

Binding decision of the Board (Art. 65)



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

Adopted on 5 December 2022

Table of contents

1	Summary of the dispute.....	5
2	The right to good administration.....	9
3	Conditions for adopting a binding decision	9
3.1	Objection(s) expressed by several CSA(s) in relation to a Draft Decision	9
3.2	The IE SA finds the objections to the Draft Decision not relevant or reasoned and does not follow them.....	10
3.3	Admissibility of the case.....	10
3.4	Structure of the Binding Decision	11
4	On whether the LSA should have found an infringement for lack of appropriate legal basis	11
4.1	Analysis by the LSA in the Draft Decision	11
4.2	Summary of the objections raised by the CSAs	14
4.3	Position of the LSA on the objections	19
4.4	Assessment of the EDPB.....	20
4.4.1	Assessment of whether the objections were relevant and reasoned.....	20
4.4.2	Assessment on the merits	24
5	On whether the LSA’s Draft Decision includes enough analysis and evidence to conclude that Meta IE is not obliged to rely on consent to process the complainant’s personal data.....	39
5.1	Analysis by the LSA in the Draft Decision	39
5.2	Summary of the objections raised by the CSAs	40
5.3	Position of the LSA on the objections	44
5.4	Assessment of the EDPB.....	45
5.4.1	Assessment of whether the objections were relevant and reasoned.....	45
5.4.2	Assessment on the merits	48
6	On the potential additional infringement of the principle of fairness	54
6.1	Analysis by the LSA in the Draft Decision	54
6.2	Summary of the objection raised by the CSA	55
6.3	Position of the LSA on the objection	56
6.4	Analysis of the EDPB.....	56
6.4.1	Assessment of whether the objection was relevant and reasoned.....	56
6.4.2	Assessment on the merits	58
7	On the potential additional infringement of the principles of purpose limitation and data minimisation	63
7.1	Analysis by the LSA in the Draft Decision	63

7.2	Summary of the objection raised by the CSAs.....	63
7.3	Position of the LSA on the objection	64
7.4	Analysis of the EDPB.....	64
7.4.1	Assessment of whether the objection was relevant and reasoned.....	64
8	On corrective measures other than administrative fines.....	66
8.1	Analysis by the LSA in the Draft Decision	66
8.2	Summary of the objections raised by the CSAs	67
8.3	Position of the LSA on the objections	69
8.4	Assessment of the EDPB.....	69
8.4.1	Assessment of whether the objections were relevant and reasoned.....	69
8.4.2	Assessment on the merits	71
9	On the determination of the administrative fine.....	77
9.1	On the determination of the administrative fine for the transparency infringements.....	77
9.1.1	Analysis by the LSA in the Draft Decision	77
9.1.2	Summary of the objections raised by the CSAs	82
9.1.3	Position of the LSA on the objections	85
9.1.4	Assessment of the EDPB.....	86
9.2	On the determination of an administrative fine for further infringements	95
9.2.1	Analysis by the LSA in the Draft Decision	95
9.2.2	Summary of the objections raised by the CSAs	96
9.2.3	Position of the LSA on the objections	101
9.2.4	Analysis of the EDPB.....	101
10	Binding Decision.....	113
11	Final remarks.....	116

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 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 relevant and reasoned objection 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**”; “Agencia Española de Protección de Datos”, hereinafter the “**ES SA**”; “Office of the Data Protection Ombudsman”, hereinafter the “**FI SA**”; “Commission Nationale de l’Informatique et des Libertés”, hereinafter the “**FR SA**”; “Hungarian National Authority for Data Protection and Freedom of Information, hereinafter “**HU SA**”; “Garante per la protezione dei dati personali”, hereinafter the “**IT SA**”; “Autoriteit Persoonsgegevens”, hereinafter the “**NL SA**”; “Datatilsynet”, hereinafter the “**NO 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 Instagram social media processing activities (hereinafter “**Instagram 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 Belgian supervisory authority (“Autorité de protection des données”), hereinafter the “**BE SA**” by a data subject who requested the non-profit NOYB - European Center for Digital Rights (hereinafter, “**NOYB**”) to represent them 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 infringements of “*all the particular requirements set out in Article 4(11), Article 6(1)(a), Article 7 and/or Article 9(2)(a) of the GDPR*”, by arguing that the controller relied on a “*forced consent*”, as well as alleging misrepresentations of the controller with regard to consent and the legal basis for the processing, and consequently, an infringement of Article 5(1)(a) GDPR⁵. The complaint articulated its requests into a request to investigate, and a request to impose corrective measures⁶.

⁴ Objections raised on behalf of the Hamburg Commissioner for Data Protection and Freedom of Information, 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, paragraphs 2.2.5. and 2.3.2.

⁶ Within its request to investigate in paragraph 3.1 of the Complaint, the Complainant requested that a full investigation be made to determine “*which processing operations the controller engages in, in relation to 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 [them]*”. As regards the request to

4. On 31 May 2018, the BE SA transferred the complaint to the IE SA. The IE SA stated in its “Schedule to the Draft Decision”⁷ 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 Instagram 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 - 07.04.2021	Inquiry Report stage: <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.
23.12.2021	The IE SA issued a Preliminary Draft Decision (hereinafter “ the Preliminary Draft Decision ”) (including a Schedule) to Meta IE and to the Complainant.
04.02.2022	The Complainant provided submissions on the Preliminary Draft Decision to the IE SA (“ Complainant’s Preliminary Draft Submissions dated 4 February 2022 ” ⁸). Meta IE made submissions on the Preliminary Draft Decision to the IE SA (“ Meta IE’s Preliminary Draft Submissions ”).
01.04.2022	The IE SA shared its Draft Decision with the CSAs in accordance with Article 60(3) GDPR.

impose corrective measures, more specifically, the complaint requested in paragraph 3.2 that the SA “*stop any processing operations that are based on invalid consent by the data subject*”, and in paragraph 3.3 that an “*effective, proportionate and dissuasive fine*” be imposed.

⁷ IE SA Schedule to the Draft Decision of 1 April 2022 in the matter of TSA (through NOYB) v Meta Platforms Ltd (formerly Facebook Ireland Limited) in respect of the Instagram Service, paragraphs 58- 72.

⁸ This document is mistakenly dated “11.06.2020”.

Between 28 and 29.04.2022	Several CSAs (AT, DE, ES, FI, FR, HU, IT, NL, NO, and SE SAs) raised objections in accordance with Article 60(4) GDPR.
01.07.2022	The IE SA issued a Composite Response setting out its replies to such objections and shared it with the CSAs (hereinafter, “ Composite 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 Memorandum, the CSAs intended to maintain their objections.
	In light of the arguments put forward by the IE SA in the Composite Response, the DE, ES, FI, HU, NL, NO, and SE SAs), confirmed to the IE SA that they maintain their remaining objections ⁹ .
08.07.2022	The IE SA invited Meta IE to exercise its right to be heard in respect of the objections (and comments) that the 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.
09.08.2022	Meta IE furnished the requested submissions (“ Meta IE Article 65 Submissions of 9 August 2022 ”).
11.08.2022	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**”)¹⁰ on 11 August 2022 in accordance with Article 60(4) GDPR.
7. The EDPB Secretariat assessed the completeness of the file on behalf of the Chair of the EDPB in line with Article 11(2) EDPB RoP in order to ensure that all the necessary documents were included in the file.
8. 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 SA¹¹. The request

⁹ Response of the DE SAs to Composite Response dated 11 July 2022; Response of the ES SA to IE SA Composite Response dated 8 July 2022; Response of the FI SA to Composite Response dated 8 July 2022; Response of the HU SA to Composite Response dated 7 July 2022; Response of the NL SA to Composite Response dated 5 July 2022; Response of the NO SA to Composite Response dated 11 July 2022; Response of the SE SA to Composite Response dated 8 July 2022

¹⁰ The Internal Market Information (IMI) is the information and communication system mentioned in Article 17 of the EDPB Rules of Procedure.

¹¹ The following documents were requested:

Letter of DPC to NOYB of 23/11/2018 outlining the scope of the inquiry.

NOYB's reply to DPC of 03/12/2018 outlining procedural concerns

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.

9. The IE SA declined the request, as it considered 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) of the EDPB RoP, they would provide documents the Board deems necessary.
10. 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.
11. On 5 October 2022, 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.
12. 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

DPC's reply to NOYB of 16/01/2019

DPC letter to Meta of 30/01/2019 outlining views on the scope;

Meta IE response to DPC of 05/02/2019, raising procedural questions;

DPC's response to Meta of 08/02/2019;

Email exchanges between DPC and Meta on 08/02 and 15/02/2019 regarding scope and procedural issues raised by NOYB;

Meta IE's Submissions of 22/02/2019 including Meta Submission of 28/09/2018 (marked up copy, of which parts Meta considered out of scope of complaint);

DPC letter to NOYB of 28/03/2019 which included an update on the scope;

Letter from NOYB to the IE SA dated 19 April 2019 which included further submissions on the scope

NOYB's letter to DPC of 24/02/2020 raising procedural issues;

DPC's reply to NOYB of 23/03/2020;

Draft Inquiry report of 20/05/2020;

DPC letter to NOYB of 20/05/2020;

NOYB's response to DPC of 03/06/2020;

NOYB submissions on the Draft Inquiry Report of 19/08/2020;

Meta IE's Submissions on the Draft Inquiry Report of 22/06/2020;

Final Inquiry report of 18 January 2021;

NOYB's Submissions on the Preliminary Draft Decision in IN-18-08-05 dated 11 June 2021;

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

2 THE RIGHT TO GOOD ADMINISTRATION

13. 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) GDPR¹².
14. 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 the 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 containing the matters of facts and law used by the EDPB to take its decision had been previously shared with Meta IE.
15. 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 observations¹³, which have been shared with the EDPB by the LSA.
16. Considering that Meta IE has been already heard by the IE SA on all matters of facts and of law addressed by the EDPB in its decision, the EDPB is satisfied that the Article 41 of the EU Charter of Fundamental Rights has been respected.
17. 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).

3 CONDITIONS FOR ADOPTING A BINDING DECISION

18. 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) GDPR¹⁴.

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

19. The EDPB notes that several CSAs (AT, DE, ES, FI, FR, HU, IT, NL, NO and SE SAs) raised objections to the Draft Decision via IMI. The objections were raised pursuant to Article 60(4) GDPR.

¹² EDPB Guidelines 3/2021 on the application of Article 65(1)(a) GDPR, adopted on 13 April 2021 (version for public consultation) (hereinafter, “EDPB Guidelines on Art. 65(1)(a)”), paragraphs 94-108.

¹³ In particular, Meta IE Preliminary Draft Submissions dated 4 February 2022, Meta IE Article 65 Submissions dated 9 August 2022.

¹⁴ According to Art. 65(1)(a) 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.

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

20. On 1 July 2022, the IE SA provided to the CSAs an analysis of the objections raised by the CSAs in the Composite Response.
21. 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 below¹⁵.

3.3 Admissibility of the case

22. The case at issue fulfils the elements listed by Article 65(1)(a) GDPR, since several CSAs raised objections to a draft decision of the LSA (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.
23. The EDPB takes note of Meta IE’s position that the current Article 65 GDPR dispute resolution should be suspended due to pending preliminary ruling proceedings before the Court of Justice of the EU (hereinafter, “**CJEU**”)¹⁶. Meta IE refers in particular to cases C-252/21¹⁷ and C-446/21¹⁸. 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 EDPB¹⁹. Also, the EDPB takes into consideration the data 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 cases²⁰.
24. 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

¹⁵ The IE SA letter to the EDPB Secretariat dated 11 August 2022.

¹⁶ Meta IE Article 65 Submissions, paragraphs 3.4 - 3.8.

¹⁷ Request for a preliminary ruling of 22 April 2021, Meta Platforms and Others, C-252/21 (hereinafter ‘C-252/21 Oberlandesgericht Düsseldorf request’).

¹⁸ Request for a preliminary ruling of 20 July 2021, Schrems, C-446/21 (hereinafter ‘C-446/21 Austrian Oberster Gerichtshof request’).

¹⁹ C-234/89 Judgement of the Court of Justice of 28 February 1991, Delimitis, C-234/89, ECLI:EU:C:1991:91; C-344/98 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.

²⁰ 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 C-453/00 Judgement of the Court of Justice of 12 January 2004, Kühne & Heitz NV, ECLI:EU:C:2004:17.

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 GDPR ²¹.

25. 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

26. 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 objection²².
27. 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 reasoned²³.

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

4.1 Analysis by the LSA in the Draft Decision

28. 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 activities involved in the provision of its service to users, including behavioural advertising insofar as that forms a core part of the service²⁴. Finding 2 reads “*I find the Complainant’s case is not made out that the GDPR does not permit the reliance by Meta Ireland on 6(1)(b) GDPR in the context of its offering of Terms of Use*”²⁵
29. The IE SA states that it does not have competence to consider substantive issues of contract law and, accordingly, its analysis is limited to the specific contract entered into by the complainant and Meta IE in respect of the Instagram service²⁶.
30. The IE SA understands the complainant’s allegations as²⁷: being that, firstly, they were given a binary choice: i.e. either accept the Instagram Terms of Use and the associated Data Policy by selecting the

²¹ 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.

²² EDPB Guidelines 9/2020 on the concept of relevant and reasoned objection, version 2 adopted on 9 March 2021, (hereinafter, “EDPB Guidelines on RRO”).

²³ See EDPB Guidelines on Art. 65(1)(a), paragraph 63 (“*The EDPB will assess, in relation to each objection raised, whether the objection meets the requirements of Article 4(24) GDPR and, if so, address the merits of the objection in the binding decision.*”)

²⁴ Draft Decision, paragraphs 112 and 115.

²⁵ Draft Decision, Finding 2, p. 40.

²⁶ Draft Decision, paragraph 84.

²⁷ Draft Decision, paragraph 10.

“accept” button, or deleting their Instagram account²⁸, lack of clarity on which specific legal basis Meta IE relies on for each processing operation²⁹, and their concern on Meta IE’s reliance on Article 6(1)(b) to deliver the Instagram Terms of Use³⁰.

31. While the IE SA acknowledges that the EDPB considers in its Guidelines 2/2019³¹ 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) GDPR³², 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) 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 users³³. Further, the IE SA states that while the examples provided in any form of EDPB guidance are helpful and instructive, they are not necessarily conclusive of the position in any specific case and indeed do not purport to be³⁴.
32. 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 EDPB³⁵. 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 contract³⁶. The IE SA is of the view that “*it is not for an authority such as the Commission, tasked with the enforcement of data protection law, to make assessments as to what will or will not make the performance of a contract possible or impossible*” and that the general principles set out in the GDPR and explained by the EDPB in the guidelines must be applied on a case-by-case basis³⁷. 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 question³⁸.
33. The IE SA refers to Meta IE’s position that in the specific context of the Instagram service, personalised advertising may constitute a distinguishing feature of said service which is an “*exact rationale*” and one of the “*essential elements of the Terms of Use*” for which the ordinary user would reasonably expect their personal data to be processed so as to receive the Instagram service as advertised³⁹. Further, the IE SA refers to Meta IE’s submission regarding whether the necessity test encompasses an impossibility threshold, and Meta IE’s argument that were impossibility an aspect of necessity, it

²⁸ Draft Decision, paragraph 11.

²⁹ Draft Decision, paragraph 17.

³⁰ Draft Decision, paragraph 77.

³¹ EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects Version 2.0, adopted on 8 October 2019 (hereinafter, “EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR”).

³² Draft Decision, paragraph 113.

³³ Draft Decision, paragraph 113.

³⁴ Draft Decision, paragraph 108.

³⁵ Draft Decision, paragraphs 107 and 112.

³⁶ Draft Decision, paragraph 107.

³⁷ Draft Decision, paragraph 108.

³⁸ Draft Decision, paragraphs 107-109 and 112.

³⁹ Draft Decision paragraph 109.

would not, in any case operate as a “*blanket prohibition*” on relying on Article (1)(b) GDPR as the legal basis for the processing in this context⁴⁰.

34. The IE SA considers personalised 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 user⁴¹. The IE SA points out that the nature of the service being offered to Instagram users is set out in the Terms of Use which describe the Instagram service as being “*personalised*” and connects users with brands, including by means of providing “*relevant*” advertising and content⁴².
35. The IE SA considers this as the Instagram service is advertised in the Terms of Use as being predicated on personalised advertising, any reasonable user would understand and expect that this is part of the core bargain that is being struck with Meta IE, even if they might prefer that the market would offer them better alternative choices⁴³.
36. The IE SA considers that as personalised advertising forms part of the core bargain struck between Meta Ireland and Instagram users, any processing necessary for the delivery of such advertising is deemed to fall within the scope of Article 6(1)(b) GDPR⁴⁴.
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 delivery of a service based on behavioural advertising of the kind provided for under the contract between Meta IE and Instagram’s users⁴⁵.
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) GDPR⁴⁶.
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 Decision⁴⁷. The IE SA considers that there have been significant failings of transparency in relation to the processing⁴⁸.
40. The IE SA considers that these failings of transparency, having regard to the specific terms of the contract and the nature of the service provided and agreed upon by the parties, do not, in principle prevent Meta IE from relying on Article 6(1)(b) GDPR as a legal basis of the processing of users’ data

⁴⁰ Draft Decision paragraph 109.

⁴¹ Draft Decision, paragraph 104.

⁴² Draft Decision, paragraph 104.

⁴³ Draft Decision, paragraph 105.

⁴⁴ Draft Decision, paragraph 105.

⁴⁵ Draft Decision, paragraph 111.

⁴⁶ Draft Decision, paragraph 114.

⁴⁷ Draft Decision, paragraph 111.

⁴⁸ Draft Decision, p. 71.

necessary for the provision of the Instagram service, including through the provision of behavioural advertising insofar as this forms a core part of that service offered to and accepted by users⁴⁹.

4.2 Summary of the objections raised by the CSAs

41. The AT, DE, ES, FI, FR, HU, NL, NO and SE SAs object to **Finding 2 of the draft decision** and the assessment leading up to it.
42. The AT, ES, FI, HU, NL, NO and SE SAs⁵⁰ consider that, **the IE SA should have found an infringement of Article 6(1)(b) of the GDPR**, in line with the EDPB's interpretation of this provision⁵¹. The DE and FR SAs argue that the IE SA should have found an infringement of Article 6(1) GDPR⁵².
43. The DE SAs, in their objection, further argue that the IE SA should find an infringement of Article 5(1)(a) GDPR and make use of corrective powers of Article 58(2)(f) and (i) GDPR and order to erase the unlawfully processed personal data, impose a ban of the respective processing of data for the purpose of behavioural advertising until a valid legal basis is in place and impose an administrative fine pursuant to Article 83 GDPR⁵³.
44. The FI SA, in its objection, also argues that the finding that Meta IE was not entitled to rely on Article 6(1)(b) GDPR as a legal basis for all the processing operations in the scope of the Instagram Service should lead to the conclusion that corrective powers pursuant to Article 58(2) GDPR must be exercised to bring the processing operations of Meta IE into compliance with the GDPR⁵⁴. Furthermore, the FI SA considers that this additional infringement should be properly reflected in the amount of the administrative fine imposed pursuant to Article 83 GDPR⁵⁵.
45. 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 fine⁵⁶.
46. The HU SA, in its objection, argues that in light of the infringement, the legal consequences of Article 58(2) (d) (order to bring processing operations into compliance) GDPR should be applied, and the controller should be instructed to indicate another alternative legal basis⁵⁷.
47. 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 online behavioural advertising

⁴⁹ Draft Decision, paragraph 113.

⁵⁰ AT SA Objection, pp. 1-7; ES SA Objection pp. 1-3; FI SA Objection pp. 2-7; HU SA Objection pp. 2-4; NL SA Objection, pp. 1-12; NO SA Objection, pp. 1-9; SE SA Objection, pp. 2-4.

⁵¹ EDPB Guidelines 02/2019 on Article 6(1)(b) GDPR.

⁵² DE SAs Objection, pp. 2-7, FR SA Objection, pp.2-7.

⁵³ DE SAs Objection, p. 10.

⁵⁴ FI SA Objection, paragraph 23.

⁵⁵ FI SA Objection, paragraph 26.

⁵⁶ FR SA Objection, paragraph 50.

⁵⁷ HU SA Objection, p. 3.

or abstain from such processing activities and impose an administrative fine against Meta IE for unlawfully processing personal data in the context of online behavioural advertising⁵⁸.

48. The AT, DE, ES, FI, FR, HU, NL, NO and SE SAs put forward several **factual and legal arguments** for the proposed change in legal assessment⁵⁹. Specifically they argue that Meta IE cannot rely on Article 6(1)(b) GDPR as a legal basis to process an Instagram user's data for behavioural advertising.
49. In addition, 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 a definition of "*behavioural advertising*"⁶⁰. The AT SA suggests mentioning also the technical possibilities Meta IE 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 Instagram account⁶¹. The AT SA also suggests including the fact that on 25 May 2018 Meta IE switched its legal basis to process data for behavioural advertising from consent to contractual performance⁶².
50. The DE and NL SAs⁶³ question the **validity of the contract** between Meta IE and the Instagram service's user to ground the said processing on Article 6(1)(b) GDPR in light of the transparency issues identified by the IE SA⁶⁴. 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 services would in the future be based on a contract⁶⁵. 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 it⁶⁶ and considers that "*the established serious lack of transparency on behalf of the controller, leads, at the very least, to a reasonable doubt whether data subjects have indeed been able to enter into a contract with the controller both willingly and sufficiently informed*"⁶⁷. The DE and NL SAs therefore considered that Meta IE's statement that it relies on Article 6(1)(b) GDPR, 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 the performance of a contract as a legal basis⁶⁸.

⁵⁸ NO SA Objection, p. 9.

⁵⁹ AT SA Objection, pp. 3-6; DE SAs Objection, pp. 2-9; ES SA Objection, pp. 1-3; FI SA Objection, pp. 3-7; FR SA Objection, pp. 2-4; HU SA Objection, pp. 2-3; NL SA Objection, pp. 2-6; NO SA Objection, pp. 2-8; SE SA Objection, pp. 2-3.

⁶⁰ AT SA Objection, pp. 6-7; FR SA Objection, paragraph 6.

⁶¹ AT SA Objection, pp. 6-7.

⁶² AT SA Objection, p. 7.

⁶³ DE SAs Objection, p. 3-4; NL SA Objection, pp. 3-5.

⁶⁴ 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) GDPR have been infringed*". The IE SA considered, among other, that "*Meta Ireland have not provided meaningful information as to the processing operation(s) and/or set(s) of operations that occur in the context of the Instagram service, either on basis of Article 6(1)(b) GDPR or any other legal basis. Indeed, I would go so far as to say that it is impossible for the user to identify with any degree of specificity what processing is carried out on what data, on foot of the specified lawful bases, in order to fulfil these objectives*" (Draft Decision, par. 185).

⁶⁵ DE SAs Objection, p. 4.

⁶⁶ NL SA Objection, paragraph 12.

⁶⁷ NL SA Objection, paragraph. 17.

⁶⁸ DE SA Objection, pp. 3-4; NL SA Objection, paragraph 7.

51. The DE 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 Article 6(1)(b) GDPR⁶⁹. Would that not be the case, the assessment of Article 6(1)(b) GDPR would practically be deducted from Supervisory Authorities' tasks provided for in Article 57(1)(a) GDPR⁷⁰. The DE and NL SAs argue that the IE SA should assess whether a valid contract is in place as required under Article 6(1)(b) GDPR⁷¹.
52. Without prejudice to any arguments made on the existence of a valid contract above, the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs are not satisfied by the assessment of necessity in the Draft Decision⁷². They assert that the **data processing for the delivery of personalised advertising is objectively not necessary for the performance of Meta IE's contract with the data subject to deliver the Instagram service and it is not an essential or core element of it**. To highlight the unnecessary of behavioural advertising to perform the contract with the Instagram user, the AT, DE, NL and SE SAs argue that this contract of providing personalised advertisement is a contract between Meta IE and a specific advertiser, in which Meta IE would presumably have this obligation towards the advertisers, yet not towards Instagram users that are not party to this contract⁷³. 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 terms of use⁷⁴. The AT, DE, HU, FI, FR, HU, NO 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 regulations⁷⁵. The DE, FR and HU SAs also cite the EDPB Guidelines 8/2020 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 applicable⁷⁶. The AT, ES and SE SAs argue that advertisements can still be displayed on Instagram using alternative methods to behavioural advertising not involving profiling and tracking⁷⁷. The SE SA adds that some degree of targeting for increased relevance is possible, such as geography, language and context⁷⁸.
53. In addition, the AT, ES, FI, FR, HU, NO and SE SAs argue, also while referring to EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, that the IE SA should have considered the EDPB's argument that behavioural

⁶⁹ DE SAs Objection, p. 3.

⁷⁰ DE SAs Objection, p. 3.

⁷¹ DE SAs Objection, p. 3; NL SA Objection, paragraph 11.

⁷² AT SA Objection, p. 3; DE SAs Objection, pp 4-7 ; ES SA Objection, pp. 1-2 ; FI SA Objection, pp. 3-5 ; FR SA Objection, pp. 3-4 ; HU SA Objection, pp. 1-3 ; NL SA Objection, pp. 4-8 ; NO SA Objection, pp. 5-6 ; SE SA Objection, p. 3.

⁷³ AT SA Objection, p. 4; DE SAs Objection, p. 5 ; NL SA Objection, paragraphs 12 and 19 ; SE SA Objection, p. 3.

⁷⁴ DE SAs Objection, p. 5.

⁷⁵ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR. AT SA Objection, p. 5; DE SAs Objection, pp. 6-7; HU SA Objection, p. 3; FI SA Objection, paragraphs 13 and 16; FR SA Objection, paragraphs 9 and 11; NO SA Objection, pp. 3 and 6-7; SE SA Objection, p. 3.

⁷⁶ EDPB Guidelines 8/2020 on the targeting of social media users, version 2.0, adopted on 13 April 2021, paragraph 49. DE SAs Objection, p. 6 ; FR SA Objection, paragraph 11; HU SA Objection, p. 3.

⁷⁷ AT SA Objection p. 4; ES SA Objection, p. 2; SE SA Objection, p. 3.

⁷⁸ SE SA Objection, p. 3.

advertising cannot be “necessary” within the meaning of Article 6(1)(b) GDPR while a data subject can 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) GDPR⁷⁹.

54. The AT, DE, FR, NO, NL and SE SAs also point out some arguments on **data subjects’ expectations about the processing** of their personal data for personalised advertising as a necessary element of the contract entered into between users and Meta IE⁸⁰. The AT, DE, 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 Instagram Terms of Use⁸¹. The NO SA takes into account how Meta IE markets its Instagram platform towards potential users (“*A simple, fun & creative way to capture, edit & share photos, videos & messages with friends & family*”) and considers that Instagram 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 IE⁸². 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 users⁸³. 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 advertising⁸⁴.
55. 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.
56. The NO SA argues that the IE SA’s interpretation of Article 6(1)(b) 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 them⁸⁵.
57. On the **risks** posed by the Draft Decision, the AT, DE, ES, HU, FI, NL, NO 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 regards to data subjects using the Instagram service⁸⁶.

⁷⁹ See paragraph 52. AT SA Objection, p. 4; ES SA Objection, p.2 ; FI SA Objection, paragraph 19 ; FR SA Objection, paragraph 11; HU SA Objection, p. 3, NO SA Objection, p. 7; SE SA Objection, p. 3.

⁸⁰ AT SA Objection, p. 4; DE SAs Objection p. 5; FR SA Objection, paragraph 9; NLSA Objection, paragraph 19; NO SA Objection, pp. 7-8; SE SA Objection p. 3.

⁸¹ AT SA Objection, p.4; DE SAs Objection, p. 5; NL SA Objection, paragraph 19; SE SA Objection, p. 3.

⁸² NO SA Objection, p. 8.

⁸³ FR SA Objection, paragraph 18; NO SA Objection, p. 8.

⁸⁴ AT SA Objection, p. 4; NLSA Objection, paragraph 12; SE SA Objection, p.3.

⁸⁵ NO SA Objection, p. 5.

⁸⁶ AT SA Objection, p. 6; DE SAs Objection, p. 9; ES SA Objection, p. 3 ; HU SA Objection, p. 4 ; FI SA Objection, paragraphs 31-33; NLSA Objection, paragraph 29; NO SA Objection, p. 8 ; SE SA Objection, p. 5.

58. Specifically, the AT, DE and NO SAs point to the conditions of consent pursuant to Article 7 GDPR as being bypassed⁸⁷. The NL SA considers that the Draft Decision allows Meta IE to engage in online behavioural advertising in a way that bypasses informed consent of data subjects⁸⁸. 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'*⁸⁹. The FI, FR and NO SAs considered that the Draft Decision poses a risk to the fundamental rights and freedoms of the individuals concerned, insofar as using the legal basis of the contract for the processing of the personal data for personalised advertising, would prevent European users of the social network to have control over their data⁹⁰.
59. Further, the AT SA sees the risk materialise as in its view Article 25(2) GDPR (privacy by default) is not applied, *"since Meta Ireland – at least in its contract – declares that behavioural advertising is 'necessary' for the contractual performance"*⁹¹.
60. 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"*⁹². The NL SA considers the Draft Decision lowers the threshold for legality of data processing on the basis of Article 6(1)(b) severely⁹³. 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) GDPR⁹⁴.
61. FR, HU, NL and SE SAs take the view that the Draft Decision, as it stands, sets a dangerous precedent contrary to the GDPR⁹⁵. 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 SAs⁹⁶. Moreover, the AT, DE, FI, HU 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 EEA⁹⁷.
62. The DE SAs specify that the risks concern the complainant in person but it argues that there is also a significant risk as regard the fundamental rights and freedoms of all Meta IE's users in the European Union that their personal data are processed without any legal basis⁹⁸; the FI SA adds that the risks

⁸⁷ AT SA Objection, p. 2 and 5; DE SAs Objection, p. 9; NO SA Objection, p. 4.

⁸⁸ NL SA Objection, paragraph 30.

⁸⁹ NO SA Objection, p. 5.

⁹⁰ FI SA Objection, paragraph 35 ; FR SA Objection, paragraph 34 ; NO SA Objection, p. 8.

⁹¹ AT SA Objection, p. 6;

⁹² DE SAs Objection, p. 9.

⁹³ NL SA Objection, paragraph 30.

⁹⁴ NO SA Objection, pp. 2 and 8;

⁹⁵ FR SA Objection, paragraph 35; HU SA Objection, p. 3 ; NL SA Objection, paragraph 31; SE SA Objection, p. 5.

⁹⁶ FR SA Objection, paragraph 35.

⁹⁷ AT SA Objection, p. 6; DE SAs Objection, p. 9; FI SA Objection, paragraph 34; HU SA Objection, p. 3 ; SE SA Objection, p. 5.

⁹⁸ DE SAs Objection, p. 9.

include fundamental right and freedom of data subjects whose personal data might be processed in the future⁹⁹.

63. Finally, the AT, DE, FI, NL and NO SAs explain that the Draft Decision creates a loophole, allowing Meta IE and any other controllers 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 contract¹⁰⁰.

4.3 Position of the LSA on the objections

64. 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 them¹⁰¹.
65. 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 authorities. It argues that this inference would create a very extensive power for SAs to regulate private law, without an appropriate basis in EU law¹⁰².
66. The IE SA argues that the core or fundamental aspects of the Terms of Use, including behavioural advertising processing, reflects the mutual expectations of the parties on contractual performance. The IE SA contends that a reasonable user would have had sufficient understanding that the Instagram service was provided on the basis of personalised advertising, based also on a “*recognised public awareness*” of behavioural advertising as a form of processing¹⁰³.
67. 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) that relies only on the textual content of the Terms of Use. 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 performance¹⁰⁴.
68. 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 service¹⁰⁵. 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 Instagram Terms of Use) between Instagram and the data subject¹⁰⁶.
69. The IE SA also disagrees with the interpretation of Article 21 GDPR making behavioural advertising optional and not indispensable¹⁰⁷. 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

⁹⁹ FI SA Objection, p. 7.

¹⁰⁰ AT SA Objection, p. 5; DESAs Objection, p. 9; FI SA Objection, paragraph 32; NL SA Objection, paragraphs 30-31; NO SA Objection, p. 2-3 and 7; SE SA Objection, p. 5.

¹⁰¹ Composite Response, paragraphs 51, 57, 77, 85, 88, 95.

¹⁰² Composite Response, paragraph 51.

¹⁰³ Composite Response, paragraphs 72 and 73.

¹⁰⁴ Composite Response, paragraphs 55 and 56.

¹⁰⁵ Composite Response, paragraphs 84.

¹⁰⁶ Composite Response, paragraph 71.

¹⁰⁷ Composite Response, paragraph 74.

parties¹⁰⁸. 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 assessed by reference to hypothetical alternative forms of the Instagram service and that it is not the role of SAs to impose specific business models on controllers¹⁰⁹.

70. The IE SA considers EDPB Guidelines as not binding on supervisory authorities, yet it acknowledges that they should be taken into account¹¹⁰. 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. The 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 measures. 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 Instagram service¹¹¹.
71. 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) GDPR. 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 infringements it proposes for its Draft Decision do not impact its findings on the legal basis, as it considers that the expectations and understanding of the parties on the Terms of Use include personalised advertising¹¹².

4.4 Assessment of the EDPB

4.4.1 Assessment of whether the objections were relevant and reasoned

72. The objections raised by the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs concern “*whether there is an infringement of the GDPR*”¹¹³.
73. 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) GDPR¹¹⁴. Meta IE’s primary argument is that “*it is not open to the EDPB to now decide on the lawfulness of Meta Ireland’s actual processing as the Objections suggest. Such an assessment is not within the scope of the Inquiry as defined by the DPC*”¹¹⁵. In Meta IE’s view, “*the EDPB cannot expand the scope of the Inquiry in the manner suggested by the CSAs through Objections*

¹⁰⁸ Composite Response, paragraph 74.

¹⁰⁹ Composite Response, paragraph 76.

¹¹⁰ Composite Response, paragraph 78.

¹¹¹ Composite Response, paragraphs 82-83.

¹¹² Composite Response, paragraph 87.

¹¹³ EDPB Guidelines on RRO, paragraph 24.

¹¹⁴ Meta IE Article 65 Submissions, paragraph 2.4 and Annex I, p. 65.

¹¹⁵ Meta IE Article 65 Submissions, paragraph 2.4.

that are not relevant to the substance of the Complaint.” and *“such objections ‘ought to be disregarded in their entirety by the EDPB’*¹¹⁶. In this context, Meta IE cites EDPB Binding Decision 2/2022, adopted on 28 July 2022 (hereinafter, “EDPB Binding Decision 2/2022”), and in particular, the EDPB’s analysis of some of the objections in that case, which were found to be not relevant or reasoned, due to the fact that these objections *“fail[ed] to establish a direct connection with the specific legal and factual content of the draft decision”*¹¹⁷.

74. Contrary to Meta IE’s position on relevance, as described above, objections can have bearing on the *“specific legal and factual content of the Draft Decision”*, despite not aligning with the scope of the inquiry as defined by an LSA¹¹⁸.
75. 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 RRO Guidelines¹¹⁹.
76. Further, Meta IE states that *“several CSAs now propose to expand the scope of the Inquiry even further to include many other unrelated issues.”* and that in this regard Meta IE *“agrees with the DPC’s position in the Composite Memo that these unrelated issues raised by the CSAs are irrelevant to the resolution of this Inquiry and that expanding the scope of the Inquiry at this point would seriously infringe Meta Ireland’s procedural rights under both Irish and EU law”*¹²⁰. Meta IE also agrees with the IE SA’s position in the Composite Response that *“expanding the scope of the Inquiry at this point as the CSAs propose would seriously infringe Meta Ireland’s legitimate expectations, right to fair procedures (including the*

¹¹⁶ Meta IE Article 65 Submissions, paragraph 4.9.

¹¹⁷ In respect of Meta IE’s arguments in paragraph 4.9 of its Article 65 Submissions on these objections not being *“relevant”*, the EDPB recalls that the analysis of whether a given objection meets the threshold set by Art. 4(24) GDPR is carried out on a case-by-case basis. Meta IE refers to the EDPB’s Binding Decision 2/2022 and specifically to the paragraphs where the EDPB established that specific objections raised by the DE SAs and NO SA in that case were not relevant and reasoned. There are several differences between those objections and the objections which are analysed in this section.

More specifically, in the Binding Decision 2/2022 the objections referred to by Meta IE did not *“establish a direct connection with the specific legal and factual content of the Draft Decision”* (Binding Decision 2/2022 paragraphs 139, 147, 164) whereas each CSA here has made several clear links with the content of the Draft Decision, as is described in paragraph 77 of this Binding Decision.

¹¹⁸ Meta IE does not consider that any of the objections are reasoned, as set out in their replies to each of the objections in Annex 1. Meta IE Article 65 Submissions, Annex 1, pp. 66 - 124. In respect of Meta IE’s arguments in paragraph 4.9 of its Article 65 Submissions on these objections not being reasoned, the EDPB notes that the objections that were found to be not relevant and/or not reasoned in the Binding Decision 2/2022 did *“not provide sufficiently precise and detailed legal reasoning regarding infringement of each specific provision in question”*, did not explain sufficiently clearly, nor substantiate in sufficient detail how the conclusion proposed could be reached, or did not sufficiently demonstrate the significance of the risk posed by the Draft Decision for the rights and freedoms of the data subjects or the free flow of data within the EU (Binding Decision 2/2022, paragraphs 140, 148, 165). Here, each CSA provides a number of legal and factual arguments and explanations as to why an infringement for lack of appropriate legal basis is to be established, and adequately identifies the risk posed by the Draft Decision if it was adopted unchanged (paragraphs 79-81 of this Binding Decision).

¹¹⁹ *“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.

¹²⁰ Meta IE Article 65 Submissions, paragraph 4.2.

*right to be heard) and rights of defence*¹²¹". Despite claiming it this has been explained "*clearly*" in the Composite Response, 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 admissible¹²². 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 IE ¹²³. 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.

77. The objections of the AT, DE, ES, FI, HU, FR, NL, NO and SE SAs 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, 6(1) or (1)(b) of the GDPR. As the LSA considered that Article 6(1)(b) of the 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, ES, FI, HU, FR, NL, NO and SE SAs objections relating to the infringement of Article 6, 6(1) or 6(1)(b) GDPR are **relevant**.
78. 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 FI SA objection asking that the infringement of Article 6(1) be properly reflected in the amount of the administrative fine, as well as 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 online 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 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, FI and NO SAs objections are **relevant**.
79. The objections of the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs on the finding of an infringement are **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, ES, FI, HU, FR, NL, NO 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) GDPR¹²⁴. Some of them provide detailed arguments

¹²¹ Meta IE Article 65 Submissions, paragraph 4.10, where Meta IE makes reference to paragraphs 32-33 of the Composite Response.

¹²² Meta IE Article 65 Submissions, paragraph 4.10.

¹²³ 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.

¹²⁴ AT SA Objection, pp. 4-5; DE SAs Objection, p. 5-6, ES SA Objection, p. 2, FI SA Objection, paragraphs 16 and 18, FR SA Objection, paragraphs 8-9, HU SA Objection, p. 3, NL SA Objection, paragraphs 18-19; NO SA Objection, p. 7, SE SA Objection, pp. 3.

challenging the validity of the contract on which the use of Article 6(1)(b) as a legal basis depends and which the IE SA accepts¹²⁵.

80. Some SAs recall, while referring to the terms of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, that it is the fundamental and mutually understood contractual purpose, which justifies that the processing is necessary¹²⁶. 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 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 Instagram Terms of Use¹²⁷. The FR 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 processing¹²⁸. 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 advertising¹²⁹.
81. The AT, DE, ES, FI, FR, HU, NL, NO and SE SAs objections also identify risks posed by the Draft Decision, in particular an interpretation of Article 6(1)(b) 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 EEA¹³⁰.
82. 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 rights¹³¹." Meta IE thus adds a condition to Article 4(24) GDPR, which is not supported by the GDPR¹³².
83. As regards the parts of the DE and NO SAs' objections requesting the finding of an infringement of Article 5(1)(a) GDPR, and the parts of the DE, FI 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 online 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

¹²⁵ DE SAs Objection, pp. 3-4 ; NLSA Objection, paragraphs 7 and 10-12.

¹²⁶ AT SA Objection, p.4; DE SAs Objection pp.5-6 ; FR SA Objection, paragraphs 9-11; NLSA Objection paragraph 18; NO SA Objection, p. 7-8; SE SA Objection, p. 3. EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 32 and 33.

¹²⁷ AT SA Objection, pp.3-4; NL SA Objection, paragraph 28, 30 - 32 ; SE SA Objection, p.3.

¹²⁸ FR SA Objection, paragraph 18; IT SA Objection, paragraph 2.6, NO SA Objection, pp.6-7.

¹²⁹ AT SA Objection, p.4; NLSA Objection, paragraph 30; SE SA Objection, p.3.

¹³⁰ See their description of the risks in paragraphs 57-63 above.

¹³¹ Meta IE Article 65 Submissions, p. 64.

¹³² Article 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 Article 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 Article 4(24) GDPR.

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.

84. Considering the above, the EDPB finds that the objections of the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs are relevant and reasoned in accordance with Article 4(24) GDPR.
85. However, the parts of the DE and NO SAs' objections concerning the additional infringement of Article 5(1)(a) GDPR and the imposition of specific 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. Similarly, the part of the FI SA's objection concerning the imposition of a specific corrective measure, namely an administrative fine is not reasoned and does not meet the threshold of Article 4(24) GDPR.

4.4.2 Assessment on the merits

86. 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.
87. 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 insofar as it rejects the Complainant's claim that the GDPR does not permit Meta IE's reliance on Article 6(1)(b) GDPR to process personal data in the context of its offering of the Instagram Terms of Use¹³³. 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

88. 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 flawed¹³⁴. 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-GDPR¹³⁵.
89. 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 Instagram service for the purposes of behavioural advertising¹³⁶. Meta IE notes that in its inquiry, the IE SA "*only addresses the issue of whether Meta Ireland may in principle rely on Article 6(1)(b) GDPR for purpose of behavioural advertising, but not the issue of whether Meta Ireland*

¹³³ These objections being those of the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs arguing that the IE SA should have found an infringement of Article 6(1)(b), 6(1) or 6 GDPR.

¹³⁴ Meta IE Article 65 Submissions, paragraph 2.4.

¹³⁵ Meta IE Article 65 Submissions, paragraph 2.5.

¹³⁶ Meta IE Article 65 Submissions, paragraph 4.24 and 4.25.

*may in fact rely on Article 6(1)(b) GDPR, which would have required a detailed factual assessment of all of Meta Ireland's data processing.*¹³⁷

90. 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 lawful.¹³⁸ Meta IE supports the IE's position that *"it would not be appropriate to undertake substantial factual findings for an open-ended assessment of all processing operations by Meta Ireland.*¹³⁹
91. Meta IE thus agrees with the 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 advertising upon the IE SA's review of the Instagram Terms of Use and the nature of the Instagram service as described in those terms¹⁴⁰.
92. Meta IE defends that Article 6(1)(b) GDPR can be relied on as a legal basis for behavioural advertising¹⁴¹. 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 contract¹⁴². Meta IE notes that the provision of a personalised experience, including in the form of behavioural advertising, is *"core"* to the Instagram Service (as per the Terms of Use which govern the contractual relationship between Meta IE and Instagram users)¹⁴³.
93. Meta IE argues that the Terms of Use make clear that users will be shown advertising personalised to their interests under the heading *"Connecting you with brands, products, and services in ways you care about"*¹⁴⁴. Meta IE supports the DPC's finding, based on its review of the Instagram Terms of Use and that Instagram is *"promoted as such"*, that an average user who accepts the Terms of Use would have the expectation that personalisation, including in the form of behavioural advertising, forms a core and integral part of the Instagram of Service¹⁴⁵. Meta IE backs this argument with a reference to a survey and a study conducted by a private entity and a digital industry association¹⁴⁶. Meta IE considers that its compliance with the GDPR's transparency obligations involves a separate and different legal assessment from Article 6(1)(b) GDPR¹⁴⁷. 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 its Terms of Use¹⁴⁸.
94. 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 advertising¹⁴⁹. Meta IE further adds, referring to the

¹³⁷ Meta IE Article 65 Submissions, paragraph 4.23.

¹³⁸ Meta IE Article 65 Submissions, paragraph 2.3.

¹³⁹ Meta IE Article 65 Submissions, paragraph 4.23.

¹⁴⁰ Meta IE Article 65 Submissions, paragraphs 2.3 and 4.7.

¹⁴¹ Meta IE Article 65 Submissions, paragraph 6.4.

¹⁴² Meta IE Article 65 Submissions, paragraph 6.7.

¹⁴³ Meta IE Article 65 Submissions, paragraphs 6.13 and 6.17.

¹⁴⁴ Meta IE Article 65 Submissions, paragraph 6.18.

¹⁴⁵ Meta IE Article 65 Submissions, paragraphs 6.20 and 6.21.

¹⁴⁶ Meta IE Article 65 Submissions, paragraph 6.21.

¹⁴⁷ Meta IE Article 65 Submissions, paragraph 6.29.

¹⁴⁸ Meta IE Article 65 Submissions, paragraph 6.29.

¹⁴⁹ Meta IE Article 65 Submissions, paragraph 6.34.

CJEU's *Huber* judgment, 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”¹⁵⁰. 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 Instagram Service in accordance with the Term of Use without providing behavioural advertising¹⁵¹. Meta IE states that the EDPB may not dictate the nature of the services Meta IE provides. Meta IE would view this as a violation of Article 16 of the Charter on the freedom to conduct a 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 activity¹⁵².

95. Meta IE further argues that its reliance on the contractual necessity legal basis does not jeopardise data subject rights¹⁵³. Meta IE considers that these would also be protected by contract and consumer protection legislations in the EU Member States¹⁵⁴. Meta IE defends that the contractual necessity legal basis is not limited to individually negotiated agreements and can also be used for standard form contracts¹⁵⁵. Meta IE further adds that it would be improper for CSAs and the EDPB to analyse the validity of Instagram Terms of Use under applicable laws of contract or to draw inferences from them¹⁵⁶. In response to what Meta IE considers mischaracterisations in certain objections of national contract law Meta IE provides expert reports on the validity of its Terms of Use in 10 Member States¹⁵⁷.
96. 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 requirements¹⁵⁸. Meta IE also distinguishes behavioural advertising on the Instagram Service from direct marketing pursuant to Article 21(2) GDPR and thus considers this provision not applicable to behavioural advertising¹⁵⁹.

The EDPB's assessment of the merits

97. The EDPB considers it necessary to begin its assessment on the merits with a general description of the practice of behavioural advertising carried out in the context of the Instagram service before determining whether the legal basis of Article 6(1)(b) GDPR is appropriate for this practice in the present case, based on the Instagram Terms of Use and the nature of its products and features as described in those terms. The requests for preliminary rulings made to the CJEU in the cases C-252/21 and C-446/21 to which some of the documents in the file refer contain helpful descriptions of Meta's

¹⁵⁰ Judgement of the Court of Justice of 16 December 2008, *Heinz Huber v Bundesrepublik Deutschland*, C-524/06, ECLI:EU:C:2008:724, (hereinafter ‘C-524/06 Huber’), paragraphs 62 and 66. Meta IE Article 65 Submission, paragraph 6.37.

¹⁵¹ Meta IE Article 65 Submissions, paragraph 6.38.

¹⁵² Meta IE Article 65 Submissions, paragraph 6.25.

¹⁵³ Meta IE Article 65 Submissions, paragraph 6.8.

¹⁵⁴ Meta IE Article 65 Submissions, paragraph 6.8.

¹⁵⁵ Meta IE Article 65 Submissions, paragraphs 6.40 - 6.46.

¹⁵⁶ Meta IE Article 65 Submissions, paragraphs 6.43 and 6.44.

¹⁵⁷ Meta IE Article 65 Submissions, paragraphs 6.44 and 6.45 and Annex 2.

¹⁵⁸ Meta IE Article 65 Submissions, paragraphs 6.47 - 6.49.

¹⁵⁹ Meta IE Article 65 Submissions, paragraphs 6.50 - 6.57.

behavioural advertising practices in the context of its Facebook services¹⁶⁰. Given that behavioural advertising is also carried out in the context of the Instagram service, and given the similarities between the two services, relying on the same Data Policy¹⁶¹, the EDPB considers that these cases are also useful in gaining an understanding of the practice of behavioural advertising in relation to the Instagram service. Furthermore, in the request for a preliminary ruling in case C-252/21, it is mentioned that if the CJEU answers the question 7 positively (regarding the competence of a Member State national competition authority to determine, when assessing the balance of interests whether data processing and their terms comply with the GDPR) that the questions 3 to 5 must be answered in relation to data from the use of the group's Instagram service.¹⁶² In addition, Meta IE makes reference to both of these requests for preliminary rulings in its submissions, and therefore clearly considers them relevant to this case¹⁶³.

98. These requests for preliminary rulings mention that Meta IE collects data on its individual users and their activities on and off its Facebook service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user's computer or mobile device¹⁶⁴. 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

¹⁶⁰ C-252/21 Oberlandesgericht Düsseldorf request, pp. 6-7, available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=242143&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=644235> and C-446/21 Austrian Oberster Gerichtshof request, paragraphs 2-3, 6-13, 15-23, available at <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=247308&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=766249>; see also the references to these requests for a preliminary ruling in the AT SA Objection p. 1-2. and Meta IE Article 65 Submission, paragraphs 3.4-3.9.

¹⁶¹ See the similarities of the Instagram and Facebook services described in the Data Policy. The Instagram Data Policy refers to both "Facebook settings" and "Instagram settings" (*"This policy describes the information we process to support Facebook, Instagram, Messenger and other products and features offered by Facebook (Facebook Products or Products). You can find additional tools and information in the Facebook Settings and Instagram Settings."*) Section I of this policy refers to the "Facebook products" when describing the kinds of information collected for the processing. Instagram Data Policy of 22.05.2018, annex 2 of the Instagram Complaint. Similarly, according to Instagram Terms of Use *"Instagram is part of the Facebook Companies, which share technology, systems, insights, and information-including the information we have about you (...) in order to provide services that are better, safer, and more secure. We also provide ways to interact across the Facebook Company Products that you use, and designed systems to achieve a seamless and consistent experience across the Facebook Company Products."*

¹⁶² Question 3 reads *"Can an undertaking, such as Facebook Ireland, which operates a digital social network funded by advertising and offers personalised content and advertising, network security, product improvement and continuous, seamless use of all of its group products in its terms of service, justify collecting data for these purposes from other group services and third-party websites and apps via integrated interfaces such as Facebook Business Tools, or via cookies or similar storage technologies placed on the internet user's computer or mobile device, linking those data with the user's Facebook.com account and using them, on the ground of necessity for the performance of the contract under Article 6(1)(b) of the GDPR or on the ground of the pursuit of legitimate interests under Article 6(1)(f) of the GDPR?"*

¹⁶³ Meta IE Article 65 Submissions, paragraphs 3.2 - 3.9.

¹⁶⁴ C-252/21 Oberlandesgericht Düsseldorf request, pp. 6-7.

users free of charge and generates revenue through this personalised advertising that targets them, in addition to static advertising that is displayed to every user in the same way.

99. The EDPB considers that these general descriptions signal by themselves the complexity, massive scale and intrusiveness of the behavioural advertising practice that Meta IE conducts through the Facebook service, as well as off the Facebook service itself, through third party websites and apps which are connected to Facebook.com via programming interfaces (“Facebook Business Tools”), including the Instagram service¹⁶⁵. Furthermore, among the aspects described in the Instagram Terms of Use is *“Providing consistent and seamless experiences across other Facebook Company Products.”* which involves *“shar[ing] technology, systems, insights, and information-including the information we have about you.”* It is therefore clear that personal data is shared between Facebook companies (*“We use data from Instagram and other Facebook Company Products, as well as from third-party partners, to show you ads (...)”*)
100. These are relevant facts to consider to assess the appropriateness of Article 6(1)(b) GDPR as a legal basis for behavioural advertising and to what extent reasonable users may understand and expect behavioural advertising when they accept the Instagram Terms of Use and perceive it as necessary for Meta IE to deliver its service¹⁶⁶. Accordingly, the EDPB further considers that the IE SA could have added to its Draft Decision a description of behavioural advertising that Meta IE conducts through the Instagram service to appropriately substantiate its reasoning leading to its acceptance of Article 6(1)(b) GDPR as a legal basis for that practice in accordance with the IE SA’s duty to state the reasons for an individual decision¹⁶⁷.
101. Notwithstanding the EDPB’s considerations above, the EDPB considers that there is sufficient information in the file for the EDPB to decide whether the IE SA needs to change its Draft Decision insofar as it rejects the complainant’s claim that the GDPR does not permit Meta IE’s reliance on Article 6(1)(b) GDPR to process personal data in the context of its offering of the Instagram service, based on its Terms of Use.
102. As described above in section 4.1., the IE SA concludes in Finding 2 of its Draft Decision that the Complainant’s case was not made out that the GDPR does not permit the reliance by Meta IE on Article 6(1)(b) GDPR in the context of its offering of Terms of Use, neither Article 6(1)(b) GDPR nor any other provision of the GDPR precludes Meta IE from relying on Article 6(1)(b) GDPR as a legal basis to deliver

¹⁶⁵C-252/21 Oberlandesgericht Düsseldorf request, pp. 6-7. Facebook Business Tools is also mentioned in Instagram’s Data Policy.

¹⁶⁶ In the same vein, the Advocate General also provides a description of behavioural advertising in his 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.

¹⁶⁷ See EDPB Guidelines on Art. 65(1)(a) GDPR, paragraph 84 and EDPB Guidelines 2/2022 on the application of Article 60 GDPR (Version 1.0, Adopted on 14 March 2022), para. 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 C-50/12 P Judgement of the Court of Justice of 26 November 2013, *Kendrion NV v European Commission*, ECLI:EU:C:2013:771.

a service, including behavioural advertising insofar as that forms a core part of the service¹⁶⁸. The IE SA considers that, having regard to the specific terms of the contract and the nature of the service provided and agreed upon by the parties, Meta IE may in principle rely on Article 6(1)(b) GDPR as a legal basis of the processing of users' data necessary for the provision of its Instagram service, including through the provision of behavioural advertising insofar as this forms a core part of its service offered to and accepted by its users¹⁶⁹. The IE SA considers the core of the service offered by Meta IE is premised on the delivery of personalised advertising¹⁷⁰. The IE SA considers a reasonable user would understand and expect this having read the Terms of Use¹⁷¹. Meta IE supports this conclusion of the IE SA¹⁷².

103. To assess these claims of the IE SA and Meta IE, the EDPB considers it necessary to recall the general objectives that the GDPR pursues, which must guide its interpretation, together with the wording of its provisions and its normative context¹⁷³.
104. The GDPR develops the fundamental right to the protection of personal data found in Article 8(1) of the EU Charter of Fundamental Rights and Article 16(1) of the TFEU, which constitute EU primary law¹⁷⁴. 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"*¹⁷⁵. 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 data¹⁷⁶. 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 EU¹⁷⁷. The GDPR acknowledges that the right to data protection needs to be balanced against other fundamental rights and freedoms, such as the freedom to conduct a business, in accordance with the principle of proportionality and has these considerations integrated into its provisions¹⁷⁸. 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 contract¹⁷⁹. The CJEU provided

¹⁶⁸ Draft Decision, paragraphs 112 and 115. Finding 2 reads: *"I find the Complainant's case is not made out that the GDPR does not permit the reliance by Meta Ireland on 6(1)(b) GDPR in the context of its offering of Terms of Use."*

¹⁶⁹ Draft Decision, paragraph 113.

¹⁷⁰ Draft Decision, paragraph 104.

¹⁷¹ Draft Decision, paragraph 105.

¹⁷² Meta IE Article 65 Submissions, paragraphs 6.21 and 6.30.

¹⁷³ 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.

¹⁷⁴ Recitals 1 and 2 GDPR.

¹⁷⁵ 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.

¹⁷⁶ Article 1(1)(2) and Recital 6 and 7 GDPR.

¹⁷⁷ Article 1(3) and Recitals 9, 10 and 13 GDPR.

¹⁷⁸ Recital 4 GDPR.

¹⁷⁹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 54.

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 interests¹⁸⁰.

105. The principle of lawfulness of Article 5(1)(a) and Article 6 GDPR is one of the main safeguards to the protection of personal data. It follows a restrictive approach whereby a controller may only process the personal data of individuals if it is able to rely on one of the bases found in the exhaustive and restrictive lists of the cases in which the processing of data is lawful under Article 6 GDPR¹⁸¹.
106. The principle of lawfulness goes hand in hand with the principles of fairness and transparency in Article 5(1)(a) GDPR. The principle of fairness includes, inter alia, recognising the reasonable expectations of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller¹⁸².
107. The EDPB agrees with the IE SA and Meta IE that there is no hierarchy between these legal bases¹⁸³. However, this does not mean that a controller, as Meta IE in the present case, has absolute discretion to choose the legal basis that suits better its commercial interests. The controller may only rely on one of the legal bases established under Article 6 GDPR if it is appropriate for the processing at stake¹⁸⁴. A specific legal basis will be appropriate insofar as the processing can meet its requirements set by the GDPR and fulfil the objective of the GDPR to protect the rights and freedoms of natural persons and in particular their right to the protection of personal data¹⁸⁵. The legal basis will not be appropriate if its application to a specific processing defeats this practical effect "*effet utile*" pursued by the GDPR and Article 5(1)(a) and Article 6 GDPR¹⁸⁶. These criteria stem from the content of the GDPR and the interpretation favourable to the rights of data subjects to be given thereto described in paragraph 104 above¹⁸⁷.
108. The GDPR makes Meta IE, as a data controller for the processing at stake, directly responsible for complying with the Regulation's principles, including the processing of data in a lawful, fair and transparent manner, and any obligations derived therefrom¹⁸⁸. This obligation applies even where the

¹⁸⁰ 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.

¹⁸¹ 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.

¹⁸² See, Recital 39 GDPR and EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 11 and 12.

¹⁸³ Draft Decision paragraph 48 and Meta IE Article 65 Submission paragraph 5.10.

¹⁸⁴ 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.

¹⁸⁵ C 708/18 TK v Asociația de Proprietari, paragraph 37.

¹⁸⁶ 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.

¹⁸⁷ Article 1(1)(2) and (5) GDPR.

¹⁸⁸ Article 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.

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 basis¹⁸⁹.

109. The first condition to be able to rely on Article 6(1)(b) GDPR as a legal basis to process the data subject's data is that a controller, in line with its accountability obligations under Article 5(2) GDPR, has to be able **to demonstrate that (a) a contract exists and (b) the contract is valid** pursuant to applicable national contract laws¹⁹⁰.
110. Both the IE SA and Meta IE consider that the Terms of Use make up the entire agreement between the Instagram user and Meta IE and that the Data Policy is simply a compliance document setting out information to fulfil the GDPR transparency obligations¹⁹¹. The IE SA thus considers that the contract for which the analysis based on Article 6(1)(b) GDPR takes place, is the Terms of Use¹⁹².
111. The IE SA and Meta IE argue that the GDPR does not confer a broad and direct competence to supervisory authorities to interpret or assess the validity of contracts¹⁹³.
112. The EDPB agrees that SAs do not have under the GDPR a broad and general competence in contractual matters. However, the EDPB considers that the supervisory tasks that the GDPR bestows on SAs imply a limited competence to assess a contract's general validity insofar as this is relevant to the fulfilment of their tasks under the GDPR. Otherwise, the SAs would see their monitoring and enforcement task under Article 57(1)(a) GDPR limited to actions such as verifying whether the processing at stake is necessary for the performance of a contract (Article 6(1)(b) GDPR), and whether a contract with a processor under Article 28(3) GDPR and data importer under Article 46(2) GDPR includes appropriate safeguards pursuant to the GDPR. Pursuant to the IE SA's interpretation, the SAs would thus be obliged to always consider a contract valid, even in situations where it is manifestly evident that it is not, for instance because there is no proof of agreement between the two parties, or because the contract does not comply with its Member State's rules on the validity, formation or effect of a contract in relation to a child¹⁹⁴.
113. As the DE and NL SAs¹⁹⁵ argue, the validity of the contract for the Instagram service between Meta IE and the complainant is questionable, given the strong indications that the Complainant was unaware of entering into a contract, and (as the IE SA establishes with its Finding 3 of its Draft Decision) serious transparency issues in relation to the legal basis relied on. In contract law, as a general rule, both parties must be aware of the substance of the contract and the obligations of both parties to the contract in order to willingly enter into such contract.

¹⁸⁹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 26.

¹⁹⁰ EDPB Binding Decision 2/2022, paragraph 84.

¹⁹¹ Draft Decision, paragraphs 72 and 73.

¹⁹² Draft Decision, paragraph 73.

¹⁹³ Composite Response, paragraph 51; Draft Decision, paragraph 95, Meta IE Article 65 Submissions, paragraph 6.43.

¹⁹⁴ Article 8(3) GDPR.

¹⁹⁵ DE SAs Objection, p.4 and NL SA Objection, paragraph 11.

114. Notwithstanding the possible invalidity of the contract, the EDPB, refers to its previous interpretative guidance on this matter to provide below its **analysis on whether behavioural advertising is objectively necessary** for Meta IE to provide its Instagram service to the user based on its Terms of Use and the nature of the service¹⁹⁶.
115. The EDPB recalls¹⁹⁷ 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”¹⁹⁸. 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 subject¹⁹⁹.
116. Moreover, the EDPB notes that the controller should be able to justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose. This depends not only on the controller’s perspective, but also on a reasonable data subject’s perspective when entering into the contract²⁰⁰.
117. The IE SA accepts the EDPB’s position that, as a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services²⁰¹. However, the IE SA considers that in this particular case, having regard to the specific terms of the contract and the nature of the Instagram service provided and agreed upon by the parties, Meta IE may in principle rely on Article 6(1)(b) GDPR to process the user’s data necessary for the provision of its service, including through the provision of behavioural advertising insofar as this forms a core part of that service offered to and accepted by users²⁰².
118. The IE SA views behavioural advertising as “*the core of both Meta Ireland’s business model and the bargain struck between Meta Ireland and Instagram users*”²⁰³. In support of this consideration, the IE SA refers to the “*first and sixth clauses*” of “*the specific contract entered into between Meta IE and Instagram users*”²⁰⁴. The IE SA considers that from the text of these “*clauses*” it is “*clear that the core of the service offered by Meta Ireland is premised on the delivery of personalised advertising.*”²⁰⁵ The IE SA considers that this position is supported by the fact that “*the Terms of Use describe the Instagram service as being ‘personalised’ and connects users with brands, including by means of providing ‘relevant’ advertising and content.*” Based on this, the IE SA is of the view that “*It is clear that the Instagram service is advertised as offering a ‘personalised’ experience, including by way of the advertising it delivers to users*”²⁰⁶. The IE SA considers that as the Instagram service is “*advertised*” in its Terms of Use “*as being predicated on personalised advertising (...) any reasonable user would*

¹⁹⁶ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR.

¹⁹⁷ See Binding Decision 2/2022, paragraph 89.

¹⁹⁸ WP29 Opinion 6/2014 on the notion of legitimate interests, p. 17

¹⁹⁹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 30.

²⁰⁰ See Binding Decision 2/2022, paragraph 90.

²⁰¹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 52. Draft Decision, paragraph 113.

²⁰² Draft Decision, paragraph 113.

²⁰³ Draft Decision, paragraph 102 and Finding 2.

²⁰⁴ Draft Decision, paragraph 103.

²⁰⁵ Draft Decision, paragraph 104.

²⁰⁶ Draft Decision, paragraph 104.

expect and understand that this is part of the core bargain that is being struck (...)" but acknowledges that "users may prefer that the market offer alternative choices²⁰⁷."

119. On this issue, the EDPB recalls that the concept of necessity has its own independent meaning under EU law. It must be interpreted in a manner that fully reflects the objective pursued by an EU instrument, in this case, the GDPR²⁰⁸. Accordingly, the concept of necessity under Article 6(1)(b) GDPR cannot be interpreted in a way that undermines this provision and the GDPR's general objective of protecting the right to the protection of personal data or contradicts Article 8 of the Charter²⁰⁹. On the processing of data in the Facebook services, Advocate General Rantos supports a strict interpretation of Article 6(1)(b) GDPR among other legal bases, particularly to avoid any circumvention of the requirement for consent²¹⁰. Given the similarities between the Facebook and Instagram services, as explained above in paragraph 97, and the fact that this case may concern the legal basis for processing of personal data for the Instagram service²¹¹.
120. As the IE SA states in its Draft Decision, *"Instagram is a global online social network service which allows registered users to communicate with other registered users through messages, audio, video calls and video chats, and by sending images and video files²¹²."* Meta IE promotes among its prospective and current users the perception that the main purpose of the Instagram service and for which it processes its users' data is to enable them to share content and communicate with others. Meta IE presents its Instagram service on its *"About"* page of its website as a platform which *"give[s] people the power to build community and bring[s] the world closer together²¹³."* At the beginning of its Terms of Use, Meta IE presents its mission for the Instagram service as *"To bring you closer to the people and things you love²¹⁴."* The description of the aspects of the service includes *"Offering personalized opportunities to create, connect, communicate."*
121. The fact that the Terms of Use do not provide for any contractual obligation binding Meta IE to offer personalised advertising to the Instagram users and any contractual penalty if Meta IE fails to do so shows that, at least from the perspective of the Instagram user, this processing is not necessary to perform the contract²¹⁵. Providing personalised advertising to its users may be an obligation between

²⁰⁷ Draft Decision, paragraph 105.

²⁰⁸ See paragraphs 103-104 above on the principles guiding the interpretation of the GDPR and its provisions. The CJEU also stated in *Huber* 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.

²⁰⁹ Article 1(2) GDPR.

²¹⁰ C-252/21 *Oberlandesgericht Düsseldorf* request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, 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).

²¹¹ Paragraph 97 and footnote 161 of this Binding Decision.

²¹² Draft Decision, paragraph 5.

²¹³ <https://about.instagram.com/>

²¹⁴ Both the IE SA and Meta IE consider the Instagram Terms of Use as constituting the entire contract between Meta IE and the Instagram users (see paragraphs 92, 110 and 118 of this Binding Decision).

²¹⁵ The Instagram Terms of Use are formulated in one-sided terms as follows: *"These Terms of Use govern your use of Instagram and provide information about the Instagram Service (...)"*. While under the first heading of the Terms of Use (*"The Instagram Service"*), Instagram announces that it *"provide[s]"* the Instagram service. After describing the aspects of the service and referencing the Data Policy, the Instagram Terms of Use include a

Meta IE and the specific advertisers that pay for Meta IE's targeted display of their advertisements in the Instagram service to Instagram users, but it is not presented as an obligation towards the Instagram users.

122. Nor does Meta IE's business model of offering services, at no monetary cost for the user to generate income by behavioural advertisement to support its Instagram service make this processing necessary to perform the contract. Under the principle of lawfulness of the GDPR and its Article 6, it is the business model which must adapt itself and comply with the requirements that the GDPR sets out in general and for each of the legal bases and not the reverse. As the Advocate General Rantos stressed recently in his opinion on Meta IE's processing in Facebook, based on Article 5(2) GDPR, it is the controller (Meta IE) in this case who is responsible for demonstrating that the personal data are processed in accordance with the GDPR²¹⁶.
123. As the EDPB provided in its guidance, *"Assessing what is 'necessary' involves a combined, fact-based assessment of the processing 'for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal'. If there are realistic, less intrusive alternatives, the processing is not 'necessary'. Article 6(1)(b) will not cover processing which is useful but not objectively necessary for performing the contractual service or for taking relevant pre-contractual steps at the request of the data subject, even if it is necessary for the controller's other business purposes."*²¹⁷
124. On the question of whether here there are realistic, less intrusive alternatives to behavioural advertising that make this processing not *"necessary"*²¹⁸, the EDPB considers that there are. The AT and SE SAs mention as examples contextual advertising based on geography, language and content, which do not involve intrusive measures such as profiling and tracking of users²¹⁹. 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 possible²²⁰. By considering the existence of alternative practices to behavioural advertising that are more respectful of the Instagram users' right to data protection, the EDPB, as the Advocate General did in relation to Facebook users, aims to assess if this processing is objectively

section which is headed with *"Your Commitments"*. While Instagram itself only *"offers"* various services, it makes clear that the Instagram Terms of Use unilaterally impose duties and obligations on the user. Otherwise, the user may face suspension or termination of their account, as described under *"Content Removal and Disabling or Terminating Your Account"* of the Instagram Terms of Use. No (contractual) sanctions appear to apply in the event that Meta IE fails to provide or poorly performs one or more of these services.

²¹⁶ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 52.

²¹⁷ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 25.

²¹⁸ 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, 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 Kārības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme', C 13/16, ECLI:EU:C:2017:336, paragraph 30..

²¹⁹ AT SA Objection, p.5; SE SA Objection, p.3.

²²⁰ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, footnote 80.

necessary to deliver the service offered, as perceived by the Instagram user whose personal data is processed, and not to dictate the nature of Meta IE's service or impose specific business models on controllers, as Meta IE and the IE SA respectively argue²²¹. 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 purposes²²².

125. The EDPB considers that the absolute right available to data subjects, under Article 21(2)(3) GDPR to object to the processing of their data (including profiling) for direct marketing purposes further supports its consideration that, as a general rule, the processing of personal data for behavioural advertising is not necessary to perform a contract. The processing cannot be necessary to perform a contract if a data subject has the possibility to opt out from it at any time, and without providing any reason.
126. The EDPB finds that a reasonable user cannot expect that their personal data is being processed for behavioural advertising simply because Meta IE briefly refers to this processing in its Instagram Terms of Use (which Meta IE and the IE SA consider as constituting the entirety of the contract), or because of the "*wider circumstances*" or "*recognised public awareness of this form of processing*" derived from its "*widespread prevalence of OBA processing*" to which the IE SA refers²²³. Behavioural advertising, as briefly described in paragraph 98 above, is a set of processing operations of personal data of great technical complexity, which has a particularly massive and intrusive nature. In view of the characteristics of behavioural advertising, coupled with the very brief and insufficient information that Meta provides about it in the Instagram Terms of Use and Data Policy (a separate document that the IE SA and Meta IE do not even consider part of the contractual obligations), the EDPB finds it extremely difficult to argue that an average user can fully grasp it, be aware of its consequences and impact on their rights to privacy and data protection, and reasonably expect it solely based on the Instagram Terms of Use. The EDPB recalls its Guidelines 2/2019 on Article 6(1)(b) GDPR, in which it argues that the expectations of the average data subject need to be considered in light, not only of the terms of service but also the way this service is promoted to users²²⁴. 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*"²²⁵ 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*"²²⁶.
127. The EDPB notes that the mission of the Instagram service, as expressed in its Terms of Use, is formulated in a vague and broad manner ("*To bring you closer to the people and things you love.*") When using the Instagram service, a user is primarily confronted with the possibility of viewing

²²¹ Meta IE Article 65 Submissions, paragraph 6.25 and Composite Response, paragraph 76. On the relevance of this Opinion for assessing Instagram's reliance on Article 6(1)(b) GDPR, see paragraph 97 of this Binding Decision.

²²² EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 25.

²²³ Composite Response, paragraphs 72 and 73.

²²⁴ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 57.

²²⁵ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 56.

²²⁶ *Ibid*, footnote 81. On the relevance of this Opinion for assessing Instagram's reliance on Article 6(1)(b) GDPR, see paragraph 97 of this Binding Decision.

photographs and videos by people or organisations that they follow, as well as sharing such content with their followers. This is acknowledged by the IE SA which provides the following description of the Instagram service in its Draft Decision: *“Instagram is a global online social network service which allows registered users to communicate with other registered users through messages, audio, video calls and video chats, and by sending images and video files”*²²⁷.

128. Based on the considerations above, the EDPB considers that the main purpose for which users use Instagram and accept its Terms of Use is to share content and communicate with others, not to receive personalised advertisements.
129. Meta IE infringed its transparency obligations under Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR by not clearly informing the complainant and other users of the Instagram Service specific processing operations, the personal data processed in them, the specific purposes they serve, and the legal basis on which each of the processing operations relies, as the IE SA concludes in its Draft Decision²²⁸. The EDPB considers that this fundamental failure of Meta IE to comply with its transparency obligations contradicts the IE SA’s finding that Instagram users could reasonably expect online behavioural advertising as being necessary for the performance of their contract (as described in the Instagram Terms of Use) with Meta IE²²⁹.
130. The EDPB recalls that *“controllers should make sure to avoid any confusion as to what the applicable legal basis is”* and that this is *“particularly relevant where the appropriate legal basis is Article 6(1)(b) GDPR and a contract regarding online services is entered into by data subjects”*, because *“[d]epending on the circumstances, data subjects may erroneously get the impression that they are giving their consent in line with Article 6(1)(a) GDPR when signing a contract or accepting terms of service”*²³⁰. Article 6(1)(b) GDPR requires the existence, validity of a contract, and the processing being necessary to perform it. These conditions cannot be met where one of the Parties (in this case the data subject) is not provided with sufficient information to know that they are signing a contract, the processing of personal data that it involves, for which specific purposes and on which legal basis, and how this processing is necessary to perform the services delivered. These transparency requirements are not only an additional and separate obligation, as the IE SA seems to imply, but also an indispensable and constitutive part of the legal basis²³¹.
131. The risks to the rights of data subjects derived from this asymmetry of information and an inappropriate reliance on this legal basis are higher in situations such as in the present case, in which the Complainant and other Instagram users face a *“take it or leave it”* situation resulting from the standard contract pre-formulated by Meta IE and the lack of few alternative services in the market. The EU legislator has regularly identified and aimed to address with multiple legal instruments these risks and the imbalance between the parties to consumer contracts. For example, Directive 93/13/EEC

²²⁷ Draft Decision, paragraph 5.

²²⁸ Draft Decision, paragraphs 184 and 185 and Finding 3, which reads *“In relation to processing for which Article 6(1)(b) GDPR is relied on, Articles 5(1)(a), 12(1) and 13(1)(c) GDPR have been infringed.”*

²²⁹ Draft Decision, paragraph 105 and Finding 2.

²³⁰ EDPB Binding Decision 1/2021, paragraph 214 and EDPB Guidelines 2/2019 on Article 6(1)(b), paragraph 20.

²³¹ Draft Decision, paragraph 111.

on unfair terms in consumer contracts²³² mandates, as the transparency obligations under the GDPR, the use of plain, intelligible language in the terms of the contracts offered to consumers²³³. This Directive even provides that where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail²³⁴. 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 fair²³⁵.

132. Advocate General Rantos concludes in reference to Meta IE that the fact that an undertaking providing a social network enjoys a dominant position in the domestic market for online social network for private users *“does play a role in the assessment of the freedom of consent within the meaning of that provision, which it is for the controller to demonstrate, taking into account, where appropriate, the existence of a clear imbalance of power between the data subject and the controller, any requirement for consent to the processing of personal data other than those strictly necessary for the provision of the services in question, the need for consent to be specific for each purpose of processing and the need to prevent the withdrawal of consent from being detrimental to users who withdraw it”*²³⁶. In line with the logic of this argument, the EDPB considers that the dominant position of Meta IE also plays an important role in the assessment of Meta IE’s reliance on Article 6(1)(b) GDPR for its Instagram service and its risks to data subjects, especially considering how deficiently Meta IE informs the Instagram users of the data it strictly needs to process to deliver the service.
133. Given that the main purpose for which a user uses Instagram service is to share and receive content, and communicate with others²³⁷, and that Meta IE conditions their use to the user’s acceptance of a contract and the behavioural advertising they include, the EDPB cannot see how a user would have the option of opting out of a particular processing which is part of the contract as the IE SA seems to argue²³⁸. The users’ lack of choice in this respect would rather indicate that Meta IE’s reliance on the contractual performance legal basis deprives users of their rights, among others, to withdraw their consent under Articles 6(1)(a) and 7 and/or to object to the processing of their data based on Article 6(1)(f) GDPR.
134. The EDPB agrees with the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs that there is a risk that the Draft Decision’s failure to establish Meta IE’s infringement of Article 6(1)(b) GDPR, pursuant to the IE SA’s interpretation of it, nullifies this provision and makes lawful theoretically any collection and reuse of personal data in connection with the performance of a contract with a data subject²³⁹. Meta IE currently leaves the complainant and other users of the Instagram service with a single choice. They may either contract away their right to freely determine the processing of their personal data and

²³² 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”* Article 3(1).

²³³ Articles 4(2) and 5 Directive 93/13/EEC.

²³⁴ Article 5 Directive 93/13/EEC.

²³⁵ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, footnote 10.

²³⁶ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, Conclusion, paragraph 78 (4). On the relevance of this Opinion for assessing Instagram’s reliance on Article 6(1)(b) GDPR, see paragraph 97 of this Binding Decision

²³⁷ See paragraphs 127-128 of this Binding Decision.

²³⁸ Composite Response, paragraph 69.

²³⁹ AT SA Objection, pp.5-6; DE SAs Objection, p. 9; ES SA Objection, p. 3 ; FI SA Objection paragraphs 31-35 ; FR SA Objection, paragraphs 34-35; HU SA Objection, p. 4 ; NL SA Objection, paragraphs 30-31 ; NO SA Objection, p. 8; SE SA Objection, p.5.

submit to its processing for the obscure, and intrusive purpose of behavioural advertising, which they can neither expect, nor fully understand based on the insufficient information Meta IE provides to them. Or, they may decline accepting Instagram Terms of Use and thus be excluded from a service that enables them to communicate, share content with and receive content from millions of users and for which there are currently few realistic alternatives. This exclusion would thus also adversely affect their freedom of expression and information.

135. This precedent could encourage other economic operators to use the contractual performance legal basis of Article 6(1)(b) GDPR for all their processing of personal data. There would be the risk that some controllers argue some connection between the processing of the personal data of their consumers and the contract to collect, retain and process as much personal data from their users as possible and advance their economic interests at the expense of the safeguards for data subjects. Some of the safeguards from which data subjects would be deprived due to an inappropriate use of Article 6(1)(b) GDPR as legal basis, instead of others such as consent (Article 6(1)(a) GDPR) and legitimate interest (Article 6(1)(f) GDPR), are the possibility to specifically consent to certain processing operations and not to others and to the further processing of their personal data (Article 6(4) GDPR); their freedom to withdraw consent (Article 7 GDPR); their right to be forgotten (Article 17 GDPR); and the balancing exercise of the legitimate interests of the controller against their interests or fundamental rights and freedoms (Article 6(1)(f) GDPR). As a result, owing to the number of users of the Instagram service, the market power, and influence of Meta IE and its economically attractive business model, the risks derived from the current findings of the Draft Decision could go beyond the Complainant and the millions of users of Instagram service in the EEA and affect the protection of the hundreds of millions of people covered by the GDPR²⁴⁰.
136. The EDPB thus concurs with the objections of the AT, DE, ES, FI, FR, HU, NL, NO and SE SAs²⁴¹ to Finding 2 of the Draft Decision in that the **behavioural advertising performed by Meta IE in the context of the Instagram service is objectively not necessary for the performance of Meta IE's alleged contract with data users for the Instagram service and is not an essential or core element of it.**
137. In conclusion, the EDPB decides that the Meta IE has inappropriately relied on Article 6(1)(b) GDPR to process the complainant's personal data in the context of Instagram Terms of Use and therefore lacks a legal basis to process these data for the purposes of behavioural advertising. Meta IE has not relied on any other legal basis to process personal data in the context of the Instagram Terms of Use for the purposes of behavioural advertising. Meta IE has consequently infringed Article 6(1) GDPR by unlawfully processing personal data. The EDPB instructs the IE SA to alter its Finding 2 of its Draft Decision which concludes that Meta IE may rely on Article 6(1)(b) GDPR in the context of its offering

²⁴⁰ In the Draft Decision, the IE SA quotes Meta IE's submissions dated 28 September 2018, in which it states that it "provides the Instagram service to hundreds of millions of users across the European region." Draft Decision, paragraph 223. In its submissions on the Preliminary Draft Decision, Meta IE stated that the correct figure for monthly active accounts for the Instagram Service as of 31 August 2018 (the date of commencement of the Inquiry) is approximately [REDACTED], while clarifying that this number represents active accounts on Instagram rather than unique users and thus does not represent the number of unique users. This figure does not include UK-based accounts as Meta IE considered accounts in that territory were not relevant for the Inquiry. The IE SA does not share this view, on the grounds that the GDPR was applicable in the UK at the date of the Complaint. Meta IE's Reponse to the Preliminary Draft Decision, paragraph 14.13. Draft Decision, paragraph 223.

²⁴¹ AT SA Objection, pp. 4-5; DE SAs Objection, p. 5-6, ES SA Objection, p. 2, FI SA Objection, paragraphs 16 and 18, FR SA Objection, paragraphs 8-9, HU SA Objection, p. 3, NL SA Objection, paragraphs 18-19; NO SA Objection, p. 7, SE SA Objection, pp. 3.

of the Instagram Terms of Use and to include an infringement of Article 6 (1) GDPR based on the shortcomings that the EDPB has identified.

5 ON WHETHER THE LSA’S DRAFT DECISION INCLUDES ENOUGH 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

138. The IE SA concludes as a matter of fact, in its Draft Decision that Meta IE did not rely, and did not seek to rely, on the complainant’s consent to process personal data in connection with the Terms of Use²⁴² and is not legally obliged to rely on consent to do so²⁴³.
139. The IE SA accepts that Meta IE never sought to obtain consent from users through the clicking of the “*Agree to Terms*” button, based also on Meta IE’s confirmation thereto²⁴⁴.
140. 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 GDPR²⁴⁵. The IE SA observes that, as noted by the EDPB, these are entirely different concepts which “*have different requirements and legal consequences*”²⁴⁶.
141. The IE SA also emphasises that there is no hierarchy between the legal basis that controllers may use to process personal data under the GDPR²⁴⁷. 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 consent²⁴⁸. 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 rely²⁴⁹.
142. 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 context. The IE SA contends that these 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 question²⁵⁰.

²⁴² Draft Decision, paragraphs 43 and 60.

²⁴³ Draft Decision, paragraphs 59-60.

²⁴⁴ Draft Decision, paragraphs 40 and 42, as well as 56.

²⁴⁵ Draft Decision, paragraph 52.

²⁴⁶ Draft Decision, paragraph 47.

²⁴⁷ Draft Decision, paragraphs 48-50.

²⁴⁸ Draft Decision, paragraph 50.

²⁴⁹ Draft Decision, paragraph 52.

²⁵⁰ Draft Decision, paragraph 57.

5.2 Summary of the objections raised by the CSAs

143. The AT, DE, ES, FI, FR and NL SAs object to the assessment in the Draft Decision on consent, leading to Finding 1 of the IE SA²⁵¹. These SAs put forward several factual and legal arguments for the changes they propose to the Draft Decision.
144. 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 Instagram, based on its Terms of Use, can rely on Article 6(1)(b) GDPR²⁵² 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 objection is no longer applicable.

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

145. The AT, DE and NL 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' data²⁵³.
146. 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 advertising. The Draft Decision does not clarify which data categories are being used for behavioural advertising and where Meta IE relies on Articles 6(1)(a) and 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 Article 6(1)(a) and Article 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 GDPR²⁵⁴.
147. 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 Instagram Terms of Use, the DE SAs objects against the IE SA's assessment that in the specific case at issue Meta IE was not legally obliged to obtain consent from the Complainant²⁵⁵. 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 basis²⁵⁶.
148. The NL SA notes its view that there is lack of any substantive investigation into what kind of personal data is being processed besides relying on information submitted by the controller²⁵⁷. The NL SA

²⁵¹ AT SA Objection, p. 9-11; DE SA Objection, p. 2-9; ES SA Objection, p. 2-3; FI SA Objection, paragraphs 36-44; FR SA Objection, paragraphs 21-31; NLSA Objection, paragraphs 20-27.

²⁵² SE SA Objection, p. 3-4.

²⁵³ AT SA Objection, p. 10; DE SA Objection, p. 7-9; NLSA Objection, paragraph 21.

²⁵⁴ AT SA Objection, p. 10.

²⁵⁵ DE SAs Objection, p. 7-8.

²⁵⁶ DE SAs Objection, p. 8-9.

²⁵⁷ NL SA Objection, paragraph 25.

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 analysis²⁵⁸. The NL SA considers that the Draft Decision should be amended if a further inquiry by the IE SA establishes that the reliance on consent as a legal ground is mandatory²⁵⁹.

149. 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 it is conditional on the use of their services as a whole (“take it or leave it”). 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 Terms of Use, is not provided in a concise, transparent, intelligible and easily accessible form, using clear and plain language²⁶⁰.

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

150. The AT, DE, ES, FI, FR and NL 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 Instagram Terms of Use²⁶¹. The DE SAs conclude that Meta IE processes the complainant’s special categories of data in breach of Article 9 (1) GDPR²⁶². The AT, ES, FI, FR and NL SAs 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 IE²⁶³.
151. The AT, ES, FI, FR and NL 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 purpose of behavioural advertising and whether Meta IE respects the requirements of the GDPR, such as those of Article 7, in obtaining consent to that end²⁶⁴.
152. The FR and NL SAs argue that the data that Meta IE processes may include special categories of personal data under Article 9 GDPR²⁶⁵. The DE SAs contend that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes²⁶⁶.
153. The FR SA notes that Instagram users can provide various sensitive data about themselves, including their sexual orientation, religious views and political opinions in the description of their profile. The FR SA considers that the IE SA cannot simply state that it has no evidence that Meta IE processes such data in the context of the Instagram service. In order to deal with the complaint, the FR SA asks for

²⁵⁸ NL SA Objection, paragraph 25.

²⁵⁹ NL SA Objection, paragraph 25.

²⁶⁰ DE SAs Objection, p. 8; FR SA Objection, paragraphs 24-29.

²⁶¹ AT SA Objection, p. 9-10; DE SAs Objection, p. 7; ES SA Objection, p. 2-3; FI SA Objection, paragraphs 36-38, 41; FR SA Objection, paragraphs 30-31; NL SA Objection, paragraphs 24-26.

²⁶² DE SAs Objection, p. 7, 10.

²⁶³ AT SA Objection, p. 9; ES SA Objection, p. 2-3; FI SA Objection, paragraphs 41-42; FR SA Objection, paragraph 31; NL SA Objection, paragraph 25.

²⁶⁴ AT SA Objection, p. 9; ES SA Objection, p. 2-3; FI SA Objection, paragraph 41; FR SA Objection, paragraph 30; NL SA Objection, paragraph 25.

²⁶⁵ FR SA Objection, paragraph 30; NL SA Objection, paragraph 24.

²⁶⁶ DE SAs Objection, p. 7.

further investigation, in particular it asks the LSA to examine whether sensitive data are processed by the controller and, if so, whether one of the conditions of Article 9(2) GDPR is met in this case²⁶⁷.

154. The NL SA argues that there is strong indication that some data processed in the context of the Instagram service actually belongs to a special category of data considering “*photographs and other images that are, or were, potentially processed with use of facial recognition technology and other artificial intelligence technologies in the context of Facebook services*”²⁶⁸. The NL SA highlights that according to the CJEU ruling in case C-136/17 the mere indexing of certain data could already suffice to conclude that Article 9 GDPR applies²⁶⁹.
155. The DE and NL 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 data²⁷⁰. The FI SA recalls that the performance of a contract is not an exception pursuant to Article 9(2) GDPR²⁷¹.

Arguments on other types of data requiring consent

156. 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 data²⁷².

Risks

157. 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 Instagram Terms of Use there is also a significant risk for the fundamental rights and freedoms of all Instagram users in the European Union that their personal data, including data of special categories are processed without any legal basis²⁷³. The AT SA also considers that the compliance of Meta IE with the GDPR rules on the processing of special categories 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 media network in the world²⁷⁴.
158. The AT, DE, FI, FR and NL 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 data²⁷⁵.
159. 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 GPDR. The AT

²⁶⁷ FR SA Objection, paragraph 30.

²⁶⁸ NL SA Objection, paragraph 25.

²⁶⁹ NL SA Objection, paragraphs 26.

²⁷⁰ DE SAs Objection, p. 7; NL SA Objection, paragraph 24.

²⁷¹ FI SA Objection, paragraph 40.

²⁷² NL SA Objection, paragraphs 22-23, 27.

²⁷³ DE SAs Objection, p. 9.

²⁷⁴ AT SA Objection, p. 9.

²⁷⁵ AT SA Objection, p. 11; DE SAs Objection, p. 9; FI SA Objection, paragraph 43; FR SA Objection, paragraph 34; NL SA Objection, paragraphs 30-31.

SA argues that this is not in line with the CJEU ruling in case C-311/18, which provides that the supervisory authority must handle complaints with all due diligence²⁷⁶.

160. 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 Instagram users to send them targeted advertising does not allow the European users to have control over the fate of their data²⁷⁷. 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 intrusive²⁷⁸.
161. 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 forgotten²⁷⁹.
162. The AT, DE, FI 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) GDPR²⁸⁰.
163. The FI SA highlights that the will of the legislator has been to protect the Article 9 GDPR special category data with a duty of care and if there is any reasonable doubt that Meta IE has no legal basis for processing operations of such sensitive data of the Instagram users, the said claim needs to be properly investigated or otherwise the lack of investigation would negatively affect hundreds of millions of Instagram users within the EEA and undermine their right to privacy and data protection²⁸¹.
164. 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 EU²⁸².
165. 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 operations that must be based on consent. This would risk leaving data subjects with a reduced degree of transparency²⁸³.

²⁷⁶ AT SA Objection, p. 10-11.

²⁷⁷ FR SA Objection, paragraph 34.

²⁷⁸ FR SA Objection, paragraph 35.

²⁷⁹ NL SA Objection, paragraph 33.

²⁸⁰ AT SA Objection, p. 11; FI SA Objection, paragraph 43; DE SAs Objection, p. 9; NLSA Objection, paragraph 33.

²⁸¹ FI SA Objection, paragraph 43.

²⁸² NL SA Objection, paragraph 33.

²⁸³ NL SA Objection, paragraph 30.

5.3 Position of the LSA on the objections

166. The IE SA considers the objections not reasoned and does not follow them²⁸⁴.
167. The IE SA argues that the scope of the inquiry is appropriate and relates to the issues raised in the complaint. It 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 particularised allegation of wrongdoing²⁸⁵.
168. 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 lodged. The IE SA argues that it would not have been possible to assess each discrete processing operation by Meta IE, 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 Meta IE's processing operations related to the Instagram Terms of Use to handle the complaint²⁸⁶.
169. The IE SA argues that its analysis of Article 6(1)(b) GDPR does not preclude the possibility that certain discrete processing operations by Meta IE may fall outside the scope of Article 6(1)(b) GDPR. 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 rules²⁸⁷.
170. 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, i.e. that the agreement to the Terms of Use was a form of GDPR consent to processing of personal data, including consent to the processing of special categories of data. 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 GDPR²⁸⁸.
171. 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 data²⁸⁹.
172. 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 basis. 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 Article 6(1)(f) GDPR. The IE SA contends that the variation in the extent of data subject rights and protections, depending on the applicable legal basis, 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 Terms of Use, Meta IE

²⁸⁴ Composite Response, paragraphs 36 and 48.

²⁸⁵ Composite Response, paragraph 97.

²⁸⁶ Composite Response, paragraph 26.

²⁸⁷ Composite Response, paragraph 27.

²⁸⁸ Composite Response, paragraph 28.

²⁸⁹ Composite Response, paragraphs 32-33.

relies on different “acts” of consent for specific aspects of the service, including personalised advertising based on users’ off-Instagram activities. In this regard, the IE SA states that the complaint in this case was about the agreement to the Terms of Use and the processing it entails once accepted²⁹⁰.

173. The IE SA argues that the objections are inconsistent with the principle of legal certainty, as cited in Recital 7 GDPR. 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 consent²⁹¹. 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 states 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 processing²⁹².

5.4 Assessment of the EDPB

5.4.1 Assessment of whether the objections were relevant and reasoned

174. The EDPB responds to Meta IE’s primary arguments to the contrary in Section 4.4.1 above²⁹³.
175. The AT, DE, ES, FI, FR and NL SAs objections analysed in this section have a direct connection with the Draft Decision and refer to a specific part of the Draft Decision, i.e. Finding 1. The AT, DE, ES, FI, FR and NL SAs argue that the IE SA has not carried out enough investigation and legal analysis in the Draft Decision to conclude that Meta IE is not legally obliged to rely on consent to process the complainants’ data²⁹⁴. According to these CSAs, the IE SA should have identified and separately assessed any

²⁹⁰ Composite Response, paragraphs 46.

²⁹¹ Composite Response, paragraph 47.

²⁹² Composite Response, paragraph 47.

²⁹³ 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 73-75 of this Binding Decision above. In particular, the EDPB recalls that the analysis of whether a given objection meets the threshold set by Art. 4(24) GDPR is carried out on a case-by-case basis. More specifically, in contrast to the objections referred to by Meta IE that did not “*establish a direct connection with the specific legal and factual content of the Draft Decision*” (Binding Decision 2/2022 paragraphs 139, 147, 164) here, each CSA has made several clear links with the content of the Draft Decision, as is described in paragraphs 143, 145-147 and 150-151 of this Binding Decision. Moreover, while the objections referenced by Meta IE in paragraph 4.9 of its Article 65 submissions were found not to be relevant and/or reasoned in the Binding Decision 2/2022 as they did “*not provide sufficiently precise and detailed legal reasoning regarding infringement of each specific provision in question*”, did not explain sufficiently clearly, nor substantiate in sufficient detail how the conclusion proposed could be reached, or did not sufficiently demonstrate the significance of the risk posed by the Draft Decision for the rights and freedoms of the data subjects or the free flow of data within the EU (Binding Decision 2/2022, paragraphs 140, 148, 165), as regards the objections analysed in this section, the AT, DE, FI, FR and NL SAs provide a number of legal and factual arguments and explanations as to why an infringement for lack of appropriate legal basis is to be established, and adequately identify the risk posed by the Draft Decision if it was adopted unchanged (paragraphs 145-165 of this Binding Decision).

²⁹⁴ AT SA Objection, p. 9; DE SAs Objection, pp. 8-9; ES SA Objection, pp. 2-3; FI SA Objection, paragraphs 36-37; FR SA Objection, paragraph 30; NLSA Objection, paragraph 21.

processing of special categories of personal data in Instagram Terms of Use²⁹⁵. The NL SA argues that processing operations concerning location data and the use of tracking technologies on users devices should have investigated and assessed by the IE SA as well²⁹⁶. The AT, FI, FR and NL SAs 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 in relation to the Instagram service²⁹⁷. The DE, FR and NL SAs argue that the data that Meta IE's processes may include special categories of personal data under Article 9 GDPR²⁹⁸. They contend that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes. The AT, DE, ES, FI and FR SAs highlight that the issue falls within the remit of the complaint since the complainant alleged a potential violation of Article 9 GDPR and should therefore be investigated and assessed by the LSA²⁹⁹. The AT, DE, ES, FI and FR SAs challenge the reasoning underling the conclusion reached by the LSA. This assessment could lead to a different conclusion insofar as the IE SA would fully cover the complaint and include facts and a legal assessment on the Instagram's service processing operations to which Article 6(1)(a), Articles 7 and 9 GDPR may apply, which may reveal an infringement by Meta IE³⁰⁰.

176. Consequently, the EDPB finds that the AT, DE, ES, FI, FR and NL SAs objections relating to Finding 1, which states that Meta IE is not required to rely on consent to deliver the Instagram Terms of Use and its underlying reasoning, are **relevant**³⁰¹.
177. The AT, DE, FI, FR and NL SAs 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, FI, FR and NL 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 Instagram Terms of Use³⁰². In particular, the DE, FR and NL SAs argue that the data that Meta IE processes may include special categories of personal data under Article 9 GDPR and that nothing indicates that Meta IE excludes these categories of data from its processing for advertising purposes³⁰³. The AT, DE, ES, FR and NL 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 data³⁰⁴. The FI SA recalls that EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR state that the WP29 has observed that Article 9(2) GDPR does not recognise "*necessary for the performance of a contract*" as an exception to the general prohibition to process special categories of data³⁰⁵. The NL SA identifies as another

²⁹⁵ AT SA Objection, p. 9; DE SAs Objection, p. 7; FI SA Objection, paragraph 37 ; FR SA Objection, paragraph 30; NL SA Objection, paragraph 25.

²⁹⁶ NL SA Objection, paragraphs 22-23 and 27.

²⁹⁷ AT SA Objection, p. 9; FI SA Objection paragraph 41; FR SA Objection, paragraph 30; NL SA Objection, paragraph 25.

²⁹⁸ DE SAs Objection, p. 7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 24-25.

²⁹⁹ AT SA Objection, p. 9; DE SAs Objection, p. 7; ES SA Objection, p. 2; FI SA Objection, p. 42; FR SA Objection, paragraph 30.

³⁰⁰ 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.

³⁰¹ See paragraphs 143, 145 and 150 of this Binding Decision.

³⁰² AT SA Objection, p. 9; DE SAs Objection, p. 7; FR SA Objection, paragraph 30; NL SA Objection, paragraph 25.

³⁰³ DE SAs Objection, p. 7; FR SA Objection, paragraph 30; NL SA Objection, paragraphs 24-25.

³⁰⁴ AT SA Objection pp. 9-10; DE SAs Objection, p. 7; ES SA Objection, p. 2-3; FR SA Objection, paragraph 31; NL SA Objection, paragraph 24.

³⁰⁵ FI SA Objection, paragraph 40.

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 data³⁰⁶. 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 children³⁰⁷. Lastly, the NL SA states that the information shared by users on Instagram may contain personal data concerning the health of individual users and mentions the ruling of the CJEU in case C-136/17 stating that the mere indexing of certain data could already suffice to conclude that Article 9 of the GDPR applies³⁰⁸.

178. On the risks posed by the Draft Decision, the AT, DE, FI, FR and NL SAs 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 data³⁰⁹. 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 GDPR³¹⁰. 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 targeted advertising purposes, which it views as particularly massive and intrusive³¹¹. 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 forgotten³¹². The AT, DE, FI and NL SAs also note 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) GDPR³¹³. The NL SA also underlines the data protection deficits that are foreseeable with a switch from consent to contract legal basis and the risk that this conclusion would create legal uncertainty that hampers the free flow of personal data within the EU³¹⁴. 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 transparency³¹⁵. The ES SA does not describe any risk on this specific topic in their objection³¹⁶.
179. On the basis of the above considerations, the EDPB finds that the objections raised by the AT, DE, FI, FR and NL SAs concerning the conclusions in the Draft Decision about the fact that Meta IE is not obliged to rely on consent to process the complainant's data, are **relevant and reasoned** objections under Article 4(24) GDPR.

³⁰⁶ NL SA Objection, paragraphs 22-23 and 27.

³⁰⁷ NL SA Objection, paragraph 34.

³⁰⁸ NL SA Objection, paragraph 26.

³⁰⁹ AT SA Objection pp. 10-11; DE SAs Objection, p. 9; FI SA Objection, pp. 9-10; FR SA Objection, p. 7; NL SA Objection, p. 9-11.

³¹⁰ AT SA Objection, p. 10.

³¹¹ FR SA Objection, paragraph 35.

³¹² NL SA Objection, paragraph 33.

³¹³ AT SA Objection, p. 11; DE SAs Objection, p. 9; FI SA Objection, paragraph 43; NLSA Objection, paragraph 33.

³¹⁴ NL SA Objection, paragraphs 32-33.

³¹⁵ NL SA Objection, paragraph 30.

³¹⁶ ES SA Objection, p. 3.

180. 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 mandate³¹⁷.
181. Finally, the EDPB considers that the objection raised by the ES SA regarding the potential infringement of Article 9 GDPR is not sufficiently reasoned with reference to the significance of the risks posed by the Draft Decision at stake and, therefore, the objection of the ES SA does not meet the threshold provided for by Article 4(24) GDPR.

5.4.2 Assessment on the merits

182. 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.
183. The EDPB considers that the objections found to be relevant and reasoned in this subsection³¹⁸ 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 Terms of Use 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

184. 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 it³¹⁹.
185. 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 users' acceptance the Terms of Use³²⁰. 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 [users'] activity off of Meta Company Products, so we can personalise ads we show [them] on Meta Company Products and on websites, apps and devices that use our advertising services*" and that it has a separate process for obtaining this consent in a manner that satisfies the requirements of Article 4(11) and Article 7 GDPR and which is "*entirely separate from any interaction by users with the Terms of Use or Data Policy, is not part of the Complaint and has not been examined*" in the IE SA's inquiry³²¹. 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 Terms of Use. 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 acceptance of the

³¹⁷ NL SA Objection, paragraphs 7-8.

³¹⁸ These objections being those of the AT, DE, FI, FR and NL SAs, disagreeing with the IE SA's Finding 1, which states that Meta IE is not required to rely on consent to deliver the Instagram Terms of Use and its underlying reasoning.

³¹⁹ Meta IE Article 65 Submissions, paragraphs 5.2 and 5.6.

³²⁰ Meta IE Article 65 Submissions, paragraph 5.4.

³²¹ Meta IE Article 65 Submissions Footnote 61 and paragraph 6.27.

Terms of Use, the inquiry should end there and all unrelated assertions in the objections should be disregarded³²².

186. 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 mandates Meta IE to rely on consent for *“its data processing for purposes of behavioural advertising (or any other purpose)”*³²³. 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 certainty³²⁴. 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 providers³²⁵. 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 processing; it is technology neutral and does not include specific derogations or rules for any one specific industry³²⁶.
187. With regard to the consideration that consent as a legal basis provides more extensive data protection rights, 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 bases³²⁷. Meta IE supports the IE SA’s view that Article 6(1) GDPR does not require legal bases to be determined by reference to the applicable data subject rights for each basis³²⁸.

EDPB’s assessment on the merits

188. The EDPB notes that the IE SA’s Draft Decision 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 Instagram user³²⁹. The BE SA forwarded this complaint to the IE SA as LSA in the case, given Meta IE’s main establishment in Ireland.
189. 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 Instagram Terms of Use and Privacy Policy³³⁰. 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 GDPR³³¹. The Complainant argues that the Terms of Use and Privacy Policy also include special categories of data under Article 9(1) GDPR because the data subject, as an Instagram user, has interacted with various groups and individuals, which would accordingly reveal the data subject’s political affiliation, sexual orientation, health condition, etc³³². The

³²² Meta IE Article 65 Submissions, paragraph 5.8.

³²³ Meta IE Article 65 Submissions, paragraph 5.2.

³²⁴ Meta IE Article 65 Submissions, paragraph 5.14.

³²⁵ Meta IE Article 65 Submissions, paragraph 5.15.

³²⁶ Meta IE Article 65 Submissions, paragraph 5.15.

³²⁷ Meta IE Article 65 Submissions, paragraph 5.16.

³²⁸ Meta IE Article 65 Submissions, paragraphs 5.16-5.17.

³²⁹ Draft Decision, paragraph 3; Schedule to the Draft Decision, paragraphs 12 and 19.

³³⁰ Complaint, p. 1-2.

³³¹ Complaint, p. 1-2.

³³² Complaint, p. 1-2.

Complainant claims that the controller also allows to target such information for advertisement³³³. 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) GDPR³³⁴.

190. Based on the scope of the 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 “*Agree to Terms*” button constitutes or must be considered consent for the purposes of the GDPR and, if so, whether it is valid consent for the purposes of the GDPR.
 - Issue 2 – Whether Meta IE could rely on Article 6(1)(b) GDPR as a lawful basis for processing of personal data in the context of Terms of Use and/or Data Policy.
 - Issue 3 – Whether Meta IE provided the requisite information on the legal basis for processing on foot of Article 6(1)(b) GDPR and whether it did so in a transparent manner.³³⁵
191. 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 lodged³³⁶. 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) GDPR³³⁷. 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 Article³³⁸. 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 Terms of Use and (b) is not legally obliged to rely on consent in order to do so, based on the submissions of the Parties and Instagram Terms of Use³³⁹. 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 IE³⁴⁰.
192. The EDPB notes that the Complaint makes plain the confusion of the Instagram user over which of the user's special categories of data are processed, for which purposes and on which basis.
193. The Instagram Terms of Use themselves note in general terms “*Providing our Service requires collecting and using your information. The Data Policy explains how we collect, use, and share*

³³³ Complaint, p. 4.

³³⁴ Complaint, p. 7 and 16.

³³⁵ Draft Decision, paragraph 30.

³³⁶ Composite Response, paragraph 26.

³³⁷ Composite Response, paragraph 26.

³³⁸ Composite Response, paragraph 28.

³³⁹ Draft Decision, paragraph 60; Finding 1.

³⁴⁰ Composite Response, paragraphs 30-33 and 35.

information across the Facebook Products”³⁴¹ (service which includes “Offering personalized opportunities to create, connect, communicate, discover, and share” and “Connecting you with brands, products, and services in ways you care about”³⁴²). The Instagram Terms of Use include a reference to a separate document “the Data Policy”³⁴³, 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”³⁴⁴. 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”³⁴⁵ 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 Policy³⁴⁶ 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 page³⁴⁷, which includes a link to a separate facebook.com page mentioning the use of consent on data with special protection and referring to the Instagram Settings³⁴⁸.

194. The IE SA finds that the way in which Meta IE provides, in relation to processing for which Article 6(1)(b) GDPR is relied upon, this information 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)³⁴⁹. The IE SA considers the complaint in this case to be limited to the Terms of Use and the processing it entails once accepted³⁵⁰. 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 Terms of Use³⁵¹. 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. The IE SA also does not examine or verify whether special categories of data under Article 9 GDPR are processed in the context of the Instagram service and, if so, whether they are subject to these “acts” of consent and thus effectively treated outside the scope of the Terms of Use

³⁴¹ Instagram Terms of Use, Section “The Data Policy”.

³⁴² Instagram Terms of Use, Section “The Instagram Service”.

³⁴³ The document is titled as “Instagram Data Policy”, however it is explained in its chapeau that “[t]his policy describes the information we process to support Facebook, Instagram, Messenger and other products and features offered by Facebook (Facebook Products or Products)”.

³⁴⁴ Instagram Data Policy, Section “Things you and others do and provide”.

³⁴⁵ Instagram Data Policy, Section “How do we use this information? -Provide, personalize and improve our Products”.

³⁴⁶ Instagram Data Policy, Section “Things you and others do and provide” and Section “How do we use this information? -Provide, personalize and improve our Products”.

³⁴⁷ Data Policy, Section “What is our legal basis for processing data?”.

³⁴⁸ Facebook website https://www.facebook.com/about/privacy/legal_bases.

³⁴⁹ Draft Decision, Finding 3.

³⁵⁰ The IE SA mentions in its Schedule to the Draft Decision, paragraphs 134-135 “My view is that [...] the Complaint even taken at its height quite clearly only concerns data processing arising out of the act of acceptance. On this basis, I do not 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. There is no evidence that Meta Ireland processes special category data at all in respect of the Instagram service”.

³⁵¹ Composite Response, paragraph 46.

and the legal basis of Article 6(1)(b) GDPR on which the Terms of Use purportedly rely, or whether some special categories of personal data, as defined by the GDPR and EU case-law³⁵², are treated under the Instagram Terms of Use.

195. 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 Charter³⁵³. 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 person³⁵⁴. 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 social network services 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*”³⁵⁵.
196. 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 context of the Instagram service covered by this Article³⁵⁶. 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 it relies on consent³⁵⁷.
197. In the present case, the IE SA limited its facts and legal assessment in the Draft Decision to the general question of whether Meta IE has (a) sought to rely on consent in order to process personal data to deliver the Terms of Use 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, and if it does, if

³⁵² See Article 9 GDPR and C-184/20 Vyriausioji tarnybinės etikos komisija.

³⁵³ C-184/20 Vyriausioji tarnybinės etikos komisija, paragraph 126.

³⁵⁴ C-184/20 Vyriausioji tarnybinės etikos komisija, paragraph 127.

³⁵⁵ C-252/21 Oberlandesgericht Düsseldorf request, Opinion of the Advocate General on 20 September 2022, ECLI:EU:C:2022:704, paragraph 46.

³⁵⁶ Complaint, p. 1-3, 7, 16.

³⁵⁷ Draft Decision, paragraphs 28-29; Complainant’s Submission on Preliminary Draft Decision in inquiry IN-18-5-5 of 11 June 2021, pp. 11-13 (in a letter to the IE SA of 4 February 2022 p. 2 the Complainant explains that their submissions in IN-18-5-5 on facebook.com should be considered as their submissions in IN-18-5-7 on Instagram and all references should be read accordingly).

Meta IE complies with the conditions of Article 9 GDPR and others relevant to the application of this provision (for example, Articles 6(1)(a) and Article 7 GDPR).

198. By deciding not to investigate, further to the Complaint, the processing of special categories of personal data in the context of the Instagram service, the IE SA leaves unaddressed the risks this processing poses for the Complainant and for Instagram users. First, there is the risk that the Complainant's special categories of personal data are processed within the Instagram 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(2) GDPR 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-law³⁵⁸) certain categories of personal data it processes and consequently, that Meta IE does not treat them accordingly. Third, the Complainant and other Instagram users whose special categories of 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 forgotten³⁵⁹. 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 Instagram 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.
199. The EDPB further considers, also in view of these risks to the Complainant and to other Instagram users, that the IE SA did not handle the Complaint with all due diligence³⁶⁰. 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 Complaint³⁶¹. 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.
200. The EDPB also highlights that by limiting excessively the scope of its inquiry despite the scope of the complaint in this cross-border case and systematically considering all the objections raised by CSAs 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*

³⁵⁸ 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,.

³⁵⁹ Art. 17 GDPR.

³⁶⁰ 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'), 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.

³⁶¹ Complaint, p. 1-3, 7, 16.

*and sincere and effective cooperation with the other supervisory authorities concerned*³⁶². 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.

201. As a result of the limited scope of the inquiry and the fact that the IE SA did not verify and assess in the Draft Decision Meta IE's processing of special categories of personal data in its Instagram service, the EDPB does not have sufficient factual evidence on Meta IE's processing operations to enable it to make a finding on any possible infringement by Meta IE of its obligations under Article 9 GDPR and other GDPR provisions relevant thereto.
202. 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 process personal data to carry out the personal data processing activities involved in the delivery of the Instagram Service, including behavioural advertising as set out in the Instagram Terms of Use 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.
203. 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 Instagram 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 dDecision in accordance with Article 60(3) GDPR³⁶³.

6 ON THE POTENTIAL ADDITIONAL INFRINGEMENT OF THE PRINCIPLE OF FAIRNESS

6.1 Analysis by the LSA in the Draft Decision

204. The IE SA in its Draft Decision addresses the Complainant's allegations that the unclear and misleading nature of the Instagram Terms of Use and Data Policy, together with the mode of acceptance of the Terms of Use, have made Instagram users believe that all processing operations were based on consent under Article 6(1)(a) GDPR and thus constituted a breach of the Meta IE's transparency obligations under Articles 5(1)(a) and 13(1)(c) GDPR³⁶⁴. The IE SA analyses the submissions provided by the Meta IE and, noting the Complaint's focus on the alleged "*forced consent*"³⁶⁵, concludes that Meta IE has breached Article 5(1)(a), Article 13(1)(c) and Article 12(1) GDPR due to the lack of

³⁶² 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.

³⁶³ EDPB Guidelines on Article 65(1)(a) GDPR, Section 4.2.3 and paragraph 85.

³⁶⁴ Draft Decision, issue 3, paragraphs 116-196, in particular the conclusion in paragraph 196.

³⁶⁵ See also paragraph 3 of this Binding Decision

transparency in relation to the processing for which Article 6(1)(b) GDPR has been relied on³⁶⁶. 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 provisions³⁶⁷. Nevertheless, the IE SA takes the view that “[t]he factual question of whether the data subject was misled as to the legal basis is therefore part of the broader question as to whether there was compliance with transparency requirements and should not be considered in isolation of this broader issue”³⁶⁸. The IE SA points out that Article 5(1)(a) GDPR links transparency to the overall fairness of the activities of the controller³⁶⁹ and concludes on the breach of this provision in relation to the infringement of the transparency obligations³⁷⁰.

6.2 Summary of the objection raised by the CSA

205. 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 transparency³⁷¹. 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 transparency³⁷².
206. According to the IT SA, the relationship between Meta IE and Instagram users is markedly and significantly unbalanced³⁷³ and an infringement of the fairness principle resulted, first of all, from the misrepresentation of the legal basis for processing by the controller³⁷⁴, considering that “*Meta presented its service to users in a misleading manner*” and “*without taking due account of users’ right to the protection of their personal data*”³⁷⁵. 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*”³⁷⁶.
207. 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 enterprise³⁷⁷.
208. 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

³⁶⁶ Draft Decision, paragraphs 180-196.

³⁶⁷ Draft Decision, paragraph 191.

³⁶⁸ Draft Decision, paragraph 25.

³⁶⁹ Draft Decision, paragraph 193.

³⁷⁰ Draft Decision, paragraphs 191-196 and Finding 3.

³⁷¹ ITSA Objection, p. 4-5.

³⁷² ITSA Objection, p. 5.

³⁷³ ITSA Objection, p. 5.

³⁷⁴ ITSA Objection, p. 5.

³⁷⁵ ITSA Objection, p. 5.

³⁷⁶ ITSA Objection, p. 6.

³⁷⁷ ITSA Objection, p. 6.

from this provision, without any need for supplementary investigations³⁷⁸. According to the IT SA, should the objection be followed, it would also impact the exercise of by 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 GDPR³⁷⁹.

6.3 Position of the LSA on the objection

209. The IE SA does not consider the IT SA objection to be relevant and reasoned and does not follow it³⁸⁰. 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 inquiry³⁸¹.
210. 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 it³⁸². 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 neither necessary, nor could be reconciled with the controller's right to a fair procedure³⁸³.

6.4 Analysis of the EDPB

6.4.1 Assessment of whether the objection was relevant and reasoned

211. The IT SA objection concerns "*whether there is an infringement of the GDPR*"³⁸⁴.
212. 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 "*irrelevant to the resolution of this Inquiry*" and, if accepted, would seriously infringe Meta IE's procedural rights under both Irish and EU law³⁸⁵. According to Meta IE, "*the EDPB cannot expand the scope of the Inquiry in the manner suggested by the CSAs through Objections that are not relevant to the substance of the Complaint*" and in relation to this Meta IE refers to the EDPB Binding Decision 2/2022³⁸⁶.

³⁷⁸ ITSA Objection, p. 5-6.

³⁷⁹ ITSA Objection, p. 1.

³⁸⁰ Composite Response, paragraph 36.

³⁸¹ Composite Response, paragraph 29.

³⁸² Composite Response, paragraphs 31-32.

³⁸³ Composite Response, paragraph 35.

³⁸⁴ EDPB Guidelines on RRO, paragraph 24.

³⁸⁵ Meta IE Article 65 Submissions, paragraph 4.2 and paragraphs 4.10 to 4.20 regarding the right to fair procedure, as well as Meta IE Article 65 Submissions, Annex 1, paragraph 7.7.

³⁸⁶ Meta IE Article 65 Submissions, paragraph 4.9. In particular, Meta IE refers to paragraphs 139, 140, 147, 148, 164, and 165 of the EDPB Binding Decision 2/2022.

213. Meta IE further contends that the IT SA objection is not reasoned as it provides broad and unsubstantiated allegations without presenting facts or evidence in this regard³⁸⁷ and fails to address the significance of the risk to fundamental rights and freedoms posed by the Draft Decision³⁸⁸.
214. 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 objection³⁸⁹. 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 unjustifiably fails to cover some of the issues raised by the complainant³⁹⁰. 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*"³⁹¹. 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*"³⁹². Therefore, the EDPB disagrees with the IE SA's finding that assessing Meta IE's compliance with the principle of fairness would amount addressing matters "*which fall outside of the scope of the underlying complaint*"³⁹³.
215. 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) GDPR³⁹⁴. As this finding is not subject to a dispute, the EDPB will not examine this matter.
216. 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 3³⁹⁵), 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 separate requirements relating to transparency under this provision³⁹⁶. The

³⁸⁷ Meta IE Article 65 Submissions, Annex 1, paragraph 7.8.

³⁸⁸ Meta IE Article 65 Submissions, Annex 1, paragraph 7.9.

³⁸⁹ See paragraphs 73-75 of this Binding Decision.

³⁹⁰ EDPB Guidelines on RRO, paragraph 27.

³⁹¹ Complaint, paragraph 2.3.1.

³⁹² Complaint, paragraph 2.3.2.

³⁹³ Composite Response, paragraph 30.

³⁹⁴ ITSA Objection, p. 4-5.

³⁹⁵ ITSA Objection, p. 4-5.

In respect of Meta IE's arguments in paragraph 4.9 of its Article 65 Submissions on this objection not being relevant, the EDPB recalls that the analysis of whether a given objection meets the threshold set by Art. 4(24) GDPR is carried out on a case-by-case basis. Meta IE refers to the EDPB's Binding Decision 2/2022 and specifically to the paragraphs where the EDPB established that specific objections raised by the DE SAs and NO SA in that case were not relevant and reasoned. There are several differences between those objections and the objection of the IT SA that is being analysed in this section.

More specifically, in the Binding Decision 2/2022 the objections referred to by Meta IE did not "*establish a direct connection with the specific legal and factual content of the Draft Decision*" (Binding Decision 2/2022 paragraphs 139, 147, 164) whereas the IT SA objection here makes several clear links with the content of the Draft Decision, by referring to the analysis carried out by the IE SA in respect of the breach of the transparency obligations and to specific observations made by the LSA and explains how the additional infringement of Art. 5(1)(a) could be established on that basis (see, for example, p. 6 of the IT Objection referring to paragraph 185 of the Draft Decision concerning users being left "*in the dark*").

³⁹⁶ ITSA Objection, p. 5-6.

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 GDPR³⁹⁷.

217. 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) GDPR³⁹⁸. For example, the IT SA explains that “[t]ransparency 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”³⁹⁹. The IT SA contends that the “overall relationship between Meta and Instagram users is markedly as well as significantly unbalanced”⁴⁰⁰. According to the IT SA, the first way in which Meta IE has infringed the principle of fairness is by misrepresenting the legal basis for processing in order to pursue its business model “without taking due account of users’ right to the protection of personal data” and leaving “its users in the dark”⁴⁰¹. Further, in the IT SA’s view, Meta IE has breached the fairness principle, 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 life⁴⁰².
218. 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 concerning other digital platform operators - more generally, other controllers belonging to the same business sector - and markedly weakening the safeguards that must be provided through the effective implementation of the data protection framework on account of the comprehensive disregard of the fairness of the processing principle⁴⁰³.
219. 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

220. In accordance with Article 65(1)(a) GDPR, the EDPB shall take a binding decision concerning all the matters which are the subject of the relevant and reasoned objections, in particular whether there is an infringement of the GDPR.

³⁹⁷ IT SA Objection, p. 1.

³⁹⁸ See paragraphs 206-208 of this Binding Decision.

³⁹⁹ IT SA Objection, p. 5.

⁴⁰⁰ IT SA Objection, p. 5.

⁴⁰¹ IT SA Objection, p. 6.

⁴⁰² IT SA Objection, p. 6. See also above, paragraphs 206-208. In respect of Meta IE’s arguments in paragraph 4.9 of its Article 65 Submissions on this objection not being reasoned, the EDPB notes that the objections that were found to be not relevant and/or not reasoned in the Binding Decision 2/2022 did “not provide sufficiently precise and detailed legal reasoning regarding infringement of each specific provision in question”, did not explain sufficiently clearly, nor substantiate in sufficient detail how the conclusion proposed could be reached, or did not sufficiently demonstrate the significance of the risk posed by the Draft Decision for the rights and freedoms of the data subjects or the free flow of data within the EU (Binding Decision 2/2022, paragraphs 140, 148, 165). The IT SA objection provides, instead, a number of legal and factual arguments and explanations as to why a breach of the fairness principle is to be established, and adequately identifies the risk posed by the Draft Decision if it was adopted unchanged.

⁴⁰³ IT SA Objection, p. 7.

221. 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.
222. The EDPB takes note of Meta IE's view that the IT SA objection lacks merit as it goes beyond the scope of the inquiry⁴⁰⁴. The EDPB also notes that Meta IE links the issue of the potential infringement of the principle of fairness, raised in the IT SA objection, with the question of the competence of CSAs or the EDPB to assess the validity of contracts in the context of Article 6(1)(b) GDPR and, when responding to the merits of the IT SA objection, Meta IE refers to its submissions on application of Article 6(1)(b) GDPR with respect to standard form contracts⁴⁰⁵. While taking note of Meta IE's view on this matter, the EDPB considers the question of Meta IE's compliance with the principle of fairness under Article 5(1)(a) GDPR to be distinct from the question of the choice of the appropriate legal basis (although a connected one, as explained below) and proceeds with its respective assessment below.
223. Firstly, the EDPB recalls that the basic principles relating to processing listed in Article 5 GDPR can, as such, be infringed⁴⁰⁶. 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.
224. The EDPB underlines that the principles of fairness, lawfulness and transparency, all three enshrined in Article 5(1)(a) GDPR, are three distinct but intrinsically linked and interdependent principles that every controller should respect when processing personal data. The link between these principles is evident from a number of GDPR provisions: Recitals 39 and 42, Article 6(2) and Article 6(3)(b) GDPR refer to lawful and fair processing, while Recitals 60 and 71 GDPR, as well as Article 13(2), Article 14(2) and Article 40(2)(a) GDPR refer to fair and transparent processing.
225. 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*"⁴⁰⁷ 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.

⁴⁰⁴ Meta IE Article 65 Submissions, Annex 1, paragraph 7.10. In this respect see paragraphs 73-75 (section 4.4.1) on this Binding Decision.

⁴⁰⁵ "*To the extent the IT SA Objects to the lawfulness of Meta Ireland's data processing based on the nature of the contract between Meta Ireland and users of the Instagram Service (i.e. a standard form contract), Meta Ireland submits that the validity of contract is not within the competence of CSAs or the EDPB. In any event, Meta Ireland respectfully asks the EDPB to take into account its submission above with respect to standard form contracts*". Meta IE Article 65 Submissions, Annex 1, paragraph 7.10.

⁴⁰⁶ See also Binding Decision 1/2021, paragraph 191.

⁴⁰⁷ Draft Decision, paragraph 193.

226. The EDPB recalls that, in data protection law, the concept of fairness stems from the EU Charter of Fundamental Rights⁴⁰⁸. The EDPB has already provided some elements as to the meaning and effect of the principle of fairness in the context of processing personal data. For example, the EDPB has previously opined in its Guidelines on Data Protection by Design and by Default that “[f]airness is an overarching principle which requires that personal data should not be processed in a way that is unjustifiably detrimental, unlawfully discriminatory, unexpected or misleading to the data subject”⁴⁰⁹.
227. 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 processing⁴¹⁰. 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”⁴¹¹.
228. 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 GDPR⁴¹². 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”⁴¹³, 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 processed⁴¹⁴. 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 data⁴¹⁵ which is in contrast with the element of “autonomy” of data subjects as to the processing of their personal data⁴¹⁶.
229. 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

⁴⁰⁸ 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).

⁴⁰⁹ 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.

⁴¹⁰ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴¹¹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 12.

⁴¹² 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.

⁴¹³ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴¹⁴ On online services, see EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraphs 3-5.

⁴¹⁵ Further EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 4.

⁴¹⁶ 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”.

data. Compliance by providers of online services acting as controllers with all three of the cumulative requirements under Article 5(1)(a) GDPR, taking into account the particular service that is being provided and the characteristics of their users, serves as a shield from the danger of abuse and deception, especially in situations of power asymmetries.

230. The EDPB has previously emphasised that the identification of the appropriate lawful basis is tied to the principles of fairness and purpose limitation⁴¹⁷. In this regard, the IT SA rightly observes that while finding a breach of transparency relates to the way in which information has been provided to users via the Instagram Terms of Use and Data Policy, compliance with the principle of fairness also relates to *“how the controller addressed the lawfulness of the processing activities in connection with its social networking service”*⁴¹⁸. Thus the EDPB considers that an assessment of compliance by Meta IE with the principle of fairness requires also an assessment of the consequences that the choice and presentation of the legal basis entail for the users of the Instagram service. In addition, that assessment cannot be made in the abstract, but has to take into account the specificities of the particular social networking service and of the processing of personal data carried out, namely for the purpose of online behavioural advertising⁴¹⁹.
231. The EDPB notes that in this particular case the breach of Meta IE’s transparency obligations is of such gravity that it clearly impacts the reasonable expectations of the Instagram users by confusing them on whether clicking the *“Agree to Terms”* button results in giving their consent to the processing of their personal data. The EDPB notes in this regard that one of the elements of compliance with the principle of fairness is avoiding deception i.e. providing information *“in an objective and neutral way, avoiding any deceptive or manipulative language or design”*⁴²⁰.
232. As outlined in the Draft Decision, the Complainant argues that Meta IE relied on *“forced consent”* as a result of being led to believe that the legal basis for processing the controller was relying upon was consent⁴²¹. The Complaint demonstrates the confusion suffered by the Complainant both due to the (lack of) information presented to Instagram users in the context of their *“agreement”*⁴²² and the circumstances of how the act of *“agreement”* was sought by Meta IE⁴²³. The EDPB considers that the LSA should have taken into account such Meta IE’s practices in relation to the principle of fairness, regardless of its finding that Meta IE has not sought to rely on consent in order to process personal data to deliver the Terms of Use⁴²⁴.
233. In addition, and as recognised by the LSA itself, further to its assessment of the information provided concerning processing being carried out in reliance on Article 6(1)(b) GDPR, *“it is impossible for the user to identify with any degree of specificity what processing is carried out on what data, on foot of*

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

⁴¹⁸ ITSA Objection, p. 5.

⁴¹⁹ See Draft Decision, paragraph 104 where the IE SA holds that *“the core of the service offered by Meta Ireland is premised on the delivery of personalised advertising”* and Meta IE Article 65 Submissions, paragraph 6.38 where Meta IE claims that *“It would be impossible to provide the Instagram Service in accordance with the Terms of Use without providing behavioural advertising”*.

⁴²⁰ EDPB Guidelines on Data Protection by Design and by Default, paragraph 70.

⁴²¹ Draft Decision, paragraph 37.

⁴²² Complaint, p. 3.

⁴²³ Complaint, p. 6-7.

⁴²⁴ Draft Decision, Finding 1.

the specified lawful bases"⁴²⁵. Considering this, in the EDPB's view, there are clear indications that Instagram users' expectations with regard to the applicable legal basis have not been fulfilled⁴²⁶. Therefore, the EDPB shares the IT SA's concern that Instagram users are left "*in the dark*"⁴²⁷ and considers that the processing by Meta IE cannot be regarded as ethical and truthful⁴²⁸ because it is confusing with regard to the type of data processed, the legal basis and the purpose of the processing, which ultimately restricts the Instagram users' possibility to exercise their data subjects' rights.

234. Furthermore, the EDPB considers that the extensive analysis by the IE SA with regard to the issue of legal basis and transparency in relation to the processing being carried out in reliance on Article 6(1)(b) GDPR is closely linked to the issue of compliance by Meta IE with the principle of fairness. Considering the seriousness of the infringements of the transparency obligations by Meta IE already identified in the Draft Decision and the related misrepresentation of the legal basis relied on, the EDPB agrees with the IT SA that Meta IE has presented its service to the Instagram users in a misleading manner⁴²⁹, 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 transparency⁴³⁰ should extend to the principle of fairness too.
235. This is all the more supported by the fact that, in the circumstances of the present case as demonstrated above⁴³¹, the overall effect of the infringements by Meta IE of the transparency obligations under Article 5(1)(a), Article 12(1), Article 13(1)(c) GDPR and the infringement of Article 6(1)(b) GDPR⁴³² further intensifies the imbalanced nature of the relationship between Meta IE and the Instagram users brought up by the IT SA objection. The combination of factors, such as the asymmetry of the information created by Meta IE with regard to the Instagram service users, combined with the "*take it or leave it*" situation that they are faced with due to the lack of alternative services in the market and the lack of options allowing them to adjust or opt out from a particular processing under the contract with Meta IE, systematically disadvantages the Instagram service users, limits their control over the processing of their personal data and undermines the exercise of their rights under Chapter III of the GDPR.
236. Therefore, the EDPB instructs the IE SA to include a finding of an infringement of the principle of fairness under Article 5(1)(a) GDPR by Meta IE, in addition to the infringement of the principle of transparency under the same provision, and to adopt the appropriate corrective measures, by addressing, but without being limited to, the question of an administrative fine for this infringement as provided for in Section 9 of this Binding Decision.

⁴²⁵ Draft Decision, paragraph 185.

⁴²⁶ 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.

⁴²⁷ ITSA Objection, p. 6.

⁴²⁸ 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".

⁴²⁹ ITSA Objection, p. 5.

⁴³⁰ Draft Decision, paragraphs 180-196.

⁴³¹ Paragraphs 223-235 of this Binding Decision.

⁴³² Paragraph 137 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

237. The IE SA refers to Article 5(1)(b) GDPR⁴³³ and Article 5(1)(c) GDPR⁴³⁴ 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 abstract⁴³⁵. 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 whole⁴³⁶.
238. In this context, the IE SA points out that the six principles laid down under Article 5 GDPR are interconnected and operate in combination to underpin the whole GDPR⁴³⁷. However, the IE SA does not assess whether Meta IE'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

239. 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 fine⁴³⁸.
240. 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 contracts purposes (the provision of online behavioural advertising), while the Instagram service would actually be composed of several processing activities pursuing several purposes⁴³⁹. 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 principles⁴⁴⁰. 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 limitation⁴⁴¹. 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

⁴³³ Draft Decision, paragraphs 152-160.

⁴³⁴ Draft Decision, paragraph 152.

⁴³⁵ Draft Decision, paragraph 162.

⁴³⁶ Draft Decision, paragraphs 167-171.

⁴³⁷ Draft Decision, paragraph 152 and paragraphs 153-160 with respect to the principle of purpose limitation under Art. 5(1)(b) GDPR.

⁴³⁸ ITSA Objection, p. 4.

⁴³⁹ ITSA Objection, p. 2.

⁴⁴⁰ ITSA Objection, p. 2.

⁴⁴¹ ITSA Objection, p. 3.

performed independently, the applicability of Article 6(1)(b) GDPR should be assessed for each of those services separately⁴⁴².

241. 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 limitation⁴⁴³, namely that “*data controllers may 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*”⁴⁴⁴. 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 law⁴⁴⁵.

7.3 Position of the LSA on the objection

242. The IE SA does not consider that the IT SA’s objection is relevant and reasoned⁴⁴⁶. 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 inquiry⁴⁴⁷. It 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 it⁴⁴⁸. 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 law⁴⁴⁹. 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 principle⁴⁵⁰.

7.4 Analysis of the EDPB

7.4.1 Assessment of whether the objection was relevant and reasoned

243. The IT SA’s objection concerns “*whether there is an infringement of the GDPR*”⁴⁵¹.

⁴⁴² ITSA Objection, p. 3.

⁴⁴³ WP29 Opinion 03/2013 on purpose limitation, WP 203, adopted on 2 April 2013.

⁴⁴⁴ ITSA Objection, p. 3.

⁴⁴⁵ ITSA Objection, p. 3.

⁴⁴⁶ Composite Response, paragraph 36.

⁴⁴⁷ Composite Response, paragraph 29.

⁴⁴⁸ Composite Response, paragraphs 31-32.

⁴⁴⁹ Composite Response, paragraph 32.

⁴⁵⁰ Composite Response, paragraph 33.

⁴⁵¹ EDPB Guidelines on RRO, paragraph 24.

244. 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 inquiry⁴⁵². 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 objection⁴⁵³.
245. Meta IE points out that the objection concerns matters that have not been investigated and relates to theoretical findings on legal bases⁴⁵⁴. 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 contravened⁴⁵⁵.
246. 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 3⁴⁵⁶, and argues that the IE SA should have found an infringement of Article 5(1)(b) and Article 5(1)(c) GDPR which lay down the principles of data minimisation and purpose limitation.
247. 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 perspective⁴⁵⁷. 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 thereafter⁴⁵⁸.
248. 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 Article 5(1)(b) and Article 5(1)(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 obligations⁴⁵⁹. 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.
249. 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*

⁴⁵² Meta IE Article 65 Submissions, Annex 1, paragraphs 7.1-7.4.

⁴⁵³ See paragraphs 73-75 of this Binding Decision.

⁴⁵⁴ Meta IE Article 65 Submissions, Annex 1 paragraphs 7.2.

⁴⁵⁵ Meta IE Article 65 Submissions, Annex 1, paragraphs 7.3.

⁴⁵⁶ The IT SA refers to the IE SA’s reasoning preceding Finding 2 and to paragraphs 122-149 and 184, 185 and 187 preceding Finding 3 of the Draft Decision.

⁴⁵⁷ IT SA Objection, p. 4.

⁴⁵⁸ IT SA Objection, p. 4.

⁴⁵⁹ EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, paragraph 16.

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”⁴⁶⁰.

250. 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 freedoms⁴⁶¹. The CSA needs to advance sufficient arguments to explicitly show that such risks are substantial and plausible⁴⁶². 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 objection⁴⁶³.
251. The EDPB considers that the IT SA’s 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’s decision not to make a finding on the infringement of Article 5(1)(b) and Article 5(1)(c) GDPR.
252. 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

253. The IE SA considers that an order to bring processing into compliance (Art. 58(2)(d) GDPR) should be imposed on Meta IE, requiring them to bring their Data Policy and 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 decision⁴⁶⁴.
254. The LSA considers an order is necessary and proportionate, contrary to the controller’s position⁴⁶⁵. 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’ rights⁴⁶⁶. 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

⁴⁶⁰ ITSA Objection, p. 3.

⁴⁶¹ EDPB Guidelines on RRO, paragraph 18.

⁴⁶² EDPB Guidelines on RRO, paragraph 37.

⁴⁶³ EDPB Guidelines on RRO, paragraph 37.

⁴⁶⁴ Draft Decision, paragraphs 200 and 203.

⁴⁶⁵ Meta IE Submissions on Preliminary Draft Decision, paragraphs 12.1, 12.2, and 12.4; Draft Decision, paragraphs 200 and 201.

⁴⁶⁶ Draft Decision, paragraph 204.

recalls 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 proportionate⁴⁶⁷.

8.2 Summary of the objections raised by the CSAs

255. The NL SA objects to the choice of the corrective measures of the LSA in their Draft Decision⁴⁶⁸. 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 measures⁴⁶⁹. 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 objection⁴⁷⁰. 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 EEA⁴⁷¹. According to the NL SA, the Draft Decision should be modified to include a temporary ban on Meta IE’s processing of personal data for the duration necessary for the controller to bring its processing into compliance with the GDPR (Article 58(2)(f) GDPR), as this would be appropriate, necessary and proportionate taking into account the circumstances of the case⁴⁷², and would be the only measure suitable to make sure that the expansive violation of the fundamental rights and freedoms of data subjects is not continued⁴⁷³. 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 compliance⁴⁷⁴. 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 period⁴⁷⁵.
256. The FI SA also argues that the IE SA should “*exercise effective, proportionate and dissuasive corrective powers*” and order Meta IE to “*bring its processing operations into compliance with the provision of Article 6(1) GDPR and prohibit to process users’ personal data for behavioural advertising by relying on Article 6(1)(b) GDPR as laid down in Article 58(2)(d) GDPR*”⁴⁷⁶. The HU SA reaches the same conclusion, proposing to apply the legal consequences under Article 58(2)(d) GDPR and to instruct the controller to indicate a different legal basis⁴⁷⁷. On the risks, both the FI and the HU SAs state that the absence of appropriate and necessary corrective powers would amount to a dangerous precedent,

⁴⁶⁷ Draft Decision, paragraph 205.

⁴⁶⁸ NL SA Objection, paragraph 55.

⁴⁶⁹ NL SA Objection, paragraph 56.

⁴⁷⁰ NL SA Objection, paragraph 56.

⁴⁷¹ NL SA Objection, paragraph 57.

⁴⁷² NL SA Objection, paragraph 58

⁴⁷³ NL SA Objection, paragraph 59.

⁴⁷⁴ NL SA Objection, paragraph 63.

⁴⁷⁵ NL SA Objection, paragraphs 57, 58, and 63.

⁴⁷⁶ FI SA Objection, paragraph 25.

⁴⁷⁷ HU SA Objection, p. 3.

sending a deceiving message to the market and to data subjects whose fundamental rights and freedoms would ultimately jeopardise⁴⁷⁸. Moreover, the FI SA notes that the Draft Decision affects all data subjects within the EEA and that, therefore, the consequences of not making use of the corrective measures pursuant Article 58(2) would be enormous⁴⁷⁹.

257. The AT SA requests that the LSA makes use of its corrective measures pursuant to Article 58(2) GDPR in relation to the additional infringement of Article 6(1)(b) GDPR⁴⁸⁰, in order to bring the processing operations of the controller in line with the GDPR⁴⁸¹ and remedy the infringement⁴⁸². According to the AT SA, the IE SA should exercise “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 behavioral 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 [Meta IE] 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*”⁴⁸⁵, which would affect millions of data subjects within the EEA and bear vast consequences⁴⁸⁶.
258. 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 fine⁴⁸⁷
259. 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.

⁴⁷⁸ FI SA Objection, paragraph 28 ; HU SA Objection, p. 4.

⁴⁷⁹ FI SA Objection, paragraph 29.

⁴⁸⁰ AT SA Objection, p. 7.

⁴⁸¹ AT SA Objection, p. 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 it cites C-311/18, 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, paragraph 112), it finds the exercise of corrective powers to be necessary in the current case.

⁴⁸² AT SA Objection, p. 8-9.

⁴⁸³ AT SA Objection, p. 7-8.

⁴⁸⁴ AT SA Objection, p. 9.

⁴⁸⁵ AT SA Objection, p. 7.

⁴⁸⁶ AT SA Objection, p. 8.

⁴⁸⁷ FR SA Objection, paragraph 50.

⁴⁸⁸ DE SAs Objection, p. 10 ; NO SA Objection, p. 9.

8.3 Position of the LSA on the objections

260. The IE SA does not consider the objections above to be relevant and/or reasoned and does not follow them⁴⁸⁹. Given that these objections were premised upon the requirement for the Draft Decision to include a finding of infringement of Article 6(1)(b) GDPR on which the IE SA expressed its disagreement, the IE SA does not consider the objections requesting the exercise of a corrective power in response to a finding of infringement of Article 6(1)(b) GDPR as being relevant and reasoned⁴⁹⁰.

8.4 Assessment of the EDPB

8.4.1 Assessment of whether the objections were relevant and reasoned

261. The objections raised by the AT, DE, FI, FR, HU, NL and NO SAs concern “*whether the action envisaged in the Draft Decision complies with the GDPR*”⁴⁹¹.
262. In addition to the primary argument levelled against all CSA’s objections, Meta IE provides additional arguments on whether these are relevant and/or reasoned⁴⁹².
263. Meta IE argues the AT and NL SAs’ objection cannot be considered relevant because they are dependent on another objection, which Meta IE deems inadmissible and without merit⁴⁹³. On the same basis, Meta IE refutes that the AT SA’s objection is adequately reasoned⁴⁹⁴. As stated above, in Section 4.4.1, the EDPB finds the AT and NL SAs’ objections on the subject of Article 6(1)(b) GDPR relevant and reasoned⁴⁹⁵.
264. 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) GDPR⁴⁹⁶. The EDPB has taken this line of reasoning into consideration above in

⁴⁸⁹ Composite Response, paragraphs 103-104 (in response to the AT and FI SAs), paragraph 105 (in response to NL SA), paragraph 106 (in response to DE SAs), paragraph 107 (in response to NO SA) and paragraph 108 (in response to HU SA).

⁴⁹⁰ Composite Response, paragraphs 110.

⁴⁹¹ EDPB Guidelines on RRO, paragraph 32.

⁴⁹² Meta IE argues that “*the EDPB cannot expand the scope of the Inquiry in the manner suggested by the CSAs through Objections that are not relevant to the substance of the Complaint.*” 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.

⁴⁹³ Meta IE Article 65 Submissions, Annex 1, p. 71: “*The ATSA’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 does not satisfy the Thresholds and lacks merit. Therefore, this Objection is not sufficiently relevant as it has no direct connection to the substance and reasoning of the Draft Decision.*” Analogous wording is used in response to the NL SA’s objection in Meta IE Article 65 Submissions, Annex 1, p. 110.

⁴⁹⁴ Meta IE Article 65 Submissions, Annex 1, p. 71: “*The ATSA’s Objection fails to satisfy the Adequately Reasoned Threshold because it is premised on its Objection that Meta Ireland infringed Article 6(1) GDPR, which, as analysed in the previous section, 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. 110.

⁴⁹⁵ Paragraph 84 above.

⁴⁹⁶ Meta IE Article 65 Submissions, Annex 1, p. 72 and p. 111.

Section 4.4.1⁴⁹⁷. Second, Meta IE puts forward that the AT and NL SAs appear to consider that the Draft Decision provides “a mandate for Meta Ireland to unlawfully process data”⁴⁹⁸. Meta IE points out that no such inference can be drawn from the Draft Decision, going on to draw the conclusion that “as the Draft Decision does not in any way give a blanket approval for any unlawful processing based on Article 6(1)(b) GDPR, there is no direct and significant risk to the fundamental rights and freedoms”⁴⁹⁹. 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 Ireland to unlawfully process data, thus limiting future investigations.

265. The NL SA disagrees with the corrective measure chosen by the IE SA in addition to the administrative fine, arguing 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**.
266. 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 deficits⁵⁰⁰. 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 GDPR⁵⁰¹. 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 period⁵⁰². The NL SA considers the risk significant, as the controller provides the Instagram service to hundreds of millions of users across Europe and because the processing involves special categories of personal data⁵⁰³. Therefore, the EDPB considers the objection to be **reasoned** and to clearly demonstrate the significance of the risks posed by the Draft Decision.
267. 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) GDPR⁵⁰⁴. More specifically, the AT SA suggests that the IE SA prohibits Meta IE from relying on Article 6(1)(b) GDPR⁵⁰⁵. Therefore, if followed, this objection would lead to a different conclusion as to the choice of corrective measures⁵⁰⁶. In consequence, the EDPB considers the objection to be **relevant**.
268. 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 Articles 6(1)(b) - the supervisory authority is under an obligation to issue appropriate corrective measures pursuant to Article 58(2)

⁴⁹⁷ Paragraph 82 above.

⁴⁹⁸ Meta IE Article 65 Submissions, Annex 1, p. 111. Analogous wording is used in response to the AT SA, Meta IE's Article 65 Submissions, Annex 1, p. 72.

⁴⁹⁹ Meta IE Article 65 Submissions, Annex 1, p. 111. Analogous wording is used in response to the AT SA, Meta IE's Article 65 Submissions, Annex 1, p. 72.

⁵⁰⁰ NL SA Objection, paragraph 57-58.

⁵⁰¹ NL SA Objection, paragraph 63.

⁵⁰² NL SA Objection, paragraphs 58-59.

⁵⁰³ NL SA Objection, paragraphs 58-59.

⁵⁰⁴ AT SA Objection, pp. 7-8.

⁵⁰⁵ AT SA Objection pp. 7-8.

⁵⁰⁶ AT SA Objection, pp. 7-8.

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 millions of data subjects within the EEA⁵⁰⁷. Therefore, the EDPB considers the objection to be **reasoned** and to clearly demonstrate the significance of the risks posed by the Draft Decision.

269. 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.
270. 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 SA (requesting to take appropriate corrective measures), and by the FI and HU SAs (asking the LSA to take corrective measures under Article 58(2)(d) GDPR), which were found to be **relevant** and **reasoned**.
271. The EDPB recalls that the DE and NO SAs 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 decision⁵⁰⁸. In the absence of legal or factual arguments 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**.

8.4.2 Assessment on the merits

Preliminary matters

272. 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.
273. 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.

⁵⁰⁷ AT SA Objection, p. 8.

⁵⁰⁸ EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 50.

Meta IE's position on the objections and its submissions

274. Meta IE considers the LSA has sole discretion to determine the appropriate corrective measures in the event of a finding of infringement⁵⁰⁹ and that the EDPB lacks competence to determine or adopt decisions on appropriate corrective measures⁵¹⁰.
275. 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 in the Draft Decision by the LSA. Therefore, according to Meta IE, “should the EDPB find an infringement of Article 6(1) GDPR [...], the appropriate course would be to refer the matter back to the LSA (i.e. the DPC) to determine whether to impose any appropriate corrective measures. To do otherwise, including direct the DPC to make a specific order in the terms proposed by certain Objections, would exceed the EDPB’s competence under Article 65 GDPR”⁵¹¹.
276. 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 neither necessary, nor proportionate 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 GDPR⁵¹². In addition, 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 basis⁵¹³. Further, Meta IE considers there is no urgent necessity for a ban based on other decisions taken under the Article 60 GDPR cooperation mechanism in similar circumstances⁵¹⁴. Finally, Meta IE puts forward the significant impact of a temporary ban not only on its activities but also on third parties’ business, such as small and medium sized businesses across Europe, relying on the platform for behavioural advertising⁵¹⁵.

EDPB's assessment on the merits

277. 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 Regulation⁵¹⁶. 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 procedure⁵¹⁷.

⁵⁰⁹ Meta IE Article 65 Submissions, paragraphs 8.4 and 8.18.

⁵¹⁰ Meta IE Article 65 Submissions, paragraph 8.6.

⁵¹¹ Meta IE Article 65 Submissions, paragraph 8.13.

⁵¹² Meta IE Article 65 Submissions, paragraph 8.27.

⁵¹³ Meta IE Article 65 Submissions, paragraph 8.28.

⁵¹⁴ Meta IE Article 65 Submissions, paragraph 8.28.

⁵¹⁵ Meta IE Article 65 Submissions, paragraph 8.29.

⁵¹⁶ See Art. 51(2), Art. 60, Art. 61(1) GDPR, and C-645/19, Facebook v Gegevensbeschermingsautoriteit, paragraphs 53, 63, 68, 72.

⁵¹⁷ See 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).

278. More specifically, when raising an objection on the existing or missing corrective measure(s) in the Drafting Decision, the CSAs should indicate which action they believe would be appropriate for the LSA to undertake and include in the final decision⁵¹⁸. In case of 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)⁵¹⁹. 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) GDPR⁵²⁰, 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.
279. In addition, the EDPB finds that Meta IE misunderstands the AT SA’s 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 judgment⁵²¹. In fact, the AT SA does not do 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, point 112)*”⁵²² 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.
280. 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 GDPR 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) GDPR⁵²³. 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 infringement⁵²⁴. This highlights the need for the corrective measures and any exercise of powers by supervisory authorities to be tailored to the specific case⁵²⁵.
281. 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, FI,

⁵¹⁸ See EDPB Guidelines on RRO, paragraph 33.

⁵¹⁹ Art. 65(1)(a) GDPR.

⁵²⁰ See EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 92.

⁵²¹ Meta IE Article 65 Submissions, paragraph 8.6. See above paragraph 274.

⁵²² AT SA Objection, p. 8.

⁵²³ C-311/18, Schrems II, paragraph 111.

⁵²⁴ 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.

⁵²⁵ EDPB Binding Decision 1/2021, paragraph 256.

FR, HU and NL 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.

282. 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 objection⁵²⁶. 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 violations⁵²⁷. The FI SA considers that the IE SA should “*exercise effective, proportionate and dissuasive corrective powers*” and, taking into account the nature of the infringement, order Meta IE to “*bring its processing operations into compliance with the provision of Article 6(1) GDPR and prohibit to process users’ personal data for behavioural advertising by relying on Article 6(1)(b) GDPR as laid down in Article 58(2)(d) GDPR*”⁵²⁸. The HU SA proposes to apply the legal consequences under Article 58(2)(d) GDPR in relation to violation of Article 6(1) GDPR by Meta IE and to instruct the controller to indicate a another alternative legal basis⁵²⁹. 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*”⁵³⁰.
283. Meta IE argues that a temporary ban would not be necessary as less onerous measures could be imposed and that it would be unfair and disproportionate, also considering its impact on third parties⁵³¹.
284. 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*”⁵³² with the GDPR, in relation to processing of “*extensive amounts of [...] data, which is essential to the controller’s business mode*”⁵³³, thus harming “*the rights and freedoms of millions of data subjects in the EEA*”⁵³⁴. 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.

⁵²⁶ NL SA Objection, paragraph 57. 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.

⁵²⁷ NL SA Objection, paragraph 58.

⁵²⁸ FI SA Objection, paragraph 25.

⁵²⁹ HU SA Objection, p. 3.

⁵³⁰ AT SA Objection, p. 8-9.

⁵³¹ Meta IE Article 65 Submissions, paragraphs 8.27-8.28.

⁵³² NL SA Objection, paragraph 54.

⁵³³ NL SA Objection, paragraph 58.

⁵³⁴ NL SA Objection, paragraph 57.

285. In addition, the EDPB recalls that contrary to Meta IE's contention, it is not necessary to establish an '*urgent necessity*'⁵³⁵ for imposing a temporary ban, in that nothing in the GDPR limits the application of Article 58(2)(f) GDPR to exceptional circumstances⁵³⁶.
286. 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 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 pursued⁵³⁷. Compliance with the principle of proportionality requires ensuring that the chosen measure does not create disproportionate disadvantages in relation to the aim pursued.
287. 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 4.4.2 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.
288. In respect of the imposition of an order to bring processing into compliance, Meta IE submits that any such order should "*afford a reasonable opportunity*" to Meta IE to comply⁵³⁸. 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*"⁵³⁹. The LSA also points out the significant financial, technological, and human resources, as well as the

⁵³⁵ Meta IE Article 65 Submissions, paragraph 8.28.

⁵³⁶ 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.

⁵³⁷ 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*".

⁵³⁸ Meta IE Article 65 Submissions, point 8.31.

⁵³⁹ Draft Decision, paragraph 202. 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, drafting, designing and engineering the relevant changes, conducting and taking account of user testing of the proposed changes, internal cross-functional engagement as well as of course engagement with the Commission, and localisation and translation of the information for countries in the European Region*". Draft Decision, paragraph 201.

clear instructions provided to Meta IE to comply with GDPR⁵⁴⁰. 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.

289. 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 million 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 fines⁵⁴¹. In addition, the investigative powers of supervisory authorities allow them to order the provision of all the information necessary for the performance of their tasks including the verification of compliance with one of their orders⁵⁴².
290. 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 Instagram services into compliance with Article 6(1) GDPR within three months.
291. In addition, the EDPB notes that the current wording of the order *“to bring the Data Policy and Terms of Use 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. Therefore, the EDPB instructs the LSA to adjust its order to Meta IE to bring its Instagram Data Policy and Terms of Use into compliance with Article 5(1)(a), Article 12(1) and Article 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 on data processed for the purpose of behavioural advertising in the context of Instagram services (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).

⁵⁴⁰ Draft Decision, paragraph 202.

⁵⁴¹ Art. 83(2)(i) GDPR.

⁵⁴² Art. 58(1) GDPR.

9 ON THE DETERMINATION OF THE ADMINISTRATIVE FINE

292. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines⁵⁴³.

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

293. In its Draft Decision, the IE SA explains how it considered the criteria in Article 83(2) GDPR in deciding whether to impose an administrative fine and to determine its amount in the circumstances of this case⁵⁴⁴. 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 the level of damage suffered by them (Article 83(2)(a) GDPR)

294. 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 Article 83(2) GDPR criteria⁵⁴⁵. Further, the IE SA explains that “*the processing concerned*” refers to “*all of the processing operations that [Meta IE] carries out in the context of the Instagram service 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)⁵⁴⁶.

295. In terms of the **nature of the infringements**, the IE SA 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*”⁵⁴⁷. Further, the IE SA points out that the

⁵⁴³ See Recital 150 GDPR; EDPB Guidelines on RRO, paragraph 34 and EDPB Guidelines on Article 65(1)(a) GDPR, paragraph 91.

⁵⁴⁴ Draft Decision, paragraphs 206-207.

⁵⁴⁵ “*While I emphasise that each is an individual and discrete “infringement” of the GDPR, I am proposing to assess all three infringements simultaneously as all concern transparency and, by reason of their common nature and purpose, are likely to generate the same, or similar, outcomes in the context of some of the Article 83(2) GDPR assessment criteria*”. Draft Decision, paragraph 209.

⁵⁴⁶ Draft Decision, paragraph 210.

⁵⁴⁷ Draft Decision, paragraphs 212.

breach of the transparency principle by Meta IE has the potential to undermine other fundamental data protection principles such as the principles of fairness and accountability⁵⁴⁸. Finally, the IE SA notes that the European legislator included infringements on the right to information and Article 5 GDPR in Article 83(5) GDPR, which carries the highest maximum fine⁵⁴⁹.

296. 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”*⁵⁵⁰.
297. With regards to the **nature, scope or purpose of the processing concerned**, the IE SA considers that the *“processing carried out by [Meta IE] in the context of the Instagram service pursuant to Article 6(1)(b) GDPR is extensive. [Meta IE] processes a variety of data in order to provide Instagram users with a ‘personalised’ experience, including by way of serving personalised advertisements. The processing is central to and essential to the business model offered, and, for this reason, the provision of compliant information in relation to that processing becomes even more important. This, indeed, may include location and IP address data”*⁵⁵¹.
298. 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 commencement of the Inquiry, i.e. 31 August 2018, [Meta IE] had approximately [REDACTED] monthly active accounts and, as of December 2021, it had approximately [REDACTED] monthly active users in the European Economic Area”*⁵⁵². While noting the figures provided by Meta IE incorrectly excluded the number of UK active accounts to which the GDPR was applicable at the date of the Complaint, the LSA considered that, when measuring these figures by reference to the total population of the EEA (including the UK), a *“significant portion of the population of the EEA seems to have been impacted by the infringements”*⁵⁵³.
299. In terms of **damages suffered** by affected data subjects, the IE SA finds that *“failure to provide all of the prescribed information undermines the effectiveness of the data subject rights and, consequently, infringes the rights and freedoms of the data subjects concerned. A core element of transparency is empowering data subjects to make informed decisions about engaging with activities that cause their personal data to be processed, and making informed decisions about whether to exercise particular rights, and whether they can do so. This right is undermined by a lack of transparency on the part of a data controller”*⁵⁵⁴.
300. 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*

⁵⁴⁸ Draft Decision, paragraph 213

⁵⁴⁹ Draft Decision, paragraph 214.

⁵⁵⁰ Draft Decision, paragraph 216.

⁵⁵¹ Draft Decision, paragraph 221.

⁵⁵² Draft Decision, paragraph 223.

⁵⁵³ Draft Decision, paragraphs 223-225 and 253.

⁵⁵⁴ Draft Decision, paragraph 228.

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”⁵⁵⁵. The IE SA further notes the impact of the infringement on a “significant portion of the population of the EEA”, as well as on “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”⁵⁵⁶.

301. The IE SA does not attach significant weight to the duration of the infringements⁵⁵⁷, considering that the complaint - and therefore the Inquiry - was made against a specific set of documents (Instagram’s Data Policy and Terms of Use) and that more recent versions of the relevant documents are outside the scope of the Inquiry⁵⁵⁸.

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

302. The IE SA notes the complainants view that the infringement arose from “[Meta IE] made a deliberate and calculated decision to present the information in a particular manner such as to mislead data subject”⁵⁵⁹ but states that there is no evidence that Meta IE “made a deliberate decision to present the information to data subject in a particular way”⁵⁶⁰. The IE SA further notes that the EDPB Guidelines on Administrative Fines “recognise that an intentional breach generally only occurs where there is a deliberate act to infringe the GDPR”, and that, in this regard, “a finding of intentionality is predicated on knowledge and wilfulness as to characteristics of an offence”. The IE SA finds there was no evidence of an intentional and knowing breach of a provision of the GDPR. The IE SA however finds that the infringement was negligent, taking into account “the failure of an organisation of this size to provide sufficiently transparent materials in relation to the core of its business mode”⁵⁶¹.

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

303. The IE SA notes Meta IE’s position that “has discharged its transparency obligations in respect of the Instagram service and, accordingly, complies fully with the GDPR in this respect.” Notwithstanding their disagreement with this position, the IE SA “accept[s] that it represents a genuinely held belief on [Meta IE’s] part”. On that basis, the IE SA notes that “there has not been an effort to mitigate the damage to data subjects, as it was [Meta IE’s] position that data subjects were incurring no such damage”⁵⁶². The IE SA is not swayed by Meta IE’s argument that their efforts to comply with the GDPR

⁵⁵⁵ Draft Decision, paragraph 253.

⁵⁵⁶ Draft Decision, paragraph 253.

⁵⁵⁷ Draft Decision, paragraph 253.

⁵⁵⁸ Draft Decision, paragraphs 218 and 253. The IE SA notes, however, that “In imposing corrective powers [...] the GDPR requires that the broader impact of infringements be considered” (Draft Decision, paragraph 218).

⁵⁵⁹ Draft Decision, paragraph 231.

⁵⁶⁰ Draft Decision, paragraph 232. 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 230-232.

⁵⁶¹ In this regard, the IE SA notes that “Meta Ireland should have been aware of its transparency requirements, especially in light of the transparency guidelines and should have provided clarity about the precise extent of the processing operations carried out pursuant to Article 6(1)(b) GDPR. Meta Ireland further should have ensured that it adhered strictly to its transparency obligations when choosing the lawful bases on which they rely and should have used these obligations as a guide as to the information to be conveyed to data subjects” (Draft Decision, paragraph 253).

⁵⁶² Draft Decision, paragraph 234.

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”*⁵⁶³. 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 inquiry⁵⁶⁴.

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)

304. The IE SA does mention this factor as an aggravating factor in the Draft Decision. The IE SA takes the view that, considering that guidance on transparency was available to Meta IE at the date of the complaint, it *“should have been aware of the appropriate standards – albeit at a general level – and, having made a deliberate decision to present the information in a manner which fell significant below the standard required, has a high degree of responsibility for the lack of compliance with the GDPR”*⁵⁶⁵.

Any relevant previous infringements by the controller or processor (Article 83(2)(e) GDPR)

305. The IE SA does not mention this factor as an aggravating or mitigating factor in the Draft Decision⁵⁶⁶, taking into consideration that *“the Commission has not made any findings of infringements by Meta Ireland in the context of the Instagram service which could be considered relevant for [this] assessment”*⁵⁶⁷.

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

306. The IE SA notes that *“[the] lack of transparency concerned broad categories of personal data relating to users who sign up to the Instagram service”*⁵⁶⁸. Although acknowledging that the assessment made by the IE SA in this Inquiry *“was rather generalised in nature”* the LSA points out that the lack of transparency by Meta IE contributed to the *“lack of clarity as to the precise categories of personal data relevant for this Inquiry”*⁵⁶⁹.
307. Nonetheless, the IE SA concludes that, in the absence of evidence that these personal data are of a particularly sensitive nature, this factor should be regarded as neither aggravating nor mitigating⁵⁷⁰.

⁵⁶³ Draft Decision, paragraph 235.

⁵⁶⁴ Draft Decision, paragraph 236.

⁵⁶⁵ Draft Decision, paragraph 240.

⁵⁶⁶ Draft Decision, paragraph 253.

⁵⁶⁷ Draft Decision, paragraphs 241 and 243. The IE SA notes their disagreement with Meta IE Article 65 Submissions that the absence of previous decision should be considered as a mitigating factor.

⁵⁶⁸ Draft Decision, paragraph 247.

⁵⁶⁹ Draft Decision, paragraph 247.

⁵⁷⁰ Draft Decision, paragraph 247.

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

308. 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”⁵⁷¹. The IE SA does not mention this factor as an aggravating or mitigating factor in the Draft Decision⁵⁷².

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

309. The IE SA considers whether the “lack of transparency has the potential to have resulted in financial benefits for [Meta IE]” based on the view that a “more transparent approach to processing operations carried out on foot of that contract would represent a risk to [Meta IE]’s business model”, which would be the case “if existing or prospective users were dissuaded from using the Instagram service by clearer explanations of the processing operations carried out, and their purposes”. 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”⁵⁷³.

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

310. Based on these circumstances, the IE SA considers that administrative fines pursuant to Article 58(2)(i) GDPR and Article 83 GDPR, totaling an amount not less than €18 million and an amount not more than €23 million should be issued on Meta IE for the infringement of Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR in the context of Instagram service⁵⁷⁴.
311. The LSA considers that the proposed administrative fines are effective, proportionate and dissuasive taking into account all of the circumstances of the Inquiry⁵⁷⁵. 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 the failure to comply with the transparency requirements for users”⁵⁷⁶. 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

⁵⁷¹ Draft Decision, paragraph 248.

⁵⁷² Draft Decision, paragraph 253.

⁵⁷³ Draft Decision, paragraphs 251-252.

⁵⁷⁴ Draft Decision, sections 9 and 10.

More specifically, the IE SA proposes the following administrative fines (Draft Decision, paragraph 254):

- a fine of between €11.5 million and €14 million for the failure to provide sufficient information in relation to the processing operations carried out on foot of Article 6(1)(b) GDPR, thereby infringing Articles 5(1)(a) and 13(1)(c) GDPR;

- a fine of between €6.5 million and €9 million for the failure to provide the information that was provided on the processing operations carried out in foot of Article 6(1)(b) GDPR, in a concise, transparent, intelligible and easily accessible form, using clear and plain language, thereby infringing Articles 5(1)(a) and 12(1) GDPR.

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 264, 295 and 296.

⁵⁷⁵ Draft Decision, paragraph 258.

⁵⁷⁶ Draft Decision, paragraph 255.

conduct concerned”⁵⁷⁷. 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 Instagram user base, the impact of the infringements on the effectiveness of the data subject rights enshrined in Chapter III of the GDPR and the importance of those rights in the context of the GDPR as a whole”⁵⁷⁸.

312. The IE SA refers to the need to take into account the undertaking’s turnover in the calculation of the maximum possible fine amounts⁵⁷⁹. The notion of “undertaking” is determined to refer to Meta Platforms, Inc.⁵⁸⁰. The IE SA takes into consideration the revenue reported by Meta Platforms, Inc. for the year ending 31 December 2020 (\$85.965 billion)⁵⁸¹.

9.1.2 Summary of the objections raised by the CSAs

313. The DE, FR, IT, NL, and NO SAs⁵⁸² object to the envisaged action taken by the LSA with regard to the administrative fine proposed in the Draft Decision concerning the infringements of the transparency obligations by asking the IE SA to impose **a (significantly)⁵⁸³ higher administrative fine with reference to the established infringements.**
314. The dispute arising from these objections concerns whether the proposed fine is effective, proportionate and dissuasive pursuant to Article 83(1) GDPR⁵⁸⁴. With reference to these three criteria, the above mentioned CSAs, specifically, argue as follows.
315. According to the DE SAs, the fine proposed by the LSA in the Draft Decision is not proportionate with regard to the financial position of the undertaking. More specifically, the DE SAs argue that the envisaged fine of at most 23 million euros is not proportionate compared to the worldwide annual turnover on Meta Platforms, Inc⁵⁸⁵. The DE SAs point out that the proposed fine “represents only about 0.03% of the turnover of Meta Platforms, Inc. and about 0.72% of the maximum fine”⁵⁸⁶. With respect to dissuasiveness, the DE SAs consider that the fine proposed by the LSA “weakens the position of supervisory authorities and endangers compliance with the GDPR” as this would leave controllers under the impression that “enforcement of the GDPR will not be felt economically”⁵⁸⁷.
316. 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

⁵⁷⁷ Draft Decision, paragraph 256.

⁵⁷⁸ Draft Decision, paragraph 257.

⁵⁷⁹ Draft Decision, paragraph 274.

⁵⁸⁰ Draft Decision, paragraphs 275 - 295. Formerly Facebook, Inc.

⁵⁸¹ Draft Decision, paragraph 295.

⁵⁸² DE SAs Objection, pp. 10-12; FR SA Objection, paragraphs 36-48; IT SA Objection, pp. 7-10; NL SA Objection, paragraphs 39-53; NO SA Objection, pp. 9-13.

⁵⁸³ All these CSAs specified that the fine should be increased “significantly” or “substantially” except the NL and the IT SAs (which stated the fine should be increased). See DE SAs Objection, p. 12; FR SA Objection, paragraph 45; IT SA Objection, pp. 8-9; NO SA Objection, p. 13; NL SA Objection, paragraph 51.

⁵⁸⁴ DE SAs Objection, p. 11 ; FR SA Objection, paragraph 47; IT SA Objection pp. 7-8 ; NL SA Objection, paragraph 50; NO SA Objection, pp. 11-12.

⁵⁸⁵ DE SAs Objection, p. 11.

⁵⁸⁶ DE SAs Objection, p. 11.

⁵⁸⁷ DE SAs Objection, p. 11.

*number of data subjects concerned, the particularly intrusive nature of the processing operations in question, the breaches observed, the position of Meta Platforms Ireland Limited as a quasi-monopolist and its financial situation”*⁵⁸⁸. In this respect, 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 0.03% of the turnover of Meta Platforms Inc. and less than 1% of the maximum fine”*⁵⁸⁹.

317. The IT SA argues that *“by having regard to the controller, in particular the nature and size of Meta Platforms Inc. [...] the range at issue would appear to be overly low and neither proportionate nor dissuasive”*⁵⁹⁰.
318. The NL SA doubts, also referring to the EDPB 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”*⁵⁹¹. As regard to dissuasiveness, the NL SA argues, also referring to established CJEU case-law, that Meta IE *“generates a turnover of over 86 billion dollars (approximately 79 billion euros) per annum, therefore it would be able to generate a daily revenue of approximately 235 million dollars. Instead of dissuading future behaviour, the penalty would be simply regenerated in a few hours”* (specific deterrence)⁵⁹². 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 infringements⁵⁹³.
319. 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 violation and worldwide annual turnover of Meta Platform, Inc. for 2020⁵⁹⁴. In particular, the 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”*⁵⁹⁵. The NO SA illustrates this by the fact that in 2020, Meta IE set aside one billion euro of provisions to address, inter alia, the risk of fines for infringement to the data protection rules⁵⁹⁶.
320. In addition, these objections raise arguments with regards to the weight afforded to some of the criteria listed in Article 83(2) GDPR.
321. The IT SA objects to the LSA's decision not to consider WhatsApp's previous infringements in the case IN-18-12-2 as an aggravating circumstance under Article 83(2)(e) GDPR, insofar as it is part of the same group of companies of Meta IE. According to the IT SA *“even though the WhatsApp case did raise additional, more specific issues, one can hardly question that the relevant decision sets a key precedent*

⁵⁸⁸ FR SA Objection, paragraph 38.

⁵⁸⁹ FR Objection, paragraph 40.

⁵⁹⁰ IT SA Objection, p. 8.

⁵⁹¹ NL SA Objection, paragraph 48.

⁵⁹² NL SA Objection, paragraph 49.

⁵⁹³ NL SA Objection, paragraph 50.

⁵⁹⁴ NO SA Objection, p. 12.

⁵⁹⁵ NO SA Objection, p. 12.

⁵⁹⁶ NO SA Objection, p. 11.

*in assessing controller's repetitive conduct' as "not only did the controller in question clearly stick to the same business model in offering its different social networking services, it also did not change its assessment as to how to manage users' data with particular regard to its information and transparency obligations"*⁵⁹⁷.

322. According to the DE, FR, NL and NO SAs, the fine proposed by the LSA in the Draft Decision is not proportionate with regard to the seriousness of the infringement⁵⁹⁸.
323. 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 such⁵⁹⁹. The FR SA also 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)⁶⁰⁰.
324. The DE, FR, and IT SAs state that the fine proposed is not consistent with the amount retained by the IE SA in its decision dated 20 August 2021 against the company WhatsApp Ireland Limited (case IN-18-12-2), in which the IE SA imposed an administrative fine of 225 million euros, including a fine of 30 million euros for the infringement of Article 12 and 13 GDPR and a fine of 90 million on account of the infringement of Article 5(1)(a) GDPR⁶⁰¹. Moreover, the FR and IT SAs state 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 infringements of Articles 6, 12 and 13 GDPR, and which 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 basis⁶⁰². In addition, 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"*⁶⁰³. The FR SA considers this case as 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"*⁶⁰⁴. However, the FR SA notes that *"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"*⁶⁰⁵.

⁵⁹⁷ IT SA Objection, p. 9.

⁵⁹⁸ DE SAs Objection p.11 ; FR SA Objection, paragraph 47; NL SA Objection, paragraphs 39 and 43-44 ; NO SA Objection, p. 12.

⁵⁹⁹ NL SA Objection, paragraphs 39 and 43-44.

⁶⁰⁰ FR SA Objection, paragraph 50.

⁶⁰¹ FR SA Objection, paragraph 42 ; IT SA Objection, p. 8.

⁶⁰² FR SA Objection, paragraph 43. Similar reasoning is included in the IT SA Objection, which states that *"even by proportion to the respective turnover [...] there is little doubt that the fining proposal by the LSA is not in line with the proportionality requirement"* (IT SA Objection, p. 8).

⁶⁰³ FR SA Objection, paragraph 41.

⁶⁰⁴ FR SA Objection, paragraph 41.

⁶⁰⁵ FR SA Objection, paragraph 41.

325. 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”*⁶⁰⁶.
326. On the **risks** posed by the Draft Decision, the DE, FR, IT, NL, and NO 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 subjects⁶⁰⁷. The DE, FR, IT, NL, and NO 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)⁶⁰⁸. The NO SA considers this would mean, *“that the complainant and the affected data subjects would in practice be denied the level of data protection set out in the GDPR”*⁶⁰⁹. 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”*⁶¹⁰. The DE SAs add that *“the Draft Decision does not ensure a consistent application of administrative fines”*⁶¹¹.

9.1.3 Position of the LSA on the objections

327. The LSA considers none of the objections relating to the *quantum* of the proposed administrative fine as relevant and reasoned⁶¹².
328. In relation to objections calling for an increase of the amount of the fine set out in the Draft Decision, the LSA states that notwithstanding the variance between the views of the CSAs on the calculation of the fine that the IE SA 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 9 of the Draft Decision”*⁶¹³. The IE SA also argues that the IE SA considers *“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”*⁶¹⁴.
329. 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 relevant⁶¹⁵. The LSA recalls that it has already examined in its Draft Decision whether the infringements were intentional and whether Meta IE obtained a financial benefit as a result of the infringements, questions to which it answered in the negative⁶¹⁶. Furthermore, the LSA takes the view

⁶⁰⁶ NO SA Objection, p. 12.

⁶⁰⁷ DE SAs Objection, p. 12; FR SA Objection, paragraph 47; IT SA Objection, pp. 8-10; NL SA Objection paragraph 52; NO SA Objection, p. 12.

⁶⁰⁸ DE SAs Objection, p. 12; FR SA Objection paragraph 47; IT SA Objection, pp. 8-10 ; NL SA Objection paragraph 49 and 52; NO SA Objection, p. 12.

⁶⁰⁹ NO SA Objection, p. 12.

⁶¹⁰ FR SA Objection, paragraph. 48.

⁶¹¹ DE SAs Objection, p. 11.

⁶¹² Composite Response, paragraph 120.

⁶¹³ Composite Response, paragraph 118.

⁶¹⁴ Composite Response, paragraph 119.

⁶¹⁵ Composite Response, paragraph 126.

⁶¹⁶ Composite Response, paragraph 124. On this matter, the IE SA refers to respectively paragraphs 230-233 and 251-252 of the Draft Decision.

that “it would be contrary to a literal interpretation of Article 83(2)(e) GDPR to take the decision made by the IE SA in respect of WhatsApp Ireland Limited (i.e. IN-18-2-1) in the calculation of the fine for this Draft Decision in circumstances where the infringements do not concern the same controller or processor”⁶¹⁷.

9.1.4 Assessment of the EDPB

9.1.4.1 Assessment of whether the objections were relevant and reasoned

330. The objections raised by the DE, FR, IT, NL, and NO SAs concern “whether the action envisaged in the Draft Decision complies with the GDPR”⁶¹⁸.
331. 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) GDPR⁶¹⁹.
332. With specific regard to these objections on the determination of the administrative fine for the transparency infringements, Meta IE acknowledges that the objections as to whether envisaged corrective measures comply with the GDPR fall within the scope of the dispute resolution mechanism⁶²⁰, however in their view, objections that solely object to the amount of a fine are outside the scope of this mechanism⁶²¹. Meta IE argues that “the DPC, as the LSA, has the sole competence and discretion to impose an administrative fine”⁶²². Moreover, Meta IE claims that the EDPB is not competent to determine whether the administrative fine is effective, proportionate, and dissuasive⁶²³. The EDPB does not share this reading of the GDPR, as explained above (see Section 8.4.2, paragraphs 277-279 of this Binding Decision) and considers that CSAs may object to the fine amount proposed by an LSA in its draft decision⁶²⁴.

⁶¹⁷ Composite Response, paragraph 126.

⁶¹⁸ EDPB Guidelines on RRO, paragraph 32.

⁶¹⁹ Meta IE Article 65 Submissions, Annex 1, p. 65.

⁶²⁰ Meta IE Article 65 Submissions, paragraph 8.5

⁶²¹ Meta IE Article 65 Submissions, paragraph 9.2

⁶²² Meta IE Article 65 Submissions, paragraph 9.2.

⁶²³ Meta IE Article 65 Submissions, paragraph 9.2. Meta IE argues that “The GDPR does not confer any power on the EDPB to consider objections solely challenging the amount of a fine, and the EDPB may not give instructions as to whether a fine ought to be imposed, or as to its amount”.

⁶²⁴ 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), para 91; EDPB RRO Guidelines, paragraph 34). The EDPB found several objections on this subject matter admissible in the past, see *inter alia* 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.

333. The EDPB takes note of further arguments put forward by Meta IE, aiming to demonstrate the lack of relevance of the objections raised by the DE, FR, IT, NL, and NO SAs⁶²⁵. Meta IE disagrees with the content of these objections, which concerns its merits and not its admissibility.
334. The EDPB finds that the DE, FR, IT, NL, and NO SAs disagree with specific parts of the IE SA's Draft Decision, namely the assessment made by the LSA in Chapter 9 "*Administrative fine*" and Chapter 10 "*Other relevant factors*" in setting the administrative fine applicable to the violations of transparency identified⁶²⁶. If followed, these objections would lead to a different conclusion in terms of corrective measures imposed. In consequence, the EDPB considers the objections raised by the DE, FR, IT, NL, and NO SAs to be **relevant**.
335. Meta IE further considers that the DE, FR, IT, NL and NO SAs' objections have not created "*reasonable doubt*" as to the validity of the LSA's calculation of the fine and do not explain why the fine envisaged in the Draft Decision is incompatible with Article 83 GDPR⁶²⁷. In this respect, Meta IE claims that the objections of the DE, FR, IT, NL and NO SAs are not sufficiently reasoned as they focus on hypothetical "*preventive effects*" of the fine on other controllers in future proceedings⁶²⁸. In addition, Meta IE puts forward that the comparison made by the DE, FR, and IT SAs in their objections with other fines imposed in other cases is not relevant to the extent that fines should result in a case-by-case assessment⁶²⁹. Meta IE also objects to the FR SA's objection that the fine should be tied to the turnover, considering that Meta IE's turnover is only relevant for determining the maximum fine amount under Articles 83(4)-(6) GDPR and not the fine amount⁶³⁰. Finally, in response to the NO SA's objection, Meta IE argues that controller's financial provisions for potential regulatory-related expenses cannot be considered as a relevant factor under Article 83(2) GDPR⁶³¹. It follows from the above arguments that Meta IE disagrees with the reasoning provided in these objections, which thus concerns the merits and not the admissibility of the objection.
336. The EDPB finds that the DE, FR, IT, NL, and NO 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 breaches⁶³².

⁶²⁵ Meta IE argues that these objections are "*a direct criticism of the amount of the DPC's proposed fine (i.e. an area within the DPC's sole discretion as LSA) rather than the lawfulness of the DPC's reliance on the relevant factors to calculate the fine (which would be the Draft Decision's relevant legal and factual content to which the [CSAs] could object)*". Meta IE Article 65 Submissions, Annex 1, paragraphs 2.17 - 2.19, 5.13, 7.12, 8.23, and 9.19.

⁶²⁶ DE SAs Objection, p. 10; FR SA Objection, paragraph 36; IT SA Objection, pp. 7-9; NL SA Objection, paragraph 40 and 53; NO SAs' Objection, pp. 9-10.

⁶²⁷ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.21, 5.15, 5.17-18, 7.14, 8.25, and 9.22. In this regard Meta IE submits that "*a fine proposed by the LSA is effective, proportionate, and dissuasive as long as the criteria laid down in Article 83(2) GDPR are duly taken into account (which is clearly the case here). Indeed, the calculation of fines is subjective, and there is significant variance amongst objecting CSAs as to what the appropriate fine should be*".

⁶²⁸ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.22, 5.19, 7.16, 8.26, and 9.23.

⁶²⁹ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.23, 5.18, and 7.17.

⁶³⁰ Meta IE Article 65 Submissions, Annex 1, paragraph 5.21.

⁶³¹ Meta IE Article 65 Submissions, Annex 1, paragraph 9.26.

⁶³² DE SAs Objection, p. 11-12; FR SA Objection, paragraphs 38, 40, 42, 43, 47; IT SA Objection, pp. 7-9; NL SA Objection, paragraphs 44-45 and 47-50; NO SA Objection, pp. 11-12.

337. 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 DE, FR, IT, NL, and NO SAs fail to demonstrate the contrary, as required⁶³³.
338. In particular, Meta IE considers that the DE, FR SA and IT SAs' objections appear to focus on increasing the "*punitive impact*" of the fine on Meta IE, instead of demonstrating any significant risks to the fundamental rights of data subjects⁶³⁴. Meta IE further claims that the NL and NO SAs' objections does not set out how the proposed fine would pose a direct and significant risk to fundamental rights and freedoms⁶³⁵. In addition, Meta IE argues the DE, FR, IT, NL and NO SAs' objections rest on unsubstantiated possible effect the Draft Decision could have on future behaviour of other controllers, without demonstrating how this Decision would lead to significant risks in the case at hand⁶³⁶. Therefore, Meta IE claims that, in doing so, the assessment made by the DE, FR, IT and NL SAs is incorrect as they do not consider the reputational costs generated by such a fine⁶³⁷.
339. 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 anyway 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*"⁶³⁸. 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.
340. The EDPB also notes that the DE, FR, IT, NL, and NO SAs⁶³⁹ considered both of the aspects that are entailed by dissuasiveness of the fine, i.e. specific deterrence and general deterrence⁶⁴⁰.

⁶³³ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.24-2.27, 5.22-5.25, 7.18-7.21, 8.28-8.32, and 9.25-9.27.

⁶³⁴ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.24, 5.22, and 7.18.

⁶³⁵ Meta IE Article 65 Submissions, Annex 1, paragraphs 8.28, and 9.25.

⁶³⁶ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.25, 5.23, 7.19, 8.30, and 9.26.

⁶³⁷ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.26, 5.24, 7.20, 8.31. Meta IE adds that, in any case, it "*does not consider that fines such as the one proposed in the Draft Decision could encourage other companies not to comply with the GDPR*".

⁶³⁸ Judgement of the Court of Justice of 6 November 2003, Lindqvist, Case C-101/01, ECLI:EU:C:2003:596, (hereinafter 'C-101/01 Lindqvist'), paragraph 95; Judgement of the Court of Justice of 16 December 2008, Heinz Huber v Bundesrepublik Deutschland, C-524/06, ECLI:EU:C:2008:724, (hereinafter '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.

⁶³⁹ DE SAs Objection, p.12 (referring to the "*undertaking in question*"); FR SA Objection, paragraph 47 (referring to "*the controller*"); IT SA Objection pp.8-9 (referring to "*the controller*"); NL SA Objection, paragraph 52 (referring to the risk in relation to "*the illegal processing at hand*"); NO SA Objection, p.12 (referring to "*incentives for Meta IE*").

⁶⁴⁰ 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*

341. The EDPB finds that the DE, FR, IT, NL, and NO 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 individuals⁶⁴¹.

342. Therefore, the EDPB considers the DE, FR, IT, NL, and NO SAs objections to be **reasoned**.

9.1.4.1 9.1.4.2. Assessment on the merits

343. 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 the envisaged action in relation to the controller complies with the GDPR.

344. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines⁶⁴². A fine should be effective, proportionate and dissuasive, as required by Article 83(1) GDPR, taking account of the facts of the case⁶⁴³. In addition, when deciding on the amount of the fine, the LSA shall take into consideration the criteria listed in Article 83(2) GDPR.

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

346. The finding in the Draft Decision of a transparency infringement for the processing concerned still stands. The EDPB recalls that, on substance, no objections were raised on this finding. Meta IE infringed its general transparency obligations by being unclear on the link between the purposes of processing, the lawful bases of processing and the processing operations involved⁶⁴⁴, 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) GDPR⁶⁴⁵, including for the purposes of behavioural advertising. This is without prejudice to the fact that Meta IE inappropriately relied on Article 6(1)(b) GDPR as a legal basis to process personal data for the purpose of behavioural advertising as part of the delivery of its Instagram service under the Terms of Use. Whether or not Meta IE appropriately chose its legal basis for processing, the transparency infringement as assessed in the Draft Decision still stands. Therefore, the IE SA must not modify this description retro-actively in light of the assessment of the validity of the legal basis, including for the purpose of carrying out any reassessment of the administrative fines originally proposed by the Draft Decision, as might be required by this Binding Decision.

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.

⁶⁴¹ DE SAs Objection, p. 12, FR SA Objection, paragraphs 47-48; IT SA Objection, pp.8-9; NLSA Objection, paragraph 52; NO SA Objection, p. 12. See also EDPB Guidelines on RRO, paragraph 37.

⁶⁴² 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*").

⁶⁴³ EDPB Guidelines on Administrative fines, p. 7; EDPB Guidelines on calculation of fines, paragraphs 132-134.

⁶⁴⁴ Draft Decision, paragraph 189.

⁶⁴⁵ Draft Decision, paragraph 210.

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

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

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

349. For the purposes of Article 83(2)(e) GDPR, both previous infringements of the same subject matter and infringements of a different subject matter but committed in a manner similar to that under investigation, should be considered as relevant. Furthermore, the EDPB recalls that the scope of assessment of infringements may include not only previous decisions by the investigating supervisory authority, but also infringements found by other authorities, provided that they are relevant to the case under investigation⁶⁴⁶.

350. The EDPB first notes that, contrary to Meta IE's views⁶⁴⁷, substantial similarities exist in the infringements found by the LSA in its draft decision and in its decision IN-18-12-2 in relation to WhatsApp Ireland Limited and in which breach of GDPR obligations were established. As rightly pointed out by the IT SA, the LSA indeed considered in both decisions that the controller had not provided transparent information on the legal basis and purposes of the processing operations or sets of processing operations carried out, thereby infringing Article 5(1)(a), Article 12(1) and Article 13(1)(c) GDPR⁶⁴⁸.

351. The IT SA contends that, to the extent that Meta IE and WhatsApp Ireland Limited are part of the same corporate group, the previous decision concerning WhatsApp Ireland Limited "*sets a key precedent in assessing a controller's repetitive conduct*", as "*not only did the controller in question clearly stick to the same business model in offering its different social networking services, it also did not change its assessment as to how to manage users' data with particular regard to its information and transparency obligations*"⁶⁴⁹. The IE SA disagrees with this objection, considering that Article 83(2)(e)

⁶⁴⁶ EDPB Guidelines on Administrative Fines, paragraph 93.

⁶⁴⁷ Meta IE Article 65 Submissions, paragraph 10.3. According to Meta IE's the DPC Final Decision IN-18-12-2 against WhatsApp Ireland Limited concerns "*wholly separate proceeding involving wholly separate allegations and claims*".

⁶⁴⁸ DPC Final Decision IN-18-12-2 concerning WhatsApp Ireland Limited, 20 August 2021, paragraphs 496, 591 and 595, available at: https://edpb.europa.eu/system/files/2021-09/dpc_final_decision_redacted_for_issue_to_edpb_01-09-21_en.pdf; Draft Decision, p. 71.

⁶⁴⁹ ITSA Objection, p. 9.

GDPR cannot apply in the circumstances of this case insofar as its decision against WhatsApp Ireland Limited was addressed to a different controller⁶⁵⁰.

352. In this respect, the EDPB notes that Meta IE and WhatsApp Ireland Limited are both subsidiaries of Meta Platforms, Inc.⁶⁵¹. Nonetheless, the EDPB recalls that the GDPR draws a distinction between on the one hand the “*controller*” or “*processor*”⁶⁵², which are responsible for complying with the rules of the GDPR, and on the other hand the “*undertaking*”⁶⁵³ to which the controller or processor is part of, and that may be found jointly and severally liable for the payment of the fine⁶⁵⁴. In this context, Article 83(2)(e) GDPR explicitly refers to the need to consider previous relevant infringements committed “*by the controller or processor*” (emphasis added).
353. Therefore, the EDPB considers that the Final Decision does not need to refer to the infringements by WhatsApp Ireland Limited, as established in Decision IN-18-12-2, as an aggravating factor under Article 83(2)(e) GDPR for the calculation of the fine.

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

354. With regard to effectiveness of the fines, the EDPB recalls that the objective pursued by the corrective measure chosen can be to re-establish compliance with the rules, or to punish unlawful behaviour, or both⁶⁵⁵. 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)⁶⁵⁶. 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 objective⁶⁵⁷. 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 effect⁶⁵⁸.

⁶⁵⁰ Composite Response, paragraph 125. According to the IE SA, this stems directly from the wording of Article 83(2)(e) GDPR, which “*expressly states that only relevant previous infringements by the same controller or processor must be taken into consideration*”.

⁶⁵¹ DPC Final Decision IN-18-12-1 concerning WhatsApp Ireland Limited, 20 August 2021, paragraph 872; Draft Decision, paragraphs 5 and 288.

⁶⁵² See Art. 4(7)-(8) GDPR.

⁶⁵³ According to Recital 150, “*where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes*”. According to settled case-law of the CJEU, the term ‘undertaking’ “*encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed*” (see, in this regard, EDPB Binding Decision 1/2021, paragraph 292).

⁶⁵⁴ EDPB Binding Decision 1/2021, paragraph 290.

⁶⁵⁵ EDPB Guidelines on Administrative Fines, p. 6.

⁶⁵⁶ See, *inter alia*, C-511/11, Versalis, paragraph 94.

⁶⁵⁷ See Judgement of the General Court of 14 October 2021, MT v Landespolizeidirektion Steiermark, C-231/20, ECLI:EU:C:2021:845, paragraph 45 (“*the severity of the penalties imposed must [...] be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while not going beyond what is necessary to attain that objective*”).

⁶⁵⁸ Meta IE Article 65 Submissions, Annex 1, paragraphs, 2.22, 5.16, 7.16, 8.30 and 9.23.

355. The EDPB reiterates that it is incumbent upon the supervisory authorities to verify whether the amount of the envisaged fines meets the requirements of effectiveness, proportionality and dissuasiveness, or whether further adjustments to the amount are necessary, considering the entirety of the fine imposed and all the circumstances of the case, including e.g. the accumulation of multiple infringements, increases and decreases for aggravating and mitigating circumstances and financial/socio-economic circumstances⁶⁵⁹. Further, the EDPB recalls that the setting of a fine is not an arithmetically precise exercise⁶⁶⁰, and supervisory authorities have a certain margin of discretion in this respect⁶⁶¹.
356. The DE, FR, IT, NL, and NO SAs, object to the level of the fine envisaged in the Draft Decision as they consider the proposed fine not effective, proportionate and dissuasive (Article 83(1) GDPR)⁶⁶².
357. These CSAs argue that the elements of Article 83(2) GDPR are not weighed correctly by the LSA when calculating the administrative fines in the present case, in light of the requirements of Article 83(1) GDPR⁶⁶³. Specifically, the DE, FR, IT, NL and NO SAs argue that the fine envisaged in the Draft Decision is not proportionate with IE SA's findings in relation to the nature and seriousness of the infringements and the number of data subjects concerned⁶⁶⁴.
358. In addition, these CSAs argue that the fine is not effective, proportionate and dissuasive taking into account the financial position of Meta Platform, Inc.⁶⁶⁵.
359. The EDPB takes note of Meta IE's disagreement with the fine proposed by the IE SA⁶⁶⁶ and their view that the LSA already considers all factors it considered to be relevant to Article 83(2) GDPR and that *"none of the CSAs have created any reasonable doubt as to the validity of the DPC's calculation"*⁶⁶⁷.
360. The EDPB notes that in the Draft Decision the IE SA indicates being satisfied the proposed fines are effective, proportionate and dissuasive, taking into account all the circumstances of the IE SA's inquiry⁶⁶⁸. The IE SA assessed the different criteria of Article 83(2) GDPR in relation to the transparency

⁶⁵⁹ 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"*.

⁶⁶⁰ See Judgement of the General Court of 22 September 2021, Altice Europe NV v Commission, T 425/18, ECLI:EU:T:2021:607, paragraph 362; Judgement of the General Court of 5 October 2011, Romana Tabacchi v Commission, Case T-11/06, ECLI:EU:T:2011:560, paragraph 266.

⁶⁶¹ 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.

⁶⁶² DE SAs Objection, pp. 10-12; FR SA Objection, paragraphs 36-48; IT SA Objection pp. 7-10; NL SA Objection, paragraphs 39-53; NO SA Objection, pp. 9-13;

⁶⁶³ DE SAs Objection, p. 11 ; FR SA Objection, paragraph 47; IT SA Objection pp. 7-8 ; NL SA Objection, paragraph 50; NO SA Objection, pp. 11-12

⁶⁶⁴ DE SAs Objection, p. 11; FR SA Objection, paragraph 38 ; IT SA Objection, p. 8 ; NL SA Objection, paragraph 42 and 48; NO SA Objection, p. 12.

⁶⁶⁵ DE SAs Objection, p. 11 ; FR SA Objection, paragraph 38-40; IT SA Objection, pp. 8 ; NL SA Objection, paragraph 48-49; NO SA Objection, pp. 11-12.

⁶⁶⁶ Meta IE Article 65 Submissions, paragraph 9.1.

⁶⁶⁷ Meta IE Article 65 Submissions, paragraph 9.3.

⁶⁶⁸ Draft Decision, paragraphs 255 - 258.

infringements found⁶⁶⁹. The IE SA considered the infringements as serious in nature⁶⁷⁰, and in terms of gravity of the infringements found a significant level of non-compliance⁶⁷¹. Furthermore, the EDPB underlines that, as established by the IE SA, the infringements affect a significant number of data subjects⁶⁷² and are extensive⁶⁷³. The EDPB also observes that the IE SA considered the negligent character of the infringement⁶⁷⁴, as well as the high level of responsibility of Meta IE for the lack of compliance with the GDPR⁶⁷⁵ as aggravating factors under Article 83(2) GDPR. Further, the IE SA qualified the level of damage suffered by data subjects as significant⁶⁷⁶. In addition, the IE SA identified only one mitigating factor, without indicating, however, whether this should lead to a slight or substantial reduction of the fine range⁶⁷⁷.

361. Meta IE argues that reputation costs should also be taken into consideration, citing the IE SA's remark on *"the significant publicity that a fine in this region will attract"*⁶⁷⁸. On principle, the EDPB agrees that reputation costs could be taken into consideration to some extent, if credible arguments are put forward about the grave detriment that would ensue. Meta IE does not present such arguments⁶⁷⁹. The EDPB is of the view that in this case other incentives would offset any reputational costs. As far as advertisers are concerned, Meta IE puts forward that *"The personalised nature of the Instagram Service is also the reason why it has been instrumental in the success of small and medium sized businesses ("SMBs") worldwide, including across the EU. Personalisation on social media and other digital technologies, including the Instagram Service, enables SMBs to compete for customers through "customizing [sic] products and services, [...] building a unique brand image, tailoring marketing to a specific audience and developing a strong one-to-one connection with a community of customers"*⁶⁸⁰. As far as users of the Instagram service are concerned, there are network effects at play which leads to incentives to join - or not leave - the platform, so as not to be excluded from participating in discussions, corresponding with and receiving information from others⁶⁸¹.
362. According to the DE, FR, and IT SAs, the proposed fine is not consistent with the fine of 225 million euros decided upon by the IE SA in its decision dated 20 August 2021 against WhatsApp Ireland Limited

⁶⁶⁹ Draft Decision, paragraphs 209 - 252.

⁶⁷⁰ Draft Decision, paragraphs 212 - 215 and 253.

⁶⁷¹ Draft Decision, paragraphs 216 - 217 and 253.

⁶⁷² Draft Decision, paragraphs 223 - 225 and 253.

⁶⁷³ Draft Decision, paragraph 221.

⁶⁷⁴ Draft Decision, paragraphs 230-233 and 253.

⁶⁷⁵ Draft Decision, paragraph 240. The IE SA considers that *"Meta Ireland should have been aware of the appropriate standards – albeit at a general level – and, having made a deliberate decision to present the information in a manner which fell significant below the standard required, has a high degree of responsibility for the lack of compliance with the GDPR"*.

⁶⁷⁶ The IE SA finds it sufficiently shown that *"rights have been damaged in a significant manner, given the lack of an opportunity to exercise data subject rights while being fully informed"*, Draft Decision, paragraph 229

⁶⁷⁷ Draft Decision, paragraphs 234 - 236.

⁶⁷⁸ Composite Response, paragraph 119. See Meta IE Article 65 Submissions, Annex 1, paragraphs 2.26, 5.24, 7.20, 8.31.

⁶⁷⁹ Meta IE states that *"even if Meta Ireland or other companies could ever consider that multi-million fines are negligible from a financial point of view (a statement that is unsubstantiated and disputed), such companies would obviously be concerned by the reputational cost of such fines."* Meta IE Article 65 Submissions, Annex 1, paragraphs 2.26, 5.24, 7.20, and 8.31.

⁶⁸⁰ Meta IE Article 65 Submissions, paragraph 6.23.

⁶⁸¹ NO SA Objection, p. 5. In the same vein, the FR SA describes Meta IE's position as quasi-monopolist (FR SA Objection, paragraph 38).

for the same transparency infringements (breaches of Articles 12 and 13 GDPR)⁶⁸². In particular, the DE SAs point out that *“the facts and the seriousness of the infringements in the two cases are not sufficiently different to justify a difference of 85% in the fine imposed”*⁶⁸³. The FR and IT SAs also compare with the fine of 746 million euros decided by the LU SA in its decision of 15 July 2021 against the company Amazon Europe Core for carrying out behavioural advertising without a valid legal basis and for transparency infringements (Articles 6, 12 and 13 GDPR)⁶⁸⁴. While the EDPB agrees with both the IE SA and Meta IE that imposing fines requires a case-by-case assessment under Article 83 GDPR⁶⁸⁵, the EDPB notes that the cases cited by the DE, FR and IT SAs do show marked similarities with the current case, as they both refer to large internet platforms run by data controllers with multi-national operations and significant resources available to them, including large, in-house, compliance teams. Moreover, there are similarities with regards to the nature and gravity of the infringements involved⁶⁸⁶. Thus, these cases can give an indication on the matter.

363. The DE, FR, IT and NO SAs calculate that the envisaged upper limit of the fine range is about 0.03 %⁶⁸⁷ of the global annual turnover of Meta Platforms, Inc., which the DE SAs note is about 0.72% of the maximum ceiling provided for in Article 83(5) GDPR⁶⁸⁸. For illustrative purposes also, is the amount of time it would take Meta Platforms, Inc. on average to generate 23 million euros in turnover in 2020, which was about 2 hours and 33 minutes⁶⁸⁹.
364. The EDPB agrees with the objections raised that - if the proposed fine was to be imposed for the transparency infringements - there would be no sufficient special preventive effect towards the controller, nor a credible general preventive effect⁶⁹⁰. 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 business⁶⁹¹. As behavioural advertising is at the core of Meta IE’s business model⁶⁹², the risk of this occurring is all the greater⁶⁹³. By bearing the cost of the administrative fine, the undertaking can avoid bearing the cost of adjusting their business model to one that is compliant as well as any future losses that would follow from the adjustment.

⁶⁸² DE SA Objection, p. 11-12; FR SA Objection, paragraph 42; IT SA Objection, p.8. The IE SA’s decision in this case (case IN-18-12-2) is under a appeal before the Irish courts.

⁶⁸³ DE SA Objection, p. 12.

⁶⁸⁴ FR SA Objection, paragraph 43; IT SA Objection p.8.

⁶⁸⁵ Draft Decision, paragraph 219-220; Meta IE Article 65 Submissions, paragraphs 2.23, 5.18, 7.17.

⁶⁸⁶ In this regard, the DE SA points out that in both decisions the IE SA stated that the provisions infringed *“go to the heart of the general principle of transparency and the fundamental right of the individual to protection of his/her personal data which stems from the free will and autonomy of the individual to share his/her personal data”*. DE SA Objection, p. 11.

⁶⁸⁷ DE SA Objection, p. 11; FR SA Objection, paragraph 40; IT SA Objection, p. 8; NO SA Objection, p. 12.

⁶⁸⁸ DE SA Objection, p. 11.

⁶⁸⁹ Based on the total annual turnover of 2020 being EUR 79 billion calculated by the NL SA in its objection (NL SA Objection, paragraph 49) on the basis of the turnover of Meta Platforms, Inc. referred to in the Draft Decision (86 billion dollars). Thus, a fine of EUR 23 million would have taken 2h33 to generate.

⁶⁹⁰ DE SA Objection, p. 12; IT SA Objection, pp. 8-9; NO SA Objection, p. 12; FR SA Objection, paragraph 47.

⁶⁹¹ NO SA Objection, p. 11.

⁶⁹² Draft Decision, paragraphs 102, 221, 227 and 251.

⁶⁹³ NO SA Objection, pp. 11-12.

365. Though the IE SA touches upon the notions of effectiveness, proportionality and dissuasiveness in relation to the proposed fine⁶⁹⁴, 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) GDPR⁶⁹⁵, the IE SA does not articulate how and to what extent the turnover of this undertaking is considered to ascertain that the administrative fine meets the requirement of effectiveness, proportionality and dissuasiveness⁶⁹⁶. In this regard the EDPB recalls that, contrary to Meta IE's views⁶⁹⁷, 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) GDPR⁶⁹⁸. The EDPB therefore instructs the IE SA to modify its Draft Decision to elaborate on the manner in which the turnover of the undertaking concerned has been taken into account for the calculation of the fine.
366. In light of the above, the EDPB considers that the proposed fine does not adequately reflect the seriousness and severity of the infringements nor has a dissuasive effect on Meta IE. Therefore, the fine does not fulfil the requirement of being effective, proportionate and dissuasive in accordance with Article 83(1) and (2) GDPR. In light of this, the EDPB directs the IE SA to set out a significantly higher fine amount for the transparency infringements identified, in comparison with the upper limit for the administrative fine envisaged in the Draft Decision. In doing so, the IE SA must remain in line with the criteria of effectiveness, proportionality, and dissuasiveness enshrined in Article 83(1) GDPR in its overall reassessment of the amount of the administrative fine.

9.2 On the determination of an administrative fine for further infringements

9.2.1 Analysis by the LSA in the Draft Decision

367. 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 Instagram Terms of Use and is not legally obliged to rely on consent in order to do so (Finding 1)⁶⁹⁹. 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)⁷⁰⁰. In these terms, the IE SA did not propose to establish an infringement of Article 6(1) GDPR.

⁶⁹⁴Draft Decision, paragraphs 255 - 258.

⁶⁹⁵ Draft Decision, paragraph 295.

⁶⁹⁶ EDPB Guidelines on calculation of fines, paragraph 120.

⁶⁹⁷Meta IE Article 65 Submissions, paragraphs 9.8-9.10. In addition, Meta IE's argument that "[turnover] is not a relevant consideration when determining the amount of the fine under Article 83(2) GDPR" is not within the scope of the dispute as no CSAs raised an objection on the consideration of turnover under this provision (Meta IE Article 65 Submissions, paragraphs 9.5-9.8).

⁶⁹⁸ EDPB Binding Decision 1/2021, paragraphs 405-412.

⁶⁹⁹ Draft Decision, p. 23.

⁷⁰⁰ Draft Decision, paragraphs 111-115 and p. 40.

368. 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 Instagram Terms of Use.
369. 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)⁷⁰¹.

9.2.2 Summary of the objections raised by the CSAs

370. The AT, DE, FR, IT, NO, and SE SAs⁷⁰² 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

371. The DE and FR SAs ask for the administrative fine to be increased⁷⁰³ as a consequence of the proposed finding of an infringement of Article 6(1) GDPR⁷⁰⁴. The AT, NO and SE SAs argue that the fine should be increased following the finding of an infringement of Article 6(1)(b) GDPR⁷⁰⁵.
372. 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 Decision⁷⁰⁶. The DE SAs argue that in the current case the processing of personal data was performed without a legal basis as consent of the data subjects would be required, which was not given, and that the *"Draft Decision is insofar not in compliance with Article 83 GDPR as it does not consider the additional infringement of Articles 5(1)(a), Art. 6(1), 9(1) when calculating the amount of the administrative fine"*⁷⁰⁷. The DE SAs state that it is a highly serious infringement under Article 83(2)(a) GDPR considering that personal data of at least [REDACTED] individuals were affected⁷⁰⁸. The DE SAs also highlight that the fine imposed needs to aim to prevent further infringements of the GDPR; first, it should have *"special preventive"* effects, 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"*

⁷⁰¹ Draft Decision, p. 71.

⁷⁰² AT SA Objection, pp. 11-12; DE SAs Objection, p. 10 and 12; FR SA Objection, pp. 9-10.; NO SA Objection, pp. 9-13; SE SA Objection, pp. 4-5.

⁷⁰³ FR SA Objection, paragraph 44; DE SAs Objection, p. 10.

⁷⁰⁴ DE SAs Objection, pp. 1-6 and pp. 9-10; FR SA Objection, paragraphs 5-14, 33 and 52;

⁷⁰⁵ AT SA Objection, pp. 11-12; NO SA Objection, pp. 10-11; SE SA Objection, pp. 4-5.

In addition, also the DE (DE SAs objection, p. 10), FI and NO (NO SA objection, p. 9) SAs (FI SA Objection, paragraph 26) argue that an administrative fine should be imposed for the infringement of Article 6(1)(b) GDPR; however, this aspect of the objection raised by the DE, FI and NO SAs was deemed to be not relevant and reasoned by the EDPB in paragraph 85 above.

⁷⁰⁶ DE SAs Objection, p. 10.

⁷⁰⁷ DE SAs Objection, p. 10.

⁷⁰⁸ DE SAs Objection, p. 10.

by the undertaking lightly”; secondly, it should have “general preventive” effects by leading other controllers to “make a significant effort to avoid similar violations”⁷⁰⁹.

373. The FR SA considers that some violations are wrongly not included in the Draft Decision⁷¹⁰ and argues that “since it considers that breach of Articles 6 has been committed, which is added to the other breaches found by the Irish data protection authority, the amount proposed by the latter should be accordingly increased”⁷¹¹. 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 1/2021⁷¹².
374. On risks posed by the Draft Decision, the DE SAs explain that the shortcoming of the Draft Decision would cause significant risks for the fundamental rights and freedoms of the data subjects, “because an effective enforcement of the GDPR, which is the precondition for the protection of the fundamental rights and freedoms of the data subjects, cannot be ensured”⁷¹³. The DE SAs also point out that administrative fines shall in each individual case be effective, proportionate and dissuasive and both special and general preventive since these two “concepts aim to protect the fundamental rights and freedom of the data subjects by preventing further infringements of the GDPR”⁷¹⁴. Moreover, the DE SAs raise that “the non-compliance with one of the central provisions of the GDPR would not have any negative financial impact on the undertaking and therefore, from an economical point of a view could be a reasonable option for controllers”⁷¹⁵. 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”⁷¹⁶ 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”⁷¹⁷.

375. The AT, NO and SE SAs, which considered that the IE SA should have found an infringement of Article 6(1)(b) GDPR⁷¹⁸, ask for the administrative fine to be increased as a consequence of that infringement.
376. The AT SA argues that “the additional infringement [of Article 6(1)(b) GDPR] is not properly reflected in the envisaged amount of the administrative fine” and that the IE SA's Draft Decision is not in 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 fine⁷¹⁹.

⁷⁰⁹ DE SAs Objection, p. 10.

⁷¹⁰ FR SA Objection, paragraph 44.

⁷¹¹ FR SA Objection, paragraph 44.

⁷¹² FR SA Objection, paragraph 44.

⁷¹³ DE SAs Objection, p. 12.

⁷¹⁴ DE SAs Objection, p. 10.

⁷¹⁵ DE SAs Objection, p. 12.

⁷¹⁶ FR SA Objection, paragraph 47.

⁷¹⁷ FR SA Objection, paragraph 48.

⁷¹⁸ AT SA Objection, pp. 1-7; NO SA Objection, pp.10-11; SE SA Objection, pp. 2-3.

⁷¹⁹ AT SA Objection, p. 11.

377. 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 basis⁷²⁰. 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 fine⁷²¹. 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"*⁷²²), as well as the scope of the processing (*"wide"*, as *"all data subject activity may potentially be used for OBA purposes"*), 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 *"targeting algorithms which may be harmful on an individual and societal level"*, Article 83(2)(k) GDPR)⁷²³.
378. 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"*⁷²⁴. The SE SA takes the view that 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 factors⁷²⁵. As to intentionality, the SE SA argues that the switch from consent to Article 6(1)(b) GDPR 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"*⁷²⁶. As to the financial benefits gained, the SE SA argues *"Meta Ireland has made significant financial gain from being able to provide personal advertisement as part of a whole take it or leave it offer for its social media platform service"* 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 processing⁷²⁷. 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 dissuasive⁷²⁸.

⁷²⁰ NO SA Objection, p. 10.

⁷²¹ NO SA Objection, p. 10-11.

⁷²² The NO SA also highlights that *"[behavioural advertising] entails profiling, which inherently constitutes risks for the data subjects' integrity"*.

⁷²³ NO SA Objection, p. 10-11.

⁷²⁴ SE SA Objection, p. 4.

⁷²⁵ SE SA Objection, p. 4.

⁷²⁶ SE SA Objection, p. 4.

⁷²⁷ SE SA Objection, p. 4.

⁷²⁸ SE SA Objection, p. 4-5.

379. 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*”⁷²⁹. The NO SA explains that not imposing a fine for the lack of legal basis creates the 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*”⁷³⁰. 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 (Meta Ireland 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 Meta Ireland and other controllers*”⁷³¹.

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

380. The DE and FR SAs argue that, as 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 Instagram Terms of Use and that Meta IE processes the entire amount of data it holds, including special categories of data in breach of Articles 6 and 9 GDPR⁷³², the amount of the fine should be increased accordingly⁷³³.

381. The DE SAs state that “*the infringement of Article 5(1)(a), Article 6(1) and Article 9(1) GDPR [...] also entails an administrative measure and a fine according to Art. 83(2)(5) GDPR*”⁷³⁴, and argue that these infringements are “*serious*”⁷³⁵. The FR SA considers that a breach of Article 9 GDPR is wrongly not included in the Draft Decision⁷³⁶ and that the amount of the fine proposed by the LSA should be increased in light of the addition of such infringements to those already established⁷³⁷. 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 the Binding Decision 1/2021⁷³⁸.

382. On risks posed by the Draft Decision, the DE SAs explain that the shortcoming of the Draft Decision would cause significant risks for the fundamental rights and freedoms of the data subjects, “*because an effective enforcement of the GDPR, which is the precondition for the protection of the fundamental*

⁷²⁹ AT SA Objection, p. 12.

⁷³⁰ NO SA Objection, p. 12.

⁷³¹ SE SA Objection, p. 5.

⁷³² See Section 5.2., paragraphs 150-155.

⁷³³ DE SAs Objection, pp. 7-8; FR SA Objection, paragraph 30.

⁷³⁴ DE SAs Objection, p. 10.

⁷³⁵ DE SAs Objection, p. 10.

⁷³⁶ FR SA Objection, paragraph 44.

⁷³⁷ FR SA Objection, paragraph 44.

⁷³⁸ FR SA Objection, paragraph 44.

*rights and freedoms of the data subjects, cannot be ensured*⁷³⁹. The DE SAs also point out that administrative fines shall in each individual case be effective, proportionate and dissuasive and both special and general preventive since these two “*concepts aim to protect the fundamental rights and freedom of the data subjects by preventing further infringements of the GDPR*”⁷⁴⁰. Moreover, the DE SA raises that “*the non-compliance with one of the central provisions of the GDPR would not have any negative financial impact on the undertaking and therefore, from an economical point of a view could be a reasonable option for controllers*”⁷⁴¹. 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*”⁷⁴² 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*”⁷⁴³.

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

383. The IT SA argues that the fine should be increased following the finding of an infringement of Article 5(1)(a) GDPR⁷⁴⁴, and of Article 5(1)(b) and Article 5(1)(c) GDPR⁷⁴⁵. As stated in Section 6.2 of this Binding Decision, 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 transparency⁷⁴⁶ 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 transparency⁷⁴⁷. 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 principles⁷⁴⁸. 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 regard to the requirement that each fine should be proportionate and dissuasive. Indeed, the gravity of the infringement would be factually compounded*”⁷⁴⁹. With reference to Article 5(1)(b) and Article 5(1)(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*”⁷⁵⁰.

⁷³⁹ DE SAs Objection, p. 12.

⁷⁴⁰ DE SAs Objection, p. 10.

⁷⁴¹ DE SAs Objection, p. 12.

⁷⁴² FR SA Objection, paragraph 47.

⁷⁴³ FR SA Objection, paragraph 48.

⁷⁴⁴ ITSA Objection, Section 2, p.7

⁷⁴⁵ ITSA Objection, Section 2, p.4

⁷⁴⁶ ITSA Objection, Section 2, pp. 4-5.

⁷⁴⁷ ITSA Objection, Section 2, pp. 4-7

⁷⁴⁸ ITSA Objection, Section 1, pp. 2-4.

⁷⁴⁹ ITSA Objection, pp. 6-7

⁷⁵⁰ ITSA Objection, p.4.

384. 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”*⁷⁵¹. With reference to Article 5(1)(b) and Article 5(1)(c) GDPR, the IT SA adds that, should the Draft Decision be approved in its current version, the infringement of two key principles of the whole data protection framework as introduced by the GDPR will not be punished, *“which would seriously jeopardise the safeguards the data subjects (Instagram users) are entitled to”*⁷⁵².

9.2.3 Position of the LSA on the objections

385. 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) GDPR⁷⁵³. 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), 5(1)(b) and 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 reasoned.

9.2.4 Analysis of the EDPB

9.2.4.1 Assessment of whether the objections were relevant and reasoned

386. The objections raised by the AT, DE, FR, IT, NO, and SE SAs concern *“whether the action envisaged in the Draft Decision complies with the GDPR”*⁷⁵⁴.

387. 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) GDPR⁷⁵⁵. Meta IE rejects the objections in this section based on its view that the LSA has sole discretion to determine corrective measures⁷⁵⁶. The EDPB responds to these arguments above (see Section 8.4.2) 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 as a result of the one identified by the CSA in its objection⁷⁵⁷. Meta IE refutes the allegations of additional infringements put forward in the objections, and by consequence, any demands for increasing the administrative fine in relation them⁷⁵⁸. The EDPB recalls that the assessment of admissibility of objections and the assessment of the merits are two distinct steps⁷⁵⁹.

388. 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,

⁷⁵¹ ITSA Objection, p. 7.

⁷⁵² ITSA Objection, p. 4

⁷⁵³ Composite Response, paragraph 110..

⁷⁵⁴ EDPB Guidelines on RRO, paragraph 32.

⁷⁵⁵ Meta IE Article 65 Submissions, Annex 1, p. 65.

⁷⁵⁶ Meta IE Article 65 Submissions, Annex 1, paragraphs 1.31, 2.21, 5.18, 7.15, 9.22, and 10.16.

⁷⁵⁷ EDPB RRO Guidelines, 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.

⁷⁵⁸ See Meta IE Article 65 Submissions, paragraphs 8.10-8.15, and more specifically Annex 1, paragraphs 1.33, 2.18, 5.20, 7.13, 9.18 and 9.20, and 10.16.

⁷⁵⁹ EDPB Guidelines on Article 65(1)(a), paragraph 63.

DE, FR, NO, 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 dispute⁷⁶⁰. 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.

389. The EDPB takes note of further arguments put forward by Meta IE aiming to demonstrate the lack of relevance of these objections, specifically with regard to the objections raised by the AT SA⁷⁶¹. However, the EDPB notes that Meta IE disagrees with the content of these objections, which concerns its merits and not its admissibility.
390. If followed, these objections would lead to a different conclusion in terms of corrective measures imposed⁷⁶². In consequence, the EDPB considers the objections raised by the AT, DE, FR, NO and SE SAs in connection to imposing an administrative fine for the alleged breach of Article 6(1)/6(1)(b) GDPR and/or Article 9 GDPR to be **relevant**.
391. Meta IE argues that the AT, NO, and SE SAs objections in relation to the need to increase the fine amount because of the alleged infringement of Article 6(1)(b) GDPR lacks adequate reasoning as they fail to demonstrate why Meta IE could not rely on Article 6(1)(b) GDPR⁷⁶³. According to Meta IE, the SE SA's objection is also based on the unfounded claim that Meta IE intentionally sought to circumvent data subject rights by switching from consent to contractual necessity as the legal basis in May 2018⁷⁶⁴. Furthermore, Meta IE takes the view that the objections from the AT, DE, FR and NO SAs are not sufficiently reasoned as they refer to the use of administrative fine as "*general preventive measures*" on controllers, thus speculating on potential future behaviour or intentions of unidentified controllers⁷⁶⁵. The EDPB understands that Meta IE disagrees with the reasoning provided in the objections, which thus concerns their merits and not their admissibility.
392. In addition, Meta IE argues that the FR SA's objection is not reasoned because it 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*"⁷⁶⁶. Meta IE further takes issue with the AT SA's objection and argues it has not put forward a sufficiently reasoned basis for its objection to challenge the LSA's calculation of the criteria laid down in Article 83(2) GDPR⁷⁶⁷. In this respect, the EDPB recalls that CSAs are not required to engage in a full assessment of all the

⁷⁶⁰ AT SA Objection, p. 11; DE SAs Objection, p. 2; FR SA Objection, paragraphs 44 and 50; NO SA Objection, p. 11; SE SA Objection, p. 4.

⁷⁶¹ Meta IE Article 65 Submissions, Annex 1, paragraph 1.32. According to Meta IE, by referring to the fact that "*Meta Ireland is... the provider of one of the biggest social media network in the world*", the AT SA "*fails to explain how this relates to any specific factual and legal content of the Draft Decision*".

⁷⁶² AT SA Objection, p. 11; DE SAs Objection, p. 2; FR SA Objection, paragraph 44 and 50; NO SA Objection, p. 11; SE SA Objection, p. 4.

⁷⁶³ Meta IE Article 65 Submissions, Annex 1, 1.33, 9.20, and 10.17.

⁷⁶⁴ Meta IE Article 65 Submissions, Annex 1, 10.17.

⁷⁶⁵ Meta IE Article 65 Submissions, Annex 1, paragraphs 1.35, 2.22, 5.16 and 9.23. Meta IE adds that "*in any event, where a fine as large as that currently proposed in the Draft Decision is imposed, there is no doubt that other controllers will take note of this in such circumstances*".

⁷⁶⁶ Meta IE Article 65 Submissions, Annex 1, paragraph 5.20.

⁷⁶⁷ Meta IE Article 65 Submissions, Annex 1, paragraph 1.34.

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/erroneous and why. 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.

393. The EDPB finds that the AT, DE, FR, NO and SE SAs adequately argue why they propose amending the Draft Decision⁷⁶⁸ and how this leads to a different conclusion in terms of administrative fine imposed⁷⁶⁹.
394. 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 AT, DE, FR, NO and SE SAs⁷⁷⁰ fail to demonstrate the contrary, as required.
395. More specifically, Meta IE considers that the DE and FR SAs’ objections focus on increasing the “*punitive impact*” of the fine on Meta IE rather than demonstrating any significant risks to the fundamental rights of data subjects⁷⁷¹. In this regard, Meta IE argues the AT, DE, NO, and SE SAs’ objections rest on unsubstantiated possible effect of the Draft Decision on the future behaviour of other controllers, instead of doing a case by case assessment under Article 83 GDPR⁷⁷². In particular, Meta IE claims that, in doing so, the assessment made by these supervisory authorities is incorrect to the extent it only takes into account financial costs and does not consider reputational costs⁷⁷³.
396. The EDPB recalls that any risk assessment addresses future outcomes which are to some degree uncertain⁷⁷⁴. Contrary to Meta IE’s views, 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 “*speculative argument based on the putative lack of a general preventive impact on other controllers*”⁷⁷⁵. The EDPB also notes that the DE, FR, NL, NO and SE SAs⁷⁷⁶ considered both of the aspects that are entailed by dissuasiveness of the fine, i.e. specific deterrence and general deterrence⁷⁷⁷.

⁷⁶⁸ AT SA Objection, pp. 11; DE SAs Objection, p. 10 ; FR SA Objection, paragraph 50 ; NO SA Objection pp. 9-11; SE SA Objection p. 4.

⁷⁶⁹ AT SA Objection, pp. 11-12; DE SAs Objection, p. 12 ; FR SA Objection, paragraphs 44-45 ; NO SA Objection p. 13 ; SE SA Objection, p. 4

⁷⁷⁰ Meta IE Article 65 Submissions, Annex 1, paragraphs 1.36-1.40, 2.24-2.27, 5.22-5.25, 9.25-9.27, and 10.18-10.20.

⁷⁷¹ Meta IE Article 65 Submissions, Annex 1, paragraphs 2.24 and 5.22.

⁷⁷² Meta IE Article 65 Submissions, Annex 1, paragraphs 1.38, 2.25-2.26, 9.26, and 10.18.

⁷⁷³ Meta IE Article 65 Submissions, Annex 1, paragraphs 1.38, 2.26, 5.24, and 10.19. Meta IE adds that, in any case, it “*does not consider that fines such as the one proposed in the Draft Decision could encourage other companies not to comply with the GDPR*”.

⁷⁷⁴ See Section 9.1.4.1 of this Binding Decision.

⁷⁷⁵ Meta IE Article 65 Submissions, Annex 1, paragraph 10.18 (SE SA).

⁷⁷⁶ DE SAs Objection, p. 12 (referring to the “*undertaking in question*”), FR SA Objection, paragraph 47 (referring to “*the controller*”); IT SA Objection pp.8-9 (referring to “*the controller*”); NL SA Objection, paragraph 52 (referring to the risks in relation to “*the illegal processing at hand*”); NO SA Objection, p.12 (referring to “*incentives for Meta IE*”).

⁷⁷⁷ 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

397. 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 individuals ⁷⁷⁸.

398. 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) and/or Article 9 GDPR to be **reasoned**.

399. 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) GDPR, the EDPB finds, contrary to Meta IE's views⁷⁷⁹, 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.

400. If followed, the IT SA's objection would lead to a different conclusion in terms of corrective measures imposed ⁷⁸⁰. Taking note of Meta IE's position⁷⁸¹, the EDPB finds the objections raised by the IT SA to be **relevant**.

401. Meta IE argues the IT SA's objection does not put forward reasonable doubt as to the validity of the LSA's calculation of the fine and claims there is no basis in the GDPR for suggesting that an administrative fine must have a "*general deterrent effect*"⁷⁸². 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 imposed⁷⁸³.

infringement again) and general deterrence (discouraging others from committing the same infringement in the future). See, *inter alia*, C-511/11, Versalis, paragraph 94.

⁷⁷⁸ AT SA Objection, p. 11-12; DE SAs Objection, p. 12; FR SA Objection, paragraphs 47-48; NO SA Objection, p. 12; SE SA Objection, p. 5. See also EDPB Guidelines on RRO, paragraph 37.

⁷⁷⁹ Meta IE Article 65 Submissions, paragraph 7.13. According to Meta IE, the IT SA objections is not relevant given that the LSA has not found any infringement of the fairness, purpose limitation and data minimisation principles (Article 5(1)(a)-(c) GDPR).

⁷⁸⁰ IT SA Objection, p. 7.

⁷⁸¹ Meta IE Article 65 Submissions, paragraph 7.13. According to Meta IE, given the IE SA has not found any infringement of the fairness principle, there is no basis for the imposition of a fine on this ground. EDPB already responded to this line of reasoning above in Section 8.4.2.

⁷⁸² Meta IE Article 65 Submissions, paragraphs 7.15-16.

⁷⁸³ The IT SA argues that the finding of such infringement "*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*" insofar as "*the gravity of the infringement would be factually compounded.*" (IT SA Objection, pp. 6-7).

402. Meta IE argues the objection of the IT SA fails to demonstrate the risk posed by the Draft Decision, as required ⁷⁸⁴ and, in doing so, Meta IE dismisses the concerns articulated by the IT SA on the precedent the Draft Decision sets for other controllers⁷⁸⁵.
403. 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 individuals⁷⁸⁶.
404. 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**.

405. 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 Article 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

406. 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 the envisaged action in relation to the controller or processor complies with the GDPR. More specifically, the EDPB needs to assess whether an administrative fine should be imposed for the additional infringements of Article 6(1) GDPR and the principle of fairness under Article 5(1)(a) GDPR. However, in light of its findings in Section 5.4.2 above, the EDPB does not need to examine the merits of the objections of the DE and FR SAs requesting the imposition of a fine for the alleged additional breach of Article 9 GDPR.
407. The EDPB recalls that the consistency mechanism may also be used to promote a consistent application of administrative fines ⁷⁸⁷ 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)⁷⁸⁸. 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).

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

⁷⁸⁴ Meta IE Article 65 Submissions, paragraph 7.18.

⁷⁸⁵ Meta IE Article 65 Submissions, paragraph 7.19. On this, the EDPB has set out its position above in Section 9.1.4.1 above.

⁷⁸⁶ IT SA Objection, p. 7.

⁷⁸⁷ 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 above paragraph 344.

⁷⁸⁸ EDPB Guidelines on Administrative Fines, p. 6. See also paragraph 354 of this Binding Decision.

408. The EDPB recalls its conclusion in this Binding Decision on the infringement of Article 6(1) GDPR⁷⁸⁹ 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 fine⁷⁹⁰.
409. The EDPB takes note of Meta IE's views that, even if an infringement is found, the appropriate course would be to refer the matter back to the LSA to determine whether to impose any appropriate corrective measures⁷⁹¹, and that the LSA has sole competence and discretion regarding the amount of the fine⁷⁹². 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 in Section 8.4.2.
410. The EDPB concurs that the decision to impose an administrative fine needs to be taken on a case-by-case basis in light of the circumstances and is not an automatic one⁷⁹³. In the case at hand, however, the EDPB agrees with the reasoning put forward by the AT, DE, FR, NO and SE SAs in their objections. The EDPB reiterates that lawfulness of processing is one of the fundamental pillars of the data protection law and considers that processing of personal data without an appropriate legal basis is a clear and serious violation of the data subjects' fundamental right to data protection⁷⁹⁴.
411. Several of the factors listed in Article 83(2) GDPR speak strongly in favour of the imposition of an administrative fine for the infringement of Article 6(1) GDPR.

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

412. As mentioned above and outlined below⁷⁹⁵, the **nature and gravity of the infringement** clearly tip the balance in favour of imposing an administrative fine.
413. With respect to the **scope of processing**, the EDPB notes the IE SA's assessment that the personal data processing carried out by Meta IE on the basis of Article 6(1)(b) GDPR is extensive, adding that *"Meta Ireland processes a variety of data in order to provide Instagram users with a 'personalised' experience, including by way of serving personalised advertisements. The processing is central to and essential to the business model offered [...]"*⁷⁹⁶.

⁷⁸⁹ Section 4.4.2 of this Binding Decision.

⁷⁹⁰ Paragraph 390 and 398 of this Binding Decision.

⁷⁹¹ Meta IE Article 65 Submissions, paragraph 8.13

⁷⁹² Meta IE Article 65 Submissions, paragraph 9.2, 10.4,

⁷⁹³ 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 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."*).

⁷⁹⁴ Article 8(2), EU Charter of Fundamental Rights. See NO SA objection, p. 10.

⁷⁹⁵ In particular, see Section 4.4.2 of this Binding Decision as well as paragraphs 408, 413-415.

⁷⁹⁶ Draft Decision, paragraphs 221.

414. In this respect, the EDPB also recalls that the infringement at issue relates to the processing of personal data of a significant **number of people**⁷⁹⁷ and that the impact on them has to be considered.
415. Though the **damage** is very difficult to express in terms of a monetary value, it remains the case that data subjects have been faced with data processing that should not have occurred (by relying inappropriately on Article 6(1)(b) GDPR as a legal basis as established in Section 4.4.2). The data processing in question - behavioural advertising - entails decisions about information that data subjects are exposed to or excluded from receiving. The EDPB recalls that non-material damage is explicitly regarded as relevant in Recital 75 and that such damage may result from situations “*where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data*”. Given the nature and gravity of the infringement of Article 6(1)(b) GDPR, a risk of damage caused to data subjects is, in such circumstances, consubstantial with the finding of the infringement itself.

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

416. The SE SA argues the infringement of Article 6(1)(b) GDPR should be considered intentional on Meta IE’s part, which is an aggravating factor⁷⁹⁸.
417. The EDPB takes note of Meta IE’s position that it did not act intentionally with the aim to infringe the GDPR, nor was negligent - but “*has relied on what it has consistently considered in good faith to be a valid legal basis for the purpose of processing of personal data for behavioural advertising and which now requires escalation to the EDPB for resolution*”⁷⁹⁹. Before addressing each of the elements of this claim, the EDPB first notes that establishing either intent or negligence is not a requirement for imposing a fine, but deserves “*due regard*”. Second, contrary to what Meta IE implies, the mere circumstance that a dispute between the LSA and the CSAs has escalated to the EDPB does not serve as evidence that a controller acted in good faith with respect to the disputed issues. First, the dispute arises only (long) after the controller has decided on its course of action, and therefore cannot inform it. Second, a dispute may simply bring to light that an LSA has decided to challenge a position commonly held by (a majority of) the CSAs.
418. The EDPB Guidelines on calculation of fines confirm that there are two cumulative elements on the basis of which an infringement can be considered intentional: the knowledge of the breach and the willfulness in relation to such act⁸⁰⁰. By contrast, an infringement is “*unintentional*” when there was a breach of the duty of care, without having intentionally caused the infringement.
419. The characterisation of an infringement as intentional or negligent shall be done on the basis of objective elements of conduct gathered from the facts of the case⁸⁰¹. It is worth noting the broader

⁷⁹⁷ Draft Decision, paragraph 253, the Instagram service is provided to a significant portion of the population of the EEA. This aspect was also highlighted by the objections raised by the NO SA (NO SA Objection, pp. 10-11) and DE SAs (DE SAs Objection, pp. 9 and 11).

⁷⁹⁸ SE SA Objection, pp. 4-5.

⁷⁹⁹ Meta IE Article 65 Submissions, paragraph 8.28.

⁸⁰⁰ The EDPB Guidelines on calculation of fines, paragraphs 56, referring to the EDPB Guidelines on Administrative Fines: “*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*”.

⁸⁰¹ EDPB Guidelines on calculation of fines, paragraph 57 and EDPB Guidelines on Administrative Fines p. 12.

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 infringement⁸⁰². 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.

420. The SE SA argues that Meta IE “*has continued to rely on Article 6(1)(b) for the processing, despite the aforementioned [EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR] – which clearly gives doubt to the legality of the processing – which were first adopted on 9 April 2019 and made final on 8 October 2019. The infringement must in all cases be considered intentional from that later date*”⁸⁰³.
421. The EDPB recalls that even prior to the adoption EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR, there were clear indicators that spoke against relying on contract as legal basis. First, in WP29 Opinion 02/2010 on online behavioural advertising, only consent - as required by Article 5(3) of the ePrivacy Directive - is put forward as possible legal basis for this activity. As Article 6 GDPR resembles Article 7 of the Data Protection Directive to a large extent, WP29 Opinion 02/2010 remained a relevant source on this matter for controllers preparing for the GDPR to enter into application. Second, WP29 Opinion 06/2014 on the notion of legitimate interests explicitly states that “*the fact that some data processing is covered by a contract does not automatically mean that the processing is necessary for its performance. For example, Article 7(b) is not a suitable legal ground for building a profile of the user’s tastes and lifestyle choices based on his click-stream on a website and the items purchased. This is because the data controller has not been contracted to carry out profiling, but rather to deliver particular goods and services, for example. Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them ‘necessary’ for the performance of the contract*”⁸⁰⁴.
422. It stems from the above that Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR. However, this mere element is not sufficient to consider an infringement intentional, as stated above, since the “*aim*” or “*wilfulness*” of the action should be demonstrated.
423. The EDPB recalls that that having knowledge of a specific matter does not necessarily imply having the “*will*” to reach a specific outcome. This is in fact the approach adopted in the EDPB Guidelines on calculation of fines and WP29 Guidelines on Administrative Fines, where the knowledge and the “*wilfulness*” are considered two distinctive elements of the intentionality⁸⁰⁵. 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 intentionality⁸⁰⁶.
424. The EDPB recalls that the CJEU has established a high threshold in order to consider an act intentional. In fact, even in criminal proceedings the CJEU has acknowledged the existence of “*serious negligence*”,

⁸⁰² 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)*”.

⁸⁰³ SE SA Objection, p. 4.

⁸⁰⁴ WP29 Opinion 06/2014 on the notion of legitimate interests, p. 16-17.

⁸⁰⁵ EDPB Guidelines on calculation of fines, paragraph 56, and EDPB Guidelines on Administrative Fines, p. 11.

⁸⁰⁶ See EDPB Guidelines on calculation of fines, paragraphs 56 and 57, and WP29 Guidelines on Administrative Fines, p. 12.

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”⁸⁰⁷. In this regard, while the EDPB confirms that a company for whom the processing of personal data is at the core of its business activities is expected to have sufficient measures in place for the safeguard of personal data⁸⁰⁸, this does not, however, per se change the nature of the infringement from negligent to intentional.

425. In this regard, the SE SA puts forward that Meta IE based its processing of personalised advertisement on consent until the GDPR came into force on 25 May 2018, and at this time switched to relying on Article 6(1)(b) GDPR for the processing in question instead. The timing and the logistics for this switch suggests this act was done with the intention of circumventing the new rights of users under Article 6(1)(a) GDPR. The SE SA adds that “[the] proposed finding of infringement concerning information deficits about the processing, namely on what legal basis it is based, further supports this conclusion, since it goes to show that Meta Ireland was aware of the questionable legality of that basis and tried to conceal the infringement to avoid scrutiny by supervisory authorities and data subjects”⁸⁰⁹.
426. The EDPB considers the timing of the changes made by Meta IE to its Instagram Terms of Use as an objective element, however this alone does not indicate intention. Around this time period, many controllers updated their data protection policies. The objection suggests that the conclusion on intentionality is corroborated by the shortcomings to the transparency obligations. In the EDPB’s view, the combination of the timing of the change of legal basis with the lack of transparency is not sufficient to indicate intention either.
427. Therefore, on the basis of the available information, the EDPB is not able to identify a will of Meta IE to act in breach of the law as it cannot be concluded that Meta IE intentionally acted to circumvent its legal obligations.
428. Therefore, the EDPB considers that the arguments put forward by the SE SA do not meet the threshold to demonstrate the intentionality of the behaviour of Meta IE. Accordingly, the EDPB is of the view that the Draft Decision does not need to include this element.
429. At the same time, the EDPB notes that, even establishing that the infringement was committed negligently, a company for whom the processing of personal data is at the core of its business activities should have in place sufficient procedures for ensuring compliance with the GDPR⁸¹⁰.
430. The EDPB does not accept Meta IE’s claim of “good faith”, but is of the view that Meta IE was certainly seriously negligent in not taking adequate action, within a reasonable time period, following the adoption of the EDPB Guidelines 2/2019 on Article 6(1)(b) GDPR on 9 April 2019. Even before that date, the EDPB considers there was at the very least negligence on Meta IE’s part considering the contents of WP29 Opinion 02/2010 on online behavioural advertising and WP29 Opinion 06/2014 on the notion of legitimate interests (see paragraph 421 of this Binding Decision), which means Meta IE had (or should have had) knowledge about the infringement of Article 6(1)(b) GDPR, given the fact

⁸⁰⁷ 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.

⁸⁰⁸ EDPB Binding Decision 1/2020, adopted on 9 November 2020, paragraph 195.

⁸⁰⁹ SE SA Objection, p. 4.

⁸¹⁰ See EDPB Binding Decision 1/2020, paragraph 195.

that processing of personal data is at the core of its business practices, and the resources available to Meta IE to adapt its practices so as to comply with data protection legislation.

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

431. The EDPB considers the degree of responsibility of Meta IE's part to be of a high level, on the same grounds as set in the Draft Decision with regards to the transparency infringements⁸¹¹.

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

432. The SE SA argues Meta IE gained financial benefits from their decision to rely on contract as legal basis for behavioural advertising, rather than obtaining consent from the users of Instagram⁸¹². While not providing an estimate of its size, the SE SA considers the existence of financial benefit sufficiently proven on the basis of *"the self-evident fact that Meta Ireland has made significant financial gain from being able to provide personal advertisement as part of a whole take it or leave it offer for its social media platform service, as opposed to establishing a separate legal basis for it. By also being unclear in the information to data subjects, it is a reasonable assumption that more data subjects have been misled into being subject to the processing, thus increasing the financial benefits gained by Meta Ireland pursuant to personal advertisement"*⁸¹³.
433. As explicitly stated in Article 83(2)(k) GDPR, financial benefits gained directly or indirectly from the infringement can be considered an aggravating element for the calculation of the fine. The aim of Article 83(2)(k) GDPR is to ensure that the sanction applied is effective, proportionate and dissuasive in each individual case⁸¹⁴.
434. In particular, in view of ensuring fines that are effective, proportionate and deterrent, and in light of common accepted practice in the field of EU competition law⁸¹⁵, which inspired the fining framework under the GDPR, the EDPB is of the view that, when calculating the administrative fine, supervisory authorities could take account of the financial benefits obtained from the infringement, in order to impose a fine that aim at *"counterbalancing the gains from the infringement"*⁸¹⁶.
435. When applying this provision, the supervisory authorities must *"assess all the facts of the case in a manner that is consistent and objectively justified"*⁸¹⁷. 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 GDPR⁸¹⁸.

⁸¹¹ Draft Decision, paragraph 240. In this respect, the EDPB notes that the high degree of responsibility of Meta IE for the non-compliance with the GDPR was considered as an aggravating factor by LSA for the calculation of the fine.

⁸¹² SE SA Objection, p. 4.

⁸¹³ SE SA Objection p. 4.

⁸¹⁴ EDPB Guidelines on calculation of fines, paragraph 107.

⁸¹⁵ See the CJEU rulings cited in EDPB Binding Decision 2/2022, paragraph 219.

⁸¹⁶ EDPB Guidelines on calculation of fines, examples 7c and 7d.

⁸¹⁷ EDPB Guidelines on Administrative Fines, p. 6 (emphasis added), quoted in Binding Decision 1/2021, paragraph 403.

⁸¹⁸ EDPB Guidelines on calculation of fines, paragraph 110.

436. In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the specific weight of the financial benefit obtained from the infringement.
437. Nonetheless, the EDPB acknowledges the need to prevent that the fines have little to no effect if they are disproportionately low compared to the benefits obtained with the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the financial benefit from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed.

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

438. The NO SA identifies an aggravating factor in that *“that the unlawful processing of personal data in all likelihood has contributed to the development of algorithms which may be harmful on an individual or societal level, and which may have considerable commercial value to [Meta IE]. The algorithms may have contributed to giving [Meta IE] a competitive advantage vis-à-vis its competitors”*⁸¹⁹.
439. On principle, the EDPB agrees that a competitive advantage could be an aggravating factor if the case provides objective information that this was obtained as a result of the infringement of the GDPR⁸²⁰. In the present case, the EDPB considers that it does not have sufficiently precise information to evaluate the existence of a competitive advantage resulting from the infringement. The EDPB considers that the IE SA should ascertain if an estimation of the competitive advantage derived from the infringement is possible in this case. Insofar as this results in the need to increase the amount of the fine proposed, the EDPB requests the IE SA to increase the amount of the fine proposed.

440. Taking into account the nature and gravity of the infringement as well as other aspects in accordance with Article 83(2) GDPR, the EDPB considers that the IE SA must exercise its power to impose an additional administrative fine. Also, covering this additional infringement with a fine would be in line with the IE SA's (proposed) decision to impose administrative fines in this case for the transparency infringements relating to processing carried out in reliance on Article 6(1)(b) GDPR⁸²¹. The EDPB underlines that, in order to be effective, proportionate and dissuasive, a fine should reflect the circumstances of the case. Such circumstances not only refer to the specific elements of the infringement, but also those of the controller or processor who committed the infringement, namely its financial position.

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

441. The EDPB recalls its conclusion in this Binding Decision on the infringement by Meta IE of the fairness principle under Article 5(1)(a) GDPR⁸²² and that the objection raised by the IT SA, which was found to

⁸¹⁹ NO SA Objection, p. 11.

⁸²⁰ EDPB Guidelines on calculation of fines, paragraph 109. See also paragraphs 433 of this Binding Decision.

⁸²¹ Draft Decision, paragraphs 253-258.

⁸²² Section 4.4.2 of this Binding Decision.

be relevant and reasoned, requested the IE SA to exercise its power to impose an administrative fine⁸²³.

442. The EDPB takes note of Meta IE's views that it would not be appropriate for the EDPB to instruct the LSA to take corrective measures in relation to the additional infringement of the fairness principle under Article 5(1)(a) GDPR considering that this issue does not fall within the scope of the Inquiry. The EDPB responds to these arguments above in Section 6.4.2⁸²⁴.
443. 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 one⁸²⁵. 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 advertising⁸²⁶.
444. As previously established, the principle of fairness under Article 5(1)(a) GDPR, although intrinsically linked to the principles of lawfulness and transparency under the same provision, has an independent meaning⁸²⁷. It underpins the whole data protection framework and plays a key role for securing a balance of power in the controller-data subject relationship⁸²⁸.
445. Considering the EDPB's findings in Section 6.4.2 that Meta IE has not complied with key requirements of the principle of fairness as defined by the EDPB, namely allowing for autonomy of the data subjects as to the processing of their personal data, fulfilling data subjects' reasonable expectation, ensuring power balance, avoiding deception and ensuring ethical and truthful processing, as well as the overall effect of the infringement by Meta IE of the transparency obligations and of Article 6(1) GDPR, the EDPB reiterates its view that Meta IE has infringed the principle of fairness under Article 5(1)(a) GDPR and agrees with the IT SA that this infringement should be adequately taken into account by the IE SA in the calculation of the amount of the administrative fine to be imposed following the conclusion of this inquiry.
446. Therefore, the EDPB instructs the IE SA to take into account the infringement by Meta IE of the fairness principle enshrined in Article 5(1)(a) GDPR as established above when re-assessing the administrative fines for the transparency infringements and the determination of the fine for the lack of legal basis. If, however, the IE SA considers an additional fine for the breach of the principle of fairness is an appropriate corrective measure, the EDPB requests the IE SA to include this in its final decision. In any case, the IE SA must take into account the criteria provided for by Article 83(2) GDPR and ensuring it is effective, proportionate and dissuasive in line with Article 83(1) GDPR.

⁸²³ Paragraphs 399-404 of this Binding Decision.

⁸²⁴ Meta IE Article 65 Submissions, paragraph 8.15.

⁸²⁵ See above paragraph 410.

⁸²⁶ See above section 6.4.2

⁸²⁷ See above section 6.4.2, paragraph 224.

⁸²⁸ See above section 6.4.2

10 BINDING DECISION

447. 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.
448. 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

449. The EDPB decides that the objections of the AT, DE, ES, FI, FR, HU, NL, NO, and SE SAs regarding Meta IE's reliance on Article 6(1)(b) GDPR in the context of its offering of the Instagram Terms of Use meet the requirements of Article 4(24) GDPR.
450. 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 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. Similarly, the part of the FI SA objection concerning the imposition of a specific corrective measures, namely an administrative fine is not reasoned and does not meet the threshold of Article 4(24) GDPR.
451. 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 Instagram Terms of Use, and to include an infringement of Article 6(1) GDPR, based on the shortcomings that the EDPB has identified 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

452. The EDPB decides that the objections of the AT, DE, FI, FR, and NL 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 Instagram Terms of Use meet the requirements of Article 4(24) GDPR.
453. 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. The objection raised by the ES SA regarding the potential infringement of Article 9 GDPR is not sufficiently reasoned and, therefore, the EDPB decides that the objection of the ES SA does not meet the threshold provided for by Article 4(24) GDPR.
454. 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

Instagram 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 the 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

455. 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.
456. 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

457. 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

458. 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.
459. 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 the purposes of behavioural advertising in the context of the Instagram service into compliance with Article 6(1) GDPR within three months.
460. The EDPB also instructs the LSA to adjust its order to Meta IE to bring Instagram Data Policy and Terms of Use into compliance with Article 5(1)(a), Article 12(1) and Article 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 Instagram 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

461. The EDPB decides that the objections of the DE, FR, IT, NL, and NO SAs regarding the determination of the administrative fine for the transparency infringements, meet the requirements of Article 4(24) GDPR.
462. The EDPB considers that the Final Decision does not need to refer to the infringements by WhatsApp Ireland Limited, as established in Decision IN-18-12-2, as an aggravating factor under Article 83(2)(e) GDPR for the calculation of the fine.
463. 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.

464. 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

465. 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.
466. 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.
467. 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.
468. The EDPB instructs the IE SA to cover the additional infringement of Article 6(1) GDPR with an administrative fine which is effective, proportionate and dissuasive in accordance with Article 83(1) GDPR. 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

469. 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.
470. 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

471. 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 Article 5(1)(c) GDPR.

11 FINAL REMARKS

472. 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.
473. 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.
474. 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.
475. The IE SA shall inform the Board of the date when its final decision is notified to the controller or the processor⁸²⁹. 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 controller⁸³⁰.
476. The IE SA will communicate its final decision to the Board⁸³¹. 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 which have been subject to the consistency mechanism.

For the European Data Protection Board

The Chair

(Andrea Jelinek)

⁸²⁹ Art. 65(6) GDPR.

⁸³⁰ Art. 65(5) and (6) GDPR.

⁸³¹ Art. 60(7) GDPR.