¹.
475. The EDPB takes note of Meta IE's view that the IT SA objection is not relevant and reasoned⁹¹² and also notes that Meta IE does not provide further arguments on the content of the IT SA objection in this regard⁹¹³.
476. The EDPB recalls 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 one⁹¹⁴. In the same vein, the EDPB's assessment of Meta IE's compliance with the principle of fairness is carried out by taking into account the specificities of the case, of the particular social networking service at hand and of the processing of personal data carried out, namely for the purpose of online behavioural advertising⁹¹⁵.
477. 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 meaning⁹¹⁶. It underpins the whole data protection framework and plays a key role for securing a balance of power in the controller-data subject relationship⁹¹⁷.
478. Considering the EDPB's findings in Section 6 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 processing⁹¹⁸, as well as the

⁹⁰⁹ Draft Decision, paragraphs 9.45 - 9.51.

⁹¹⁰ Section 6.4.2 of this Binding Decision.

⁹¹¹ Paragraph 214 of this Binding Decision.

⁹¹² See paragraphs 207 - 208 above.

⁹¹³ See paragraphs 212 - 213 above.

⁹¹⁴ See paragraph 441 above.

⁹¹⁵ See paragraph 225 above.

⁹¹⁶ See paragraph 220 above.

⁹¹⁷ See paragraph 223 above.

⁹¹⁸ See paragraphs 222-230 above.

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.

479. 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.

10 BINDING DECISION

480. In light of the above, and in accordance with the task of the EDPB under Article 70(1)(t) GDPR to issue binding decisions pursuant to Article 65 GDPR, the EDPB issues the following Binding Decision in accordance with Article 65(1)(a) GDPR.

481. The EDPB addresses this Binding Decision to the LSA in this case (the IE SA) and to all the CSAs, in accordance with Article 65(2) GDPR.

On the objections concerning whether the LSA should have found an infringement for lack of appropriate legal basis/unlawful data processing

482. The EDPB decides that the objections of the AT, DE, FR, IT, NL, NO, PL, PT and SE SAs regarding Meta IE's reliance on Article 6(1)(b) GDPR in the context of its offering of the Facebook Terms of Service meet the requirements of Article 4(24) GDPR.

483. On the parts of the DE SAs objection requesting the finding of an infringement of Article 5(1)(a) GDPR, and the parts of the DE, IT and NO SAs objections requesting specific corrective measures under Article 58 GDPR for the infringement of Article 6(1) or 6(1)(b) GDPR, namely the imposition of an administrative fine, a ban of the processing of personal data for the purpose of behavioural advertising, an order to delete personal data processed under Article 6(1)(b) GDPR, and an order to identify a valid legal basis for future behavioural advertising or to abstain from such processing activities, the EDPB decides that these parts of their objections do not meet the threshold of Article 4(24) GDPR.

484. 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 Facebook Terms of Service, and to include an infringement of Article 6(1) GDPR, on the basis of the conclusion reached by the EDPB in this Binding Decision.

On the objections concerning whether the LSA's Draft Decision includes sufficient analysis and evidence to conclude that Meta IE is not obliged to rely on consent to process the Complainant's personal data

485. The EDPB decides that the objections of the AT, DE, FR, NL, and PT SAs regarding the LSA's Finding 1 that Meta IE is not legally obliged to rely on consent to process personal data to deliver the Facebook Terms of Service meet the requirements of Article 4(24) GDPR.

486. On the part of the NL SA objection asking the IE SA to include in its Draft Decision the elements concerning the need to rely on consent for the placing of tracking technology on end users devices under ePrivacy legislation, the EDPB decides that this part falls outside the scope of the EDPB's mandate.

487. The EDPB instructs the IE SA to remove from its Draft Decision its conclusion on Finding 1. The EDPB decides that the IE SA shall carry out a new investigation into Meta IE's processing operations in its Facebook service to determine if it processes special categories of personal data (Article 9 GDPR), and complies with the relevant obligations under the GDPR, to the extent that this new investigation complements the findings made in the IE SA's Final Decision adopted on the basis of this Binding Decision, and based on the results of this investigation, issue a new draft decision in accordance with Article 60(3) GDPR.

On the objection concerning the potential additional infringement of the principle of fairness

- 488. The EDPB decides that the objection of the IT SA regarding the infringement by Meta IE of the principle of fairness under Article 5(1)(a) GDPR, meets the requirements of Article 4(24) GDPR.
- 489. The EDPB instructs the IE SA to find in its final decision an additional infringement of the principle of fairness under Article 5(1)(a) GDPR by Meta IE.

On the objection concerning the potential additional infringement of the principles of purpose limitation and data minimisation

- 490. On the objection by the IT SA concerning the possible additional infringements of the principles of purpose limitation and data minimisation under Article 5(1)(b) and (c) GDPR, the EDPB decides this objection does not meet the requirements of Article 4(24) GDPR.

On the objections concerning corrective measures other than administrative fines

- 491. The EDPB decides that the objections of the AT and NL SAs requesting additional and/or alternative specific corrective measures to be imposed meet the requirements of Article 4(24) GDPR.
- 492. On the objection by the PL SA concerning the order to bring processing into compliance with the GDPR, the EDPB decides that this objection does not meet the requirements of Article 4(24) GDPR.
- 493. The EDPB instructs the IE SA to include in its final decision an order for Meta IE to bring its processing of personal data for behavioural advertising purposes in the context of the Facebook service into compliance with Article 6(1) GDPR within three months.
- 494. The EDPB also instructs the LSA to adjust its order to Meta IE to bring its Facebook Data Policy and Terms of Service into compliance with Articles 5(1)(a), 12(1) and 13(1)(c) GDPR within three months, to refer not only to information provided on data processed pursuant to Article 6(1)(b) GDPR, but also to data processed for the purposes of behavioural advertising in the context of Facebook service (to reflect the finding of the EDPB that for this processing the controller cannot rely on Article 6(1)(b) GDPR).

On the objections concerning the determination of the administrative fine for the transparency infringements

- 495. The EDPB decides that the objections of the DE, FR, NL, NO and PL SAs regarding the determination of the administrative fine for the transparency infringements, meet the requirements of Article 4(24) GDPR.
- 496. Regarding the turnover of the undertaking, the EDPB instructs the IE SA to take into consideration the total turnover of all the entities composing the single undertaking (i.e. consolidated turnover of the group headed by Meta Platforms, Inc.) for the financial year preceding the date of the final decision.
- 497. On the number of data subjects affected (Article 83(2)(a) GDPR), the EDPB finds that the IE SA is not required to amend its Draft Decision in this regard.
- 498. Concerning any action taken by the controller to mitigate the damage suffered by data subjects (Article 83(2)(c) GDPR), the EDPB finds the IE SA does not provide sufficient justification for the mitigating factor identified, and instructs the IE SA to modify its Draft Decision on this matter by considering this criterion as neither aggravating nor mitigating.

499. Regarding the financial benefit gained from the infringements (Article 83(2)(k) GDPR), the EDPB instructs the IE SA to ascertain if further estimation of the financial benefit from the infringement of transparency obligations is possible in this case. Insofar as further estimation of the financial benefit from the infringement is possible in this case and 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.
500. Concerning the relevance of the profit of the undertaking (Article 83(2)(k) GDPR), the EDPB finds that in the present case the IE SA does not have to amend its Draft Decision to additionally consider the annual profit of the undertaking pursuant to Article 83 GDPR.
501. The EDPB 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, as appropriate, to ensure the fine is effective, proportionate and dissuasive in accordance with Article 83(1) GDPR.
502. 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.

On the objections concerning the imposition of an administrative fine for the lack of legal basis

503. The EDPB decides that the objections of the AT, DE, FR, NO, and SE SAs regarding the imposition of an administrative fine for the infringement of Article 6(1) or Article 6(1)(b) GDPR meet the requirements of Article 4(24) GDPR.
504. The EDPB decides that the relevant parts of the objections of the IT and PL SAs specifically relating to an administrative fine for the lack of legal basis do not meet the threshold of Article 4(24) GDPR.
505. In relation to intentionality under Article 83(2)(b) GDPR, the EDPB considers that the arguments put forward by the SE SA in their objection do not contain sufficient objective elements to demonstrate the intentionality of the behaviour of Meta IE.
506. Concerning the manner in which the infringement became known (Article 83(2)(h) GDPR), the EDPB decides the IE SA has no cause to amend the Draft Decision.
507. Regarding the possible financial benefit obtained from the infringement as well as the competitive advantage (Article 83(2)(k) GDPR), the EDPB instructs the IE SA to ascertain if an estimation of the financial benefit from the infringement is possible in this case. Insofar as further estimation of the financial benefit from the infringement is possible in this case and 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.
508. Concerning the relevance of profit of the undertaking (Article 83(2)(k) GDPR), the EDPB finds that in the present case the IE SA does not have to amend its Draft Decision to additionally consider the annual profit of the undertaking pursuant to Article 83 GDPR.
509. The EDPB instructs the IE SA to cover the additional infringement of Article 6(1) GDPR with an administrative fine that is effective, proportionate and dissuasive in accordance with

Article 83(1) GDPR. In determining the fine amount, the IE SA must give due regard to all the applicable factors listed in Article 83(2) GDPR, in particular the nature and gravity of the infringement, the number of data subjects affected and the seriously negligent character of the infringement.

On the objection concerning the imposition of an administrative fine for the infringement of the fairness principle under Article 5(1)(a) GDPR

510. The EDPB decides that the objection of the IT SA regarding the imposition of an administrative fine for the infringement of Article 5(1)(a) GDPR meets the requirements of Article 4(24) GDPR.
511. The EDPB instructs the IE SA to factor the additional infringement of the principle of fairness enshrined in Article 5(1)(a) GDPR into its adoption of appropriate corrective measures. In this respect, the IE SA is instructed to take due account of this infringement 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.

On the objection concerning the imposition of an administrative fine for the infringement of Article 5(1)(b) and (c) GDPR

512. The EDPB decides that it does not need to examine the objection of the IT SA regarding the imposition of an administrative fine for the infringement of Article 5(1)(b) and (c) GDPR.

11 FINAL REMARKS

513. This Binding Decision is addressed to the IE SA and the CSAs. The IE SA shall adopt its final decision on the basis of this Binding Decision pursuant to Article 65(6) GDPR.
514. Regarding the objections deemed not to meet the requirements stipulated by Article 4(24) GDPR, the EDPB does not take any position on the merit of any substantial issues raised therein. The EDPB reiterates that its current decision is without any prejudice to any assessments the EDPB may be called upon to make in other cases, including with the same parties, taking into account the contents of the relevant draft decision and the objections raised by the CSAs.
515. According to Article 65(6) GDPR, the IE SA shall adopt its final decision on the basis of the Binding Decision without undue delay and at the latest by one month after the Board has notified its Binding Decision.
516. The IE SA shall inform the Board of the date when its final decision is notified to the controller or the processor⁹¹⁹. This Binding Decision will be made public pursuant to Article 65(5) GDPR without delay after the IE SA has notified its final decision to the controller⁹²⁰.

⁹¹⁹ Article 65(6) GDPR.

⁹²⁰ Article 65(5) and (6) GDPR.

517. The IE SA will communicate its final decision to the Board⁹²¹. Pursuant to Article 70(1)(y) GDPR, the IE SA's final decision communicated to the EDPB will be included in the register of decisions that have been subject to the consistency mechanism.

For the European Data Protection Board

The Chair

(Andrea Jelinek)

⁹²¹ Article 60(7) GDPR.