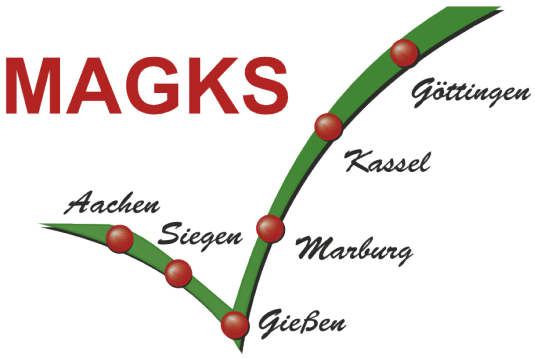


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# The Law and Economics of Art. 5(2) DMA: The Case of Meta



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# The Law and Economics of Art. 5(2) DMA: The Case of Meta

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Abstract: To what extent can Art. 5(2) of the Digital Markets Act (DMA) limit effectively the data combination abilities of gatekeepers? Gatekeepers are able to achieve significant data advantages by collecting and combining personal data from various sources. Looking at the example of Meta, it can use the resulting data advantages not only for entrenching further the leading position of its "core platform services" (CPS) but also for strengthening the market position of its remaining products and services. Such data combination practices are therefore limited by Art. 5(2) DMA, unless gatekeepers have presented users with the specific choice and received their consent. The actual functioning of this obligation and its economic effects are, however, still unclear. Thus, this paper discusses the law and economics of Art. 5(2) DMA by focusing on the example of Meta: Despite being in theory able to reduce the data advantages of the gatekeeper, its economic effects will depend crucially on the actual choices of its users. Nevertheless, Meta tries to comply with the obligation by implementing a "consent or pay" model. Any analysis of this obligation needs therefore to consider a legal interplay between Art. 5(2) DMA and the opinion 08/2024 of the European Data Protection Board (EDPB), which might make it necessary for firms such as Meta to implement a "third option" in its models. Hence, I propose an analytical framework which considers such a legal interplay and which allows to examine critically compliance questions: While Meta's updated model with three options does still suffer from different compliance weaknesses, the results of a non-compliance investigation of the European Commission (EC) on Meta's initial binary solution can be criticized in particular for a lack of economic arguments. More research that incorporates both the paramount role of consumers as well as the legal interplay is required to prove that Art. 5(2) DMA will be in fact a successful obligation.

Key words: EU Digital Markets Act, data combination, Meta, digital platforms, consent or pay

JEL codes: K21, K24, L40, L50, L86

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## 1. Introduction

The last years were dominated by multiple “Big Tech” cases in which competition authorities investigated how firms such as Meta or Alphabet exploited their powerful positions to the detriment of consumers and competition. These investigations were backed up by several policy reports, mostly written in 2018/2019, which clearly demonstrated the harmful behaviors of these firms.[1] At the same time, the reports proposed a row of improvements for existing competition laws, as these “non-tech” laws applied by competition authorities often proved to be inadequate for the challenges of the “tech” world. For example, a duration of seven years to finally prove an abuse of dominance, such as in the Google Android case of the European Commission (EC), is not uncommon.[2] In the meantime, technologies and business models might change significantly and markets might “tip” towards one dominant firm. Furthermore, the relevance of advertising for (monetarily) free platforms and the almost all-encompassing collection of personal data pose not only questions with regard to competition issues, but also with regard to the privacy of consumers. All these aspects make it necessary to find novel solutions which are not only quickly implementable, but also broadly applicable to challenges raised by “Big Tech” firms. One such novel solution trying to tackle many of these issues is the Digital Markets Act (DMA), which was introduced by the European Union (EU) in October 2022.[3] The DMA is an ex-ante regulation that aims to improve contestability and fairness in digital markets. It applies to firms running “core platform services” (CPS), i.e. certain products and services which have a crucial relevance for end users and business users. If such firms fulfil specific quantitative and qualitive criteria, they are declared to be “gatekeepers” and need to deal with a number of obligations. These obligations prohibit certain behaviors which are potentially harmful for both end users and business users. Undoubtedly, such obligations might significantly affect the business models of gatekeepers, but might at the same time be helpful for coming closer to the DMA’s goals of contestability and fairness in digital markets.

One obligation has so far received only little attention in the literature, despite being at the very top of the list of obligations and having relatively unique characteristics: Art. 5(2) DMA, which is supposed to limit the data combination abilities of gatekeepers and is often called to be inspired by the “internal unbundling” remedy issued in the Meta case of the German Bundeskartellamt (BKartA).[4] Only after receiving free and valid consent of consumers, which need to be offered a neutral and specific choice as well as a “less personalized but equivalent alternative”, gatekeepers are allowed to e.g. combine data of its CPS with other CPS and any of its other products and services.[5] If applied successfully, Art. 5(2) DMA might not only help to reduce the data advantages of gatekeepers, compared to other (or new) competitors which do not have access to data from different sources, but might empower also consumers by granting them

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1 See e.g. Schweitzer et al. (2018), Crémer et al. (2019), Furman et al. (2019).

2 See General Court (2022).

3 See EC (2022); hereafter DMA.

4 See Bundeskartellamt (2019a).

5 See DMA, Art. 5(2).

additional options regarding their privacy preferences.[6] In consequence, Art. 5(2) DMA is often interpreted to be able to address not only the goal of contestability, but also the goal of fairness.[7] A simple and successful implementation of Art. 5(2) DMA, however, is not guaranteed: For example, it is still unclear how exactly a legally compliant solution (e.g. regarding the choice architecture) might look like, despite borrowing in the obligation the requirements for valid consent from the General Data Protection Regulation (GDPR).[8] Moreover, placing consent at the center of this obligation might clearly strengthen consumers, but it remains questionable if they will be aware about their "powers" and will come eventually to a well-informed and rational decision. And even if any legal uncertainties will be solved and consumers will fully understand their choice, Art. 5(2) DMA still needs to prove that it will in fact deliver any crucial economic effects, what will also be significantly dependent on the number of consumers exerting their rights.

An investigation initiated in March 2024, however, might be a first step forward to clarify numerous uncertainties around this obligation: The EC decided to investigate a potential non-compliance of Meta's so-called "consent or pay" model, as its solution might fail to deliver its users a valid alternative which is in concordance with Art. 5(2) DMA.[9] This model allows users of Meta's products Facebook and Instagram to choose either the well-known free version with processing of their personal data for behavioral advertisements or a paid alternative without such processing and advertisements. Meta, whose business model depends significantly on processing and combining personal data of its users for the purpose of behavioral advertising, reacted with the introduction of such a model on decisions that are related to competition law and data protection law: After a ruling of the Court of Justice of the European Union (CJEU)[10] in the Meta case from July 2023 and a binding decision of the European Data Protection Board (EDPB)[11] adopted in October 2023, the gatekeeper had to revise its data processing practices in the direction of a clear consent-based approach. Nevertheless, the proposed solution via a "consent or pay" model, which was also intended to fulfil the criteria of the DMA, still raised new serious doubts among regulators and led eventually to the EC's non-compliance investigation mentioned beforehand. The doubts were further fueled by an opinion (08/2024) written by the EDPB in April 2024, which analyzed the legal requirements for large online platforms, such as Meta, to implement such a "consent or pay" model and recommended these firms to offer a "third option" without any costs and without behavioral advertising.[12] In April 2025, the EC concluded that Meta's initial binary solution infringed Art. 5(2) DMA as users were neither offered a "less personalized but equivalent" alternative nor were given a free choice regarding

6 See DMA, recitals 36/37.

7 See e.g. Louven (2023, Rn. 15–17), Podszun (2023, Rn. 11).

8 See EC (2016); hereafter GDPR.

9 See EC (2024a). The EC announced here to investigate also a potential non-compliance of Apple and Alphabet regarding other obligations of the DMA.

10 See CJEU (2023).

11 See EDPB (2023).

12 See EDPB (2024a).

consent to data combination practices.[13] The EC's decision, however, does not mark the end of the non-compliance investigation yet: First, Meta announced to appeal the EC's decision, implying that a court decision needs to be awaited.[14] And second, Meta updated in the meantime its "consent or pay" model (e.g. by adding the "third option" proposed by the EDPB).[15] In other words, final verdicts on both the initial solution and the updated solution, which could help to understand better compliance with Art. 5(2) DMA, are yet to come. Considering all these different developments, still numerous questions arise: What do we actually know about the functioning and the implementation of Art. 5(2) DMA? How does Meta actually try to reach compliance and which aspects are (so far) in the focus of the EC's non-compliance investigation? And how could a compliant solution look like?

The goal of this article is therefore to discuss the law and economics of Art. 5(2) DMA by taking a closer look at the example of the gatekeeper Meta. The implementation of Art. 5(2) DMA is not isolated of other important decisions in the field of competition law and data protection law, which affected also Meta. Thus, in this article I will try to bring all the relevant threads of this debate together and will shed some light on the (potential) functioning of this obligation: At least in theory, gatekeepers might lose their data advantages (e.g. regarding behavioral advertising or innovation) as they cannot rely on one large "data silo" across all of its products and services anymore. Subject to the number of users giving or denying consent to the different data processing practices regulated by Art. 5(2) DMA, there can be different economic effects with regard to e.g. the advertising-based business model, competition, or privacy and consumer autonomy be expected. How significant the economic effects of the obligation and how successful the obligation might be with regard to reaching its goals of contestability and fairness, however, will not only depend crucially on the actual behavior of its users but will also require more theoretical and empirical research. Understanding the functioning of Art. 5(2) DMA allows in a next step to discuss in greater detail how the obligation could be implemented. In addition, the possible consequences of the EDPB opinion 08/2024 and its concept of the "third option", which is also part of the EC's decision on Meta's initial "consent or pay" solution, cannot be neglected. Thus, the resulting interplay of both Art. 5(2) DMA and the EDPB opinion will not only aggravate the implementation of a legally compliant solution, but also the analysis of any economic effects. I will propose an analytical framework which takes the interplay into consideration and which allows to understand how a compliant solution might look like. After applying the introduced framework to Meta's "consent or pay" model it will become evident that, despite choosing an overall approach that can be feasible for fulfilling the requirements of both the DMA and the EDPB opinion, also Meta's updated solution contains elements which have to be viewed critical and might require further adaptions for achieving legal compliance (e.g. the non-granularity of choice options, a (partially) misleading design of its choice screens, and a non-equivalence of the offered alternatives). At the

13 See EC (2025a).

14 See Meta (2025d).

15 See Meta (2024b).

same time, the EC's decision does neither consider a potential legal interplay nor any serious economic arguments. As a result, it neglects important aspects (e.g. regarding the granularity of consent) and misses to answer crucial questions (e.g. regarding the appropriateness of prices). This detailed look at the non-compliance investigation, however, allows to identify relevant fields for further research on the functioning of Art. 5(2) DMA and its potential (economic) effects.

The article is structured as follows. Section 2 offers a summary of different cases that affected Meta and were based on "classical" laws: On the competition law side the focus will be on the German Meta case, while on the data protection law side the focus will be on a binding decision of the EDPB which was issued in the context of an investigation by the Irish Data Protection Commission. After looking briefly on the origins of "consent or pay" models, I will discuss the opinion 08/2024 of the EDPB with regard to valid consent in such models used by large online platforms. In section 3 I will examine in greater detail the functioning of Art. 5(2) DMA and show how exactly the gatekeeper Meta could be affected by each part of this new obligation. The paramount role of consumers foreseen by the obligation as well as economic effects will also be discussed. The insights gained in both sections 2 and 3 will be helpful for developing in section 4 an analytical framework that considers the complex interplay of both the DMA and the EDPB opinion. After presenting the different stages of the EC's non-compliance investigation and pointing out potentially problematic aspects of its first decision, the framework will be applied to discuss critically the updated solution proposed by Meta. The article closes in section 5 with a summary and a conclusion with further recommendations.

## 2. Previous investigations into Meta in competition law and data protection law

To understand better Art. 5(2) DMA and the EC's non-compliance investigation against Meta, it is necessary to look back at three different aspects that have affected the current discussions: First, the Meta case of the German BKartA, which is deemed to be the first competition law case that included data protection considerations. Second, the investigations and decisions by the data protection authorities of Ireland and Norway as well as the EDPB concerning potential infringements of the GDPR by Meta, focusing on the legal basis of its data processing activities. And third, the advent of "consent or pay" models and related debates on their legality, leading eventually to the EDPB's opinion on large online platforms and their implementation of such models.

### 2.1 The Meta case of the German BKartA

In March 2016, the BKartA announced to open an investigation against Meta.[16] Already at this early point of time, it argued with a possible abuse of market dominance which was based in terms of services that were infringing data protection laws: To be able to use the social media platform Facebook, users had to agree to an extensive data collection. This allowed Meta to gather data also from sources outside of Facebook, allowing it to create precise and unique user profiles for different purposes, such

[16] See Bundeskartellamt (2016). At this time, Meta was still called Facebook. For facilitation, throughout the paper I will use Facebook only for the social media platform.

as targeted advertising. In the view of the BKartA, users were not fully aware of the far-reaching consequences of agreeing to these terms of services.

In February 2019, the BKartA's investigation was finalized by ordering an "internal unbundling" of Meta's data sets.[17] The functioning of the remedy can be described as follows: Collecting data from any third-party service and combining it with the Facebook account requires that users give explicitly and voluntarily their consent. Data collection on any other Meta service, such as Instagram or WhatsApp, is still allowed but combining it with the Facebook account requires also valid consent. Due to its market dominance and lack of alternatives, users cannot be forced to be faced with a simple "take-it-or-leave-it" choice with regard to accepting data collection and combination for using the service. Thus, it was seen to be necessary to solve this "bundling of consent"[18] or "privacy policy tying"[19] via granting users an additional explicit choice. This additional choice could, if consent is refused, result in the novel remedy of an "internal unbundling", which would force Meta to keep data sets separated.[20] Not only the intended remedy was novel, but also the legal reasoning (which was based on German competition law): Facebook was considered to abuse its dominant market position by infringing data protection laws.[21] To be more specific, Facebook did not obtain valid consent of users according to Art. 6(1)(a) GDPR, as it was in particular considered not voluntarily due to Facebook's dominance. Furthermore, no other legal basis, such as Art. 6(1)(b) for the performance of a contract or Art. 6(1)(f) for legitimate interests, were deemed to be given either. In consequence, the BKartA concluded that Facebook exploited its users, as they were not able to make effective choices and suffered from a loss of control with regard to their privacy. Exclusionary effects were also supposed to be given, as Facebook's (potential) competitors could not keep up with its data advantage. In other words, Meta could entrench in this way its dominance in both social media and advertising markets.

After a temporary halt by the Oberlandesgericht Düsseldorf (OLG Düsseldorf)[22] in August 2019, the BKartA's decision was clearly confirmed by the German Federal Court of Justice, the Bundesgerichtshof (BGH). In its ruling in June 2020, however, the BGH deviated in its specific argumentation from the BKartA's argumentation by bringing up an interesting novel approach: Facebook plays a quasi-unavoidable role for a significant part of its user base with regard to participation in societal life.[23] Applying this to

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17 See Bundeskartellamt (2019c). The decision sparked controversial debates in the literature, e.g. regarding the relationship between competition law and data protection law; see e.g. Schneider (2018), Volmar & Helmdach (2018), Colangelo & Maggiolino (2019), Botta & Wiedemann (2019), Budzinski et al. (2021), Witt (2021).

18 See Kerber & Zolna (2022a, p. 219).

19 See Condorelli & Padilla (2020).

20 See Bundeskartellamt (2019b, pp. 1-2)

21 See Bundeskartellamt (2019a, pp. 11–13).

22 See OLG Düsseldorf (2019).

23 See Bundesgerichtshof (2020, paras. 100–104). In this context there exist in the literature also the notions of "must-have platforms" or "essential communication services"; see CMA (2020, paras. 3.189–3.197).

the constitutionally guaranteed right of informational self-determination, the BGH deemed it necessary to grant users a right to determine how and to what extent their data can be collected and processed.[24] In the present Meta case, this implies that the dominant company needs to respect the informational self-determination by granting users the explicit choice whether they prefer to combine on- and off-platform data for a more personalized experience or not. Furthermore, the BGH was of the opinion that, even though the additional data collection might not harm the users economically, it does clearly constitute an economic factor for competition.[25] Users are actually "paying" a compensation to the platform by agreeing to the additional data collection and combination, which allows to "cross-subsidize" the advertising business of the platform by further improving its personalization. Under an effective competition, it could be expected that users would be faced with less privacy-intrusive terms of services, respecting to a greater extent their preferences and giving them a factual choice.[26] In other words, there clearly exists a causality between Facebook's abusive behavior and the visible exploitative and exclusionary effects, harming both users and (potential) competitors in the markets for social media and (personalized) advertising.

The most relevant decision in the Meta case was made in July 2023 by the CJEU,[27] after being called to answer specific questions presented by the OLG Düsseldorf.[28] Certain aspects of its argumentation deserve a closer look, as they had a huge relevance for current debates related to "consent or pay" models and Art. 5(2) DMA: With regard to the validity of consent towards a powerful social media platform, the CJEU argued that the dominant position itself does not invalidate it.[29] To determine whether consent was in fact freely given, however, market power needs to be taken into consideration in a case-by-case analysis. In the given Meta case, the CJEU acknowledged that there is a clear imbalance between users and the dominant firm, which has possibly in consequence that users might be forced to accept unnecessary conditions for

[24] See Bundesgerichtshof (2020, paras. 121–124). See also Kerber & Zolna (2022a, pp. 239-240), who explain that this pathbreaking decision cannot only be transferred to the application of European law, but that "[t]he crucial outcome of this decision is that individuals have a constitutionally protected right to a minimum standard of choice about the extent of the collection and use of their personal data, which a dominant firm is not allowed to deny them."

[25] See Bundesgerichtshof (2020, paras. 60–64).

[26] See Bundesgerichtshof (2020, paras. 84–87).

[27] See CJEU (2023); for a discussion, see e.g. Graef (2023), Picht (2023).

[28] After the decision of the BGH, the case went back to the OLG Düsseldorf which decided to suspend the proceedings in March 2021; see OLG Düsseldorf (2021). It viewed, besides of legal competence questions, many crucial questions with regard to data protection law and also with regard to its relationship with competition law to be unanswered yet, thus calling for the CJEU to decide. The later ruling of the CJEU was significantly influenced by an opinion of the Attorney General, Athanasios Rantos, in September 2022; see AG Rantos (2022). In his opinion on the questions provided by the OLG Düsseldorf, there are three key statements: First, he agreed that a competition authority can consider data protection infringements in its investigations whenever it might be part of an abusive behavior, but only incidentally and neither in prejudice nor differently than the responsible data protection authority (paras. 17–33). Second, for the lawfulness of non-consent related data processing, he argues that it is necessary to prove that such processing is in fact objectively necessary for offering the services of Facebook (paras. 47–70). Last, consent is not automatically invalidated solely due to the market power of a social media platform, but needs to be evaluated on a case-by-case basis (paras. 71–77).

[29] See CJEU (2023, paras. 140–154).

the performance of the contract.[30] This would be a clear infringement of Art. 7(4) GDPR, the so-called “coupling prohibition”. Moreover, users denying consent might even suffer from further potential negative effects, as they would be forced to forgo the dominant firm’s service entirely. Therefore, subject to Art. 7(1) GDPR, Meta would clearly be obliged to prove that the given consent fulfills all criteria and, in the opinion of the CJEU, it seems that Meta’s behavior could in fact fall under the “coupling prohibition”. This would imply that any single user should be enabled to refuse freely to any single unnecessary processing of data, without having to forgo using Facebook at all. For the CJEU, this appeared to be reasonable under the light of the massive amount of data collection and its potential consequences on users, as well as under the fact that it is not assumable for users to expect not only on-platform data to be processed, but also off-platform data. Thus, according to the arguments of the CJEU, it can be expected from Meta to offer any user denying to give full consent an equivalent alternative for using Facebook without the unnecessary processing of data, but “if necessary for an appropriate fee”.[31] Nevertheless, the CJEU stated that the OLG Düsseldorf needs to decide whether this entire argumentation related to dominant firms (and consequently also the “appropriate fee” argumentation) would apply to the given Meta case at all.[32]

The decision by the OLG Düsseldorf, however, was no longer required as the BKartA announced in October 2024 to conclude the case.[33] Meta adopted different measures, such as making it no longer mandatory to agree to data processing and combination across different platforms to use Facebook and making it easier for users to understand and adapt their choice options. After receiving approval by the BKartA for these measures, Meta withdrew its appeal at the OLG Düsseldorf, which meant the end of the Meta case.

### 2.2 Meta, the GDPR, and the data protection authorities

Since the introduction of the GDPR in May 2018, there were several data protection related complaints brought up against Meta. The most influential ones which had an impact on its data processing practices were issued by the privacy-oriented Austrian non-profit organization noyb.[34] Along with a complaint against Google, noyb lodged complaints against Instagram, WhatsApp, and Facebook on the first day of the GDPR. In the complaint against Facebook (and similarly in the other complaints), it was criticized that users were more or less put under pressure to agree to both the privacy

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[30] The CJEU speaks of “particular data processing operations not necessary for the performance of the contract” (2023, para. 150). For simplification, I will use throughout the paper also the term “unnecessary purposes”.

[31] See CJEU (2023, para. 150).

[32] See CJEU (2023, paras. 151–154).

[33] See Bundeskartellamt (2024).

[34] See noyb (2018). This complaint should neither be confused with the complaints in the cases Schrems I and Schrems II, which are related to data transfers between the EU and the US and were brought up by the honorary chairman of noyb, Max Schrems, nor with a model case dealing with different GDPR infringements of Facebook. For this model case, see CJEU (2024) and its decision on questions of data minimization and use of sensitive data for the purpose of advertising.

policy and the terms of service to be able to continue these services. This included also the consent to data processing for the purpose of behavioral advertising, which was presented to be necessary to fulfill the terms of service. In the opinion of noyb, such a consent was not valid, for example due to infringement of the "coupling prohibition" manifested in Art. 7(4) GDPR. Denying consent for unnecessary data processing activities, such as for the purpose of behavioral advertising, should not preclude the use of the service of Facebook. Each complaint was filed at different national data protection authorities (DPAs), but the main responsibility for dealing with the complaints was with the Irish Data Protection Commission (DPC) as Meta (just like Alphabet) has its European headquarter in Ireland.

However, as several national DPAs raised objections against the Irish DPC draft decisions in these Meta cases, the EDPB was called to issue binding decisions within the meaning of Art. 65(1) GDPR.[35] According to the binding decision on Facebook, which was adopted in December 2022, the EDPB refused Meta's argumentation that data processing for the purpose of behavioral advertising is necessary for the performance of a contract (i.e. the use of Facebook).[36] In other words, the EDPB disagreed with the Irish DPC, which was of the opinion that Meta could rely here on Art. 6(1)(b) GDPR as legal basis and bypass asking their users for valid consent by linking these data processing activities with Facebook's terms of service. Thus, the EDPB ordered the Irish DPC to request from Facebook a GDPR compliant approach for using personal data for behavioral advertising as well as to determine for the infringements a financial penalty which is significantly above the propositions made by the Irish DPC. In January 2023, the Irish DPC followed the binding decision by fining Meta for its GDPR infringements with regard to Facebook with €210 million and with regard to Instagram with €180 million.[37] Meta was ordered to adapt the legal basis for its data processing activities for behavioral advertising within three months. With regard to WhatsApp, the Irish DPC issued a fine of €5.5 million and expected also an adaption, as it refused Meta's justification that data processing for service improvements or security features is necessary for using the messenger.[38]

Meta reacted on the decisions by switching the legal basis for different data processing activities from Art. 6(1)(b) GDPR to Art. 6(1)(f) GDPR in April 2023. This provoked in July 2023 a reaction of the Norwegian Datatilsynet (Norwegian DPA), which was of the opinion that Meta's switch to justify these activities with "legitimate interests" did neither meet the adaptions required by the Irish DPC nor the CJEU's judgement in the Meta case refusing the use of Art. 6(1)(f) GDPR for the purpose of behavioral advertising.[39] Thus, the Norwegian DPA ordered a temporary ban of processing personal data for the purpose of behavioral advertising without valid consent for users of Facebook and

35 See, as an example, EDPB (2022, pp. 5–7), which dealt specifically with Facebook.

36 See EDPB (2022, pp. 117–120).

37 See Irish DPC (2023a).

38 See Irish DPC (2023b). This decision was harshly criticized by noyb (2023a), which argued not only that the fine was too low, but that the Irish DPC should have focused more on the question if and how Meta could use metadata of WhatsApp for advertising purposes in other services.

39 See Norwegian DPA (2023a).

Instagram in Norway. An appeal of Meta against this ban at the Oslo District Court failed in September 2023.[40] In addition, after a call of the Norwegian DPA, the EDPB adopted in October 2023 an urgent binding decision that agrees with the Norwegian approach and prohibits Meta permanently to rely on Art. 6(1)(f) GDPR across the whole European Economic Area (EEA).[41] In anticipation of the EDPB decision and as a reaction on the CJEU decision in the Meta case, Meta announced already in August 2023 to adapt the legal basis to consent according to Art. 6(1)(a) GDPR.[42] The actual implementation via a "consent or pay" model in November 2023, however, sparked debates that are still ongoing.

### 2.3 "Consent or pay" models and the EDPB opinion 08/2024

The Austrian newspaper "DER STANDARD" is often considered to be the first company to introduce a so-called "consent or pay" model, which is sometimes also described as "pay or consent" or "pay or OK/okay" model. The core idea of its "PUR-Abo", which was introduced in 2018, is similar to the most other "consent or pay" models used nowadays.[43] When accessing articles online, users are confronted with a choice screen and two options: They could either choose to read articles for free and with data processing and behavioral advertisements, or choose a paid subscription without any data processing and behavioral advertisements. With regard to the legality of this model in general, however, there are still open questions: For example, some data protection authorities do not oppose "consent or pay" models per se, but point out certain requirements related to the appropriateness of the price or the content of the alternative option.[44] To find a common European approach, the EDPB initiated a process for setting guidelines which started in November 2024 with a stakeholder event.[45]

The most prominent example of a "consent or pay" model was then introduced in November 2023 by Meta, which implemented a first version of such a model in its services Facebook and Instagram in the EU, EEA and Switzerland.[46] Users of these services had to choose one out of two options: Either continuing with the "standard" service for free but with advertisements, or paying a monthly fee to avoid any advertisements.[47]

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[40] See Norwegian DPA (2023b).

[41] See EDPB (2023).

[42] See, for the updated publication of August 2023, Meta (2023).

[43] See DER STANDARD (2023). The aim of "DER STANDARD" was primarily to find a solution for financing its journalism, as newspaper websites do often suffer from free alternatives online. The "PUR-Abo" approach motivated also other websites to launch own "pure" subscription models. First empirical results analyzing the landscape of "consent or pay" models show for example that many leading websites in Austria, France, Germany, and Italy, in particular the ones offering news, adopted such a model. In other European countries "consent or pay" models do not seem to be of any relevance (yet); see Müller-Tribbensee et al. (2024, pp. 14–16).

[44] See e.g. the French CNIL (2022) or the German DSK (2023), or the Spanish AEPD (2024, 29–30).

[45] See EDPB (2024b).

[46] See, for the original publication of October 2023, Meta (2024b).

[47] It is important to note that, according to the original publication of October 2023, the paid option does not seem to limit any data collection, as it only prevents the use of this data for displaying such advertisements. In December 2023, this was further clarified in an update to the original publication by

Users deciding to avoid advertisements on Facebook or Instagram have to pay €9.99/month (via web) or €12.99/month (via app), respectively.[48] The subscription for one service is valid on all devices and subscribing also to the other service costs an additional €6/month (via web) or €8/month (via app). In its announcement, Meta justified the new solution not only with Art. 5(2) DMA and the data protection requirements discussed in section 2.2, but also with one specific aspect of the CJEU's decision described in section 2.1, i.e. offering, an equivalent alternative "if necessary for an appropriate fee". Moreover, Meta argued that users of any economic background could benefit in this way from its free and personalized services and, at the same time, firms could still be able to reach potential customers via personalized advertisements. Again, Meta's solution was met with much criticism: The European consumer organization BEUC criticized different consumer protection aspects, such as that Meta did not indicate in a clear and understandable way that it continues to collect certain types of data after choosing the paid option.[49] Another criticism from noyb focuses on Meta's reliance on the "appropriate fee" aspect from the CJEU argumentation, as this so-called "obiter dictum" is described to be not a binding part of the decision.[50] In addition, noyb criticizes the appropriateness of the price for the alternative option and argues with social reasons and the fundamental right to data protection.

The legal uncertainty with regard to "consent or pay" models in general as well as the criticism about the specific implementation by Meta led to a request of the DPAs of the Netherlands, Norway, and the German federal state of Hamburg to the EDPB, which sought further clarification concerning the compatibility of such models with the GDPR. Consequently, the EDPB issued in April 2024 an opinion (08/2024) that focused specifically on large online platforms and their implementations of "consent or pay" models for the purpose of behavioral advertising.[51] Even though the EDPB did not address specifically certain firms and the GDPR does not deliver any definition of large online platforms, it is clear that firms such as Meta are in the focus of this opinion.[52] For this, the EDPB named certain criteria that are not to be applied in general, but could be used to identify on a case-by-case basis large online platforms that could by covered by the opinion: Besides of looking at the amount of users or the amount of data processed, DPAs could apply the DMA's concept of a gatekeeper or the definition of a very large online platform (VLOP) as specified by the Digital Services Act (DSA). In the view of the EDPB, data collection by such firms should, even under consent, be strictly limited to the specific necessary purposes and should not be unfair.[53] In other words, as much as collecting huge amounts of data for the purpose of targeted advertising appears to be reasonable from a business model perspective, "consent or pay" models

excluding data processing (i.e. also data collection) for behavioral advertisement. For the update, see again Meta (2024b).

48 The markup is justified with the fees for using the app stores of Apple and Alphabet.

49 See BEUC (2023).

50 See noyb (2023b).

51 See EDPB (2024a, pp. 6–7).

52 See EDPB (2024a, pp. 10–11).

53 See EDPB (2024a, pp. 16–18).

need to follow the principle of data minimization. In addition, they should adhere to principles of fairness and transparency, e.g. by avoiding exploitation via manipulative "dark patterns" or by delivering easily understandable explanations of choice consequences. Consent needs to be "informed", e.g. by giving clear and sufficient information about the responsible data controller and for what purposes data (e.g. data combination practices) is processed.[54]

Likely the most crucial point of the EDPB opinion was that, besides of respecting usual factors such as conditionality and granularity of consent, offering users only two options in the "consent or pay" model, i.e. the free model with and a paid alternative without behavioral advertisements, is considered to be not sufficient for free and valid consent.[55] Instead, the alternative without behavioral advertisements should be offered without any fee to be considered an equivalent alternative. Should the large online platform not want to offer this option for free, it is supposed to offer a "third option": An equivalent alternative that does not process personal data for the purpose of behavioral advertising and that is offered for free. This tracking-free "third option" without any financial payment could then rely on less data-intense forms of advertisements, such as contextual advertising or advertisements based on a topic selection by the user. In this way, the large online platform will be rather able to guarantee that users will still have a free and valid choice via a free option that does also respect the principle of data minimization. With regard to the appropriateness of the price demanded for the paid option, the EDPB commented that the fee should also be examined in a case-by-case analysis whether it satisfies the GDPR's requirements for valid consent and the fundamental right to data protection.[56] Thus, the EDPB is in general open-minded towards "consent or pay" models, but points to the necessity of individual case-by-case analyses according to the standards of the GDPR.

In summary, this section made it clear that both the competition and data protection law related cases as well as the EDPB opinion had (and have) a significant influence on Meta and its business model. All these parts of the debate have also shaped the current non-compliance investigation of the EC. Before I take a more detailed look at Meta's "consent or pay" model and the EC's investigation, however, it is inevitable to understand in greater detail the functioning of the specific obligation in question: How could Art. 5(2) DMA, which aims to limit the ability to combine data across different products and services, work in theory? And how could the behavior of a gatekeeper, such as Meta, and its CPS be actually affected? These and other questions will be discussed in section 3.

## 3. The functioning of Art. 5(2) DMA

The gatekeeper Meta, which offers also different core platform services (CPS), is highly dependent on personal data for running its products. Thus, the implementation of Art. 5(2) DMA, subject to the results of the related non-compliance investigation, is likely to

54 See EDPB (2024a, pp. 32–34).

55 See EDPB (2024a, pp. 18–21).

56 See EDPB (2024a, pp. 29–30).

have a significant influence on the advertising-based business model of Meta. In the following section, I will start with a recap of Meta's designation as a gatekeeper and how this affected its products and services. Next, I will explain the (potential) functioning of Art. 5(2) DMA as it is described by the law. For this, I will stick close to the wording of this specific obligation and its respective recitals as well as to interpretations given by the legal literature. To illustrate the functioning of Art. 5(2) DMA, I will use a simplified version of Meta's business model and show how its ability to combine and to exchange data across its own products and services might be affected. Possible economic effects as well as questions for further research on the actual functioning of the obligation will also be presented. All these careful examinations are indispensable, as only a thorough understanding of Art. 5(2) DMA allows to discuss critically the non-compliance investigation of the EC against Meta.

### 3.1 The designation of gatekeepers and CPS

The introduction of the DMA adds another dimension to the discussions around Meta and its data processing practices. By imposing a set of prohibitions and obligations on gatekeepers, the DMA aims to increase contestability and fairness in digital markets. At the same time, these prohibitions and obligations might have significant economic effects on gatekeepers and affect the business models of their respective products and services. But how does the DMA determine which firms need to adhere to certain ex-ante regulations? The rules are enshrined in Art. 3(1) DMA, which explains how to designate a firm as a gatekeeper:

> "An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future."[57]

Each of these three qualitative criteria is further specified by certain quantitative criteria (e.g. annual turnover in the EU, number of monthly active users) that need to be met.[58] If a company fulfils both qualitative and quantitative criteria, it will be considered a gatekeeper if it also runs one or more so-called core platform services (CPS). Ten different types of core platforms services are stipulated in Art. 2(2) DMA and include:

> "(a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communications services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by

[57] See DMA, Art. 3(1).

[58] See DMA, Art. 3(2).

an undertaking that provides any of the core platform services listed in points (a) to (i)"[59]

In September 2023, the EC initially designated Meta and five other firms as gatekeepers, having each a different amount of CPS.[60] After different amendments, seven firms are designated as gatekeepers and 23 products and services are designated as CPS as of April 2025.[61] Regarding Meta, its five designated CPS are Facebook and Instagram (both online social networking services), WhatsApp and Messenger (both number-independent interpersonal communications services) as well as its Meta online advertising service.[62] Just like any other gatekeeper, Meta and its CPS needed to comply with the obligations of the DMA within six months after the respective designation date.[63]

### 3.2 Art. 5(2) DMA and the limiting of Meta's data combination abilities

Art. 5(2) DMA is worded as follows:

"The gatekeeper shall not do any of the following:

(a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper;

(b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;

(c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and

(d) sign in end users to other services of the gatekeeper in order to combine personal data,

unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.

Where the consent given for the purposes of the first subparagraph has been refused or withdrawn by the end user, the gatekeeper shall not repeat

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59 See DMA, Art. 2(2).

60 See EC (2023).

61 See EC (2025c). The designated gatekeepers are Alphabet (eight CPS), Meta (five CPS), Apple (four CPS), Amazon (two CPS), Microsoft (two CPS), Booking (one CPS), and ByteDance (one CPS). Quite obviously, de facto all the designated gatekeepers collect via their CPS vast amounts of consumer data and for most of them, such as Meta, the primary revenue stream is the monetization of this data via offering behavioral advertising.

62 Before April 2025, Meta had six CPS but the EC accepted its request to delist Meta Marketplace (classified as an online intermediation service) due to falling below quantitative criteria related to business users; see EC (2025a).

63 See DMA, Art. 3(10).

its request for consent for the same purpose more than once within a period of one year.

This paragraph is without prejudice to the possibility for the gatekeeper to rely on Article 6(1), points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable."[64]

The core idea behind Art. 5(2) DMA becomes clearer when reading recital 36: The aim of the policy makers was to restrict the possibilities of gatekeepers to take unfair advantages of their abilities to process and combine (personal) data across own services and third-party services, subject to receiving valid consent of users.[65] What does this mean? The gatekeeper is not only able to collect and cross-use data from own CPS, but also from all other services that belong to the gatekeeper as well as from all third parties using services from the gatekeeper. With the help of such an unfair advantage, gatekeepers are for example able to display better fitting advertisements, making it harder or even impossible for (new) competitors without similar possibilities to contest the position of CPS. In consequence, Art. 5(2) DMA wants to prevent deterioration of contestability by making it mandatory for gatekeepers to give users the choice whether they agree to these data combination practices or not. To be more precise: Users need not only to be presented with "a less personalized but equivalent alternative"[66] of a CPS, but should also be enabled to use this service and its functionalities regardless of their choice. This paramount significance of consent, however, shifts more or less the responsibility for the functioning of Art. 5(2) DMA on the users. Furthermore, dependent on the number of users granting or denying consent to each data combination practice, the actual effects on contestability and fairness can vary. I will discuss this special characteristic of Art. 5(2) DMA, which might either empower or overwhelm users, and its possible consequences in sections 3.3 and 3.4. Beforehand, I will dig into this obligation in detail by explaining Art. 5(2) DMA and its four points (a)-(d) from a legal perspective and under the assumption that all users will exercise their right by choosing the alternative option. To facilitate the understanding, I will apply the foreseen legal provisions to the example of Meta and its products and services.

In 2004, the social media platform Facebook was launched.[67] Over the years, Meta expanded its portfolio of social media platforms either by acquiring other companies or by creating own new products. Prominent examples are the acquisition of Instagram in 2012, which focuses on sharing photos and videos, the acquisition of Oculus (now Quest) in 2014, which focuses on devices for Virtual/Augmented Reality (VR/AR) applications, or the launch of Threads in 2023, which focuses on sharing texts. In general, users do not have to pay monetarily for using Facebook and many other services. Meta, however, collects different types of data about their users and their behavior and enables in this way entities to run personalized advertising campaigns, e.g. by showing advertisements being displayed in the timeline of users fitting to their interests and

64 See DMA, Art. 5(2).

65 See DMA, recital 36.

66 See DMA, recital 36.

67 See Meta (2025a).

behavior. Despite collecting data also for other purposes, such as innovation, and other revenue streams, such as users paying for Quest products, (behavioral) advertisement is the most relevant way of monetization for Meta. The collected data by one product or service of Meta is, as described in its data protection policy, also used to improve, personalize, and run other services or products offered by Meta.[68] In addition, data will also be used for R&D and innovation to develop new products and services. As one further source to collect data, Meta is also offering specific services for third parties that can be implemented in websites or apps and improve their functionalities and/or the user experience.[69] Common examples are the “Like-/Share-buttons”, allowing users for example to interact with articles of a website and connect this behavior to their Facebook account, or “Facebook Login”, a single sign-on service (SSO) that allows users to sign-on to services by using their Facebook credentials. In return for offering these services, Meta receives not only data of consumers using these services, but also of users only visiting a certain website that uses these Meta products, allowing Meta to track consumers across different websites.

To better understand the relationships between the different services and products of Meta as well as the relevant data streams, I will use in the following analysis a simplified version of Meta’s business model. Figure 1 depicts the situation before the introduction of Art. 5(2) DMA: In this simplified version, Meta runs two CPS (Facebook and Instagram) and two other products that are non-CPS (Quest and Threads). All these products are able to collect personal data and are able to exchange the data between each other. By offering certain Facebook services for third parties, Meta can also collect data generated outside of its own products. Consequently, all these data streams stemming from different sources allow Meta to combine the data in one so-called “data silo” with detailed information about many consumers and their interests and behavior on and off Meta’s products. In turn, Meta benefits significantly from a huge trove of information that allows it to run even more precise (behavioral) advertisements, to improve their existing products, and to strengthen their capabilities to remain innovative (e.g. with regard to novel technologies and their transfer into new products).[70]

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[68] See Meta (2025c).

[69] See e.g. the explanations of the Bundeskartellamt (2019a).

[70] According to Art. 2(2)(j) DMA, online advertising services are considered to be a separate CPS, but require always at least one further CPS. It is therefore not displayed as a separate CPS, but as an integral function of CPS and non-CPS. Moreover, (behavioral) advertising is an inherent part of most products of Meta that are offered for free. Thus, (behavioral) advertising will be treated in this example as the standard strategy for monetization of the data collected and combined across different products. Alternative monetization strategies, such as paying a certain price or a monthly fee for using a product, will be left out for facilitation but indicated whenever applicable.

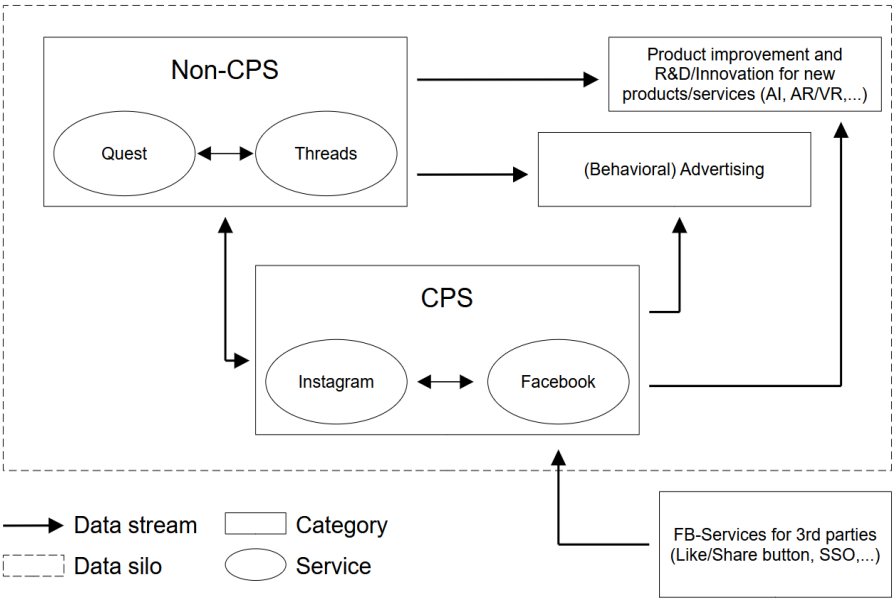


*Figure 1: Simplified version of Meta's business model before implementation of Art. 5(2) DMA*

As seen above, the aim of Art. 5(2) DMA, subject to consent of consumers, is to restrict four practices of gatekeepers with regard to processing and combination of (personal) data. Under the assumption that the gatekeeper acts in compliance with the legal requirements and all users deny their consent for any data combination practice, I will discuss each of its four points (a)-(d) by using the example of Meta and the potential effects on its products and services:

**Art. 5(2)(a) DMA – No third-party data for behavioral advertisements**

The first point deals with the use of personal data collected via third parties to display behavioral advertisements. As already mentioned, Meta offers a set of third-party services. Thus, taking the example of Facebook, websites or app makers might want to be more attractive for consumers by including Like-/Share-buttons or by including an SSO via Facebook. By including such services, however, Facebook is not only able to collect data of consumers using these services, but also of any consumer merely visiting this website or using this app which allows it to create profound tracking profiles of consumers. The data collected via these services is then combined with data collected on Facebook and other services of Meta, creating an almost unique data advantage in comparison to any competitor.[71] To reduce this data advantage, that is primarily used for (behavioral) advertising, Art. 5(2)(a) DMA restricts the ability of a gatekeeper to use data collected via third-party services offered by their CPS for online advertising services.[72]

**Art. 5(2)(b) DMA – No combination of personal data across products**

The next point limits the gatekeeper's ability to combine personal data from one CPS with personal data from any other of its products or from any third parties. As seen above, most gatekeepers do operate more than one CPS as well as further products and services that are not considered as CPS. To take advantage of these economies

[71] See e.g. ACCC (2019, p. 86-87).

[72] See Bueren & Weck (2023, Rn. 76), Louven (2023, Rn. 19), Podszun (2023, Rn. 16).

of scope, a gatekeeper could combine data of all its products and services in one large data set and expand it even further by acquiring data from third parties.[73] For example, Meta could combine personal data from both its CPS Facebook and Instagram with personal data from Quest and Threads as well as acquired personal data from data brokers. With Art. 5(2)(b) DMA, it is now prohibited for gatekeepers to combine all this data in one place whenever data of CPS are involved.[74] The idea of keeping these "data silos" separated is considered to be inspired primarily by the remedy of an internal unbundling in the German Meta case. For the case of Meta, this would imply the creation of separate "data silos" for each CPS. For all remaining data collected via non-CPS or collected/acquired via third parties, however, the gatekeeper is still allowed to gather everything in one large "data silo".

**Art. 5(2)(c) DMA – No cross-use of personal data in another product**

The next point limits the gatekeeper's ability to pass personal data from one CPS to any other of its products. It appears to be relatively similar to Art. 5(2)(b) DMA, but can be rather considered as a solution to close a potential loophole from restricting data combination.[75] In case of Art. 5(2)(c) DMA, gatekeepers are not allowed to cross-use personal data from any CPS in any other product or service that is not offered in combination or in support with the core platform service, and vice versa.[76] This forbids also any cross-use to other CPS. Using the example of Meta, this would imply that, while keeping the "data silos" separated, there will neither be a data transfer between Facebook and Instagram, nor between any of these CPS with any other product, such as Quest or Threads. Cross-use between Quest and Threads, however, will remain legal.[77]

**Art. 5(2)(d) DMA – No automatic sign in for data combination**

The last restriction aims at closing another potential loophole for gathering user data: Gatekeepers are not allowed to sign in users automatically to any further gatekeeper service for data combination.[78] Using the simplified version of Meta, it would not be permitted to e.g. sign in a user, who signed in to Instagram, automatically and without a conscious decision to Facebook or Threads to collect data across services. It is worth noting that also services for third parties, as already discussed in Art. 5(2)(a) DMA, as well as "shadow profiles", which are used to create profiles about "unaware" users that are not even using a specific service of a gatekeeper, are covered by the restriction. It is therefore irrelevant if a user is signed in by the gatekeeper or a third-party service.[79]

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73 See DMA, recital 36.

74 See Bueren & Weck (2023, Rn. 80), Louven (2023, Rn. 23), Podszun (2023, Rn. 17).

75 See Podszun (2023, Rn. 19).

76 See DMA, recital 36.

77 While Art. 5(2)(b) DMA allows, subject to consent, combining data collected before and after the introduction of the DMA, Art. 5(2)(c) DMA prohibits cross-using of old and new data. See for further information Louven (2023, Rn. 27). A potential loophole of Art. 5(2)(c) DMA, however, could be that cross-using data in third-party services is not excluded explicitly. See for further information Bueren & Weck (2023, Rn. 90).

78 See Bueren & Weck (2023, Rn. 92).

79 See Louven (2023, Rn. 28–29), Bueren & Weck (2023, Rn. 93).

What could be now the consequences if all users deny consent to any data combination practice limited by Art. 5(2) DMA? The potential effects for Meta will become clearer when applying the obligation and all its points to the figure introduced beforehand (See Figure 2). The most obvious effect of the restrictions is that Meta could lose its significant data advantage from gathering all collected data in one “data silo”. Similar to the idea of the internal unbundling, both CPS Facebook and Instagram would now need to operate (at least in the EU) independently of other products and their data bases. This implies the introduction of a separated technical structure for running (behavioral) advertisements that relies only on the specific data collected by the CPS. Facebook could still use the data collected via its services for third parties, but not for the purpose of (behavioral) advertisements. Products not being a CPS are still able to share and combine data with each other.

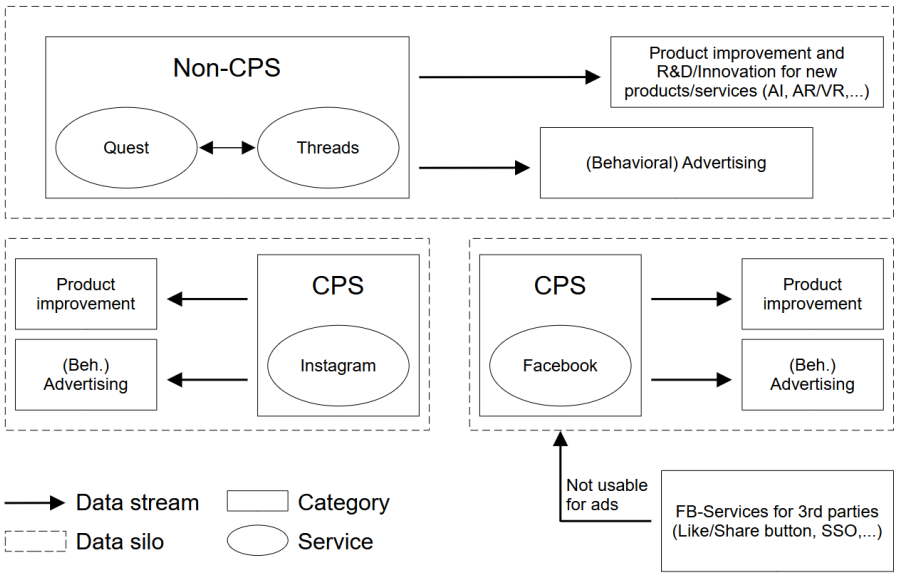


*Figure 2: Simplified version of Meta's business model after implementation of Art. 5(2) DMA*

With regard to innovation and the development of new products based on CPS data, there is no explicit statement in Art. 5(2) DMA. Nevertheless, combining or cross-using data of CPS with any other data from non-CPS or third-party sources is clearly prohibited. Thus, also here separated technical structures might be needed, as CPS could only use its own data for improving and developing its own product. In other words: Facebook and Instagram could each use its own data to add new features and improve its functionality, but could not continue to use its data for a joint development with other gatekeeper products, e.g. for the purpose of developing common functionalities or new products.[80] As shown in the given example, this could have serious consequences for Meta’s abilities to innovate: For example, the R&D entity within Meta that works on the development of novel and innovative products might need to rely on data of non-CPS and third parties only. Developing novel and innovative products, e.g. in the field of AI,

[80] Instead of this narrow definition of Art. 5(2) DMA, one could also argue with a broad definition where CPS are allowed to develop new products based on its data sets. Latest at the launch of these products, however, they would need to stop combining and cross-using their data sets. Alternatively, CPS might try to avoid the creation of new products by integrating novel functionalities directly in the CPS. Hence, in the given example this would lead to (at least) three separated R&D projects within Meta. To my knowledge, neither the narrow nor the broad definition have been discussed in the literature so far.

could be affected.[81] Thus, from the gatekeeper's perspective, a full implementation of the obligation could affect significantly its behavior and its business model, leading e.g. to less economies of scope, less innovation, a reduced quality of products (e.g. with regard to personalization), and a reduced precision of (behavioral) advertisements.

### 3.3 The role of consumers for the functioning of Art. 5(2) DMA

To what extent the four points (a)-(d) will be applicable is, however, highly dependent on the functioning of additional rules that are manifested in the second part of Art. 5(2) DMA: As consumers need to decide whether they agree or deny to data combination, gatekeepers need to respect all relevant provisions of the GDPR, such as the requirements and conditions for receiving valid consent.[82] Similar to the cases discussed in sections 2.1 and 2.2, Art. 5(2) DMA limits de facto the ability of gatekeepers to avoid the requirements of the obligation by relying on any other legal basis than consent. In other words: Consumers receive additional choices with regard to data combination, which give them at the same time an influential role in shaping the data processing behavior of gatekeepers.

Of crucial relevance for an effective choice of consumers, however, will be the DMA's requirement of "[…] offering a less personalised but equivalent alternative, and without making the use of the [CPS] or certain functionalities thereof conditional upon the end user's consent."[83] This requires gatekeepers to offer consumers actively a realistic choice with (at least) one alternative with less or even no data combination and de facto of an equivalent quality (e.g. with regard to personalization of a product), unless a lower quality would be a direct consequence out of choosing the alternative.[84] Thus, to satisfy all conditions of Art. 5(2) DMA, gatekeepers might need to abstain from coupling consent with processing data for other non-necessary purposes and to create neutrally and easily formulated choice screens with one or more reasonable alternative options. How such solutions might look like (e.g. regarding a monetization of the alternatives) is part of current debates.[85]

The functioning of Art. 5(2) DMA and its ability to reach its goals of both contestability and fairness via choice is linked significantly to general discussions about the informational self-determination of consumers and their sovereignty regarding their data, i.e. their data sovereignty.[86] In general, it is well-known that market failures stemming from information and behavioral problems of consumers do often appear in digital

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81 See Podszun (2024, mn. 17).

82 Furthermore, in case a consumer denies consent to one or all data combination practices described in (a)-(d), gatekeepers are also obliged to respect this choice by avoiding to ask again for consent within one year.

83 See DMA, recital 36.

84 See DMA, recital 37. According to Louven (2023, Rn. 33–34), this requirement making it mandatory for gatekeepers to offer a choice for receiving valid consent is a novel, but feasible interpretation of the requirements of the GDPR.

85 See e.g. Schmid & Späth (2023).

86 For a more detailed discussion about this concept, see Kerber & Zolna (2022b).

markets.[87] Many consumers are not aware about the all-encompassing data collection practices of large tech firms, which are often not interested in presenting its practices in a fully transparent and understandable way. For example, firms might use so-called "dark patterns" for the design of their choice screens, which might "nudge" users towards specific choices, or write their privacy policies in a complicated way.[88] In addition, most consumers are unable to fully grasp the possible consequences of their decisions, especially in the long term. Thus, many consumers are overwhelmed in such consent situations and give up on making a well-considered choice. This problem is of particular relevance in the context of data combination practices, as consumers might neither understand the scale and scope of information collected across different sources nor understand how many other parties are involved. Market failures related to information and behavioral problems are also often accompanied by market failures related to competition problems, leading often to situations where consumers are facing "take-it-or-leave-it" offers with regard to extensive data collection.[89] Due to the paramount significance of certain "must-have" products and lack of alternatives in the market, consumers might be additionally harmed in terms of their data sovereignty.

Regardless of these well-known issues concerning their data sovereignty, consumers receive through the additional consent requirements a paramount role for the functioning of Art. 5(2) DMA. This additional consent might empower consumers, but puts them also into a crucial role for reaching the DMA's goals of contestability and fairness. Dependent on how many of them will actually decide for the less personalized alternative instead of the usual free option, each obligation with regard to data combination might apply fully, partially, or not at all: Will all users take full advantage of their new possibilities? Or will the huge majority simply ignore the additional choices, as seen in many other digital decision-making situations? And what number of users is required to result in a significant influence on the behavior of a gatekeeper? In other words, to what extent the obligation discussed in section 3.2 will actually take effect is highly dependent on the actual choices of consumers and also any analysis of the economic effects of Art. 5(2) DMA cannot ignore their behaviors.

### 3.4 The economic effects of Art. 5(2) DMA

In the following I will try to explain shortly which effects, subject to the choices of consumers, might be expected with regard to the advertising-based business model of Meta. Moreover, I will also take a look at the factors of competition (what can reflect to some extent the goal of contestability) as well as of privacy and consumer autonomy (what can reflect to some extent the goal of fairness).[90] Undoubtedly, the following considerations can only be a starting point for further debates and cannot go into too

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87 See e.g. Solove (2013), Acquisti et al. (2016).

88 See e.g. Luguri & Strahilevitz (2021), Martini et al. (2021).

89 See Kerber & Zolna (2022b, pp. 62–64). Both market failures can also interact and aggravate the situation even further.

90 See for a similar approach Kerber & Specht-Riemenschneider (2021, pp. 65-67). In general, it is possible for the goal of fairness to incorporate different objectives linked to the fields of data protection law and consumer policy.

much detail. Further theoretical and empirical research is essential to allow for making any substantial predictions about economic effects and related trade-offs of this complex regulation.

**The effects on the advertising-based business model**

Dependent on the number of users giving or denying consent to data combination, Meta's advertising-based business model might be significantly affected. To understand the underlying mechanisms better, it makes sense to recall shortly the relevant economic concepts: In particular the CPS Facebook and Instagram are still, despite several new functions and technological improvements in the past years, classical examples for multi-sided platforms.[91] The CPS bring together users not only with other users and their content, but especially with firms interested in reaching these users. Thus, users are facing (personalized) content as well as advertisements that are paid by the firms and are expected to align with their interests and their behavior. As firms are paying monetarily for displaying (behavioral) advertisements, users can often use such platforms without monetary costs.[92] The more information Meta possesses about their users, the better it is able to target them with fitting content and, in particular, with fitting advertisements.

What could now be the implications for the functioning of Art. 5(2) DMA? The more users will deny to data combination, the less will Meta be able to benefit from its data advantage. This will very likely result in a weakening of its advertising-based business model: While quality of its (personalized) content is likely to deteriorate on the consumer side, quality of its (behavioral) advertisements is likely to deteriorate on the advertiser side. In turn, its products and services might appear less attractive for each market side and result in less users and advertisers. Obviously, this will likely result in a loss of revenues for Meta, which might also need to bear the costs of building up a company structure with separated "data silos". To recoup such losses, Meta could apply at least four different strategies:[93] First, Meta could increase prices for firms running advertisements. Second, it could try to reduce internal costs for running its products and services. Third, Meta could increase the amount of advertisements displayed. Last, it could stop offering its products for free. Undoubtedly, adapting prices or displaying more advertisements bears the risk of becoming even more unattractive for the respective market side, and also reducing internal costs might result in less innovation, product safety, or data protection, which could in turn affect attractiveness indirectly. Further conceivable strategies, such as reducing the quality of its products or starting to trade with consumer data, might lead to significant losses in trust and reputation. To

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91 See e.g. Evans & Schmalensee (2007).

92 Nevertheless, as presented by Furman et al. (2019), users are still paying more or less "indirectly" for being able to use such platforms. For example, by consenting to comprehensive data collection, users might be facing risks for their privacy and cybersecurity (paras. 1.121–1.123). Compared to the profits Meta makes with (behavioral) advertisements, one could also argue that they receive too little in exchange for their data, opening up discussions about fair compensation. Furthermore, as CPS might not face sufficient pressure from competition, firms booking advertisements might need to pay excessive fees and commissions (para. 1.134). Firms might then need to pass through these costs to consumers by raising prices of their products and services.

93 See Schmid & Späth (2022, p. 569).

sum it up, the current advertising-based business model is, subject to the actual behavior of users, under pressure and could clearly lose parts of its profitability.

**The effects on competition**

How would Meta need to face competition under such changed circumstances? First of all, it is essential to understand that Meta's position as a gatekeeper consisting of different interacting CPS and non-CPS can be compared (at least to some extent) to the concepts of (digital/data) ecosystems.[94] If now a significant number of users denied consent to data combination, Meta would lose in particular its data advantages with regard to the "width" of its data sets. In other words, it cannot profit anymore from gathering information collected across different sources to create richer consumer profiles, which could in turn be accessed by each of its products within its ecosystem. Losing these economies of scope might result primarily in a reduced ability to cross-subsidize its products via advertising based on user data.[95] This could then imply for certain (or even all) users, as discussed beforehand, the payment of a monetary price. While products with a larger user base, such as Facebook, might rather be able to continue for free, the situation might be different for smaller or new products of Meta which still need to collect a significant number of users. In particular the introduction of products to novel markets requiring significant R&D efforts could suffer from the new limitations. Nonetheless, even if access to data could be limited for certain products, access to financial means remains unaffected within the gatekeeper. In turn, smaller and new products could still be cross-subsidized by financial profits generated by other products, what is quite common in the case of (digital) conglomerates.[96]

With regard to (potential) competition, the limitations for data combination could contribute to a reduction of market entry barriers for specific products and services as well as improve the ability of (potential) competitors to contest the gatekeeper's market position.[97] Unlike Meta, other firms would not need to consider the restrictions of Art. 5(2) DMA and could combine data more easily. The more markets a firm is active in, the more could it benefit from less restrictions with regard to data combination. Hence, they could profit from resulting advantages with regard to innovation and quality of its personalized products as well as the ability to continue offering advertising-based products for free. The ability to compete effectively with Meta, however, will depend on the specific product. While Meta's abilities to leverage its market power to markets of its smaller and new products might be significantly limited, its CPS might still benefit from its entrenched market position. Thus, it is unlikely that markets for e.g. social media might become more contestable, while markets without a dominant product of Meta as well as future markets requiring significant innovation efforts might rather turn into a level playing field.

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94 See e.g. Jacobides et al. (2018), van de Waerdt (2023a, 2023b), Hornung (2024).

95 See Louven (2023, Rn. 22, 24).

96 Nevertheless, financial power is considered to be clearly of less relevance for digital conglomerates than data power; see e.g. Mendelsohn (2023, pp. 97–99).

97 See Bueren & Weck (2023, Rn. 83–86).

With regard to behavioral advertisement, different analyses showed that reduced access to personal data, e.g. caused by data protection regulations or by technical means for more privacy, can reduce its quality and reduce also its profitability.[98] Nevertheless, it remains also questionable if Meta's position in this market could be challenged. In particular gatekeepers such as Meta, which profit significantly from its ability to combine e.g. web browsing data with demographic data across its ecosystem, have an advantage that cannot be caught up that easily by other advertisers.[99] Thus, unless a huge majority of users denies consent and other competitors could build up all-encompassing data sets, Meta's leading position with regard to behavioral advertisement will likely remain uncontestable.[100] In addition, as (potential) competitors might always need to consider Meta's market power regarding both its products and advertising in parallel, it remains questionable to what extent only partial limitations of data combination can contribute to more competition. It is therefore, for example, necessary to research in greater detail what number of consumers denying consent in different markets can actually improve contestability and to what extent there exist interplays between consumer decisions in these different markets.

**The effects on privacy and consumer autonomy**

Despite being manifested in the GDPR, there have been many open questions with regard to the correct implementation of important data protection principles by large tech firms, such as purpose limitation (Art. 5(1)(b)), data minimization (Art. 5(1)(c)), or the "coupling prohibition" (Art. 7(4)). Thus, from a data protection perspective, Art. 5(2) DMA can be viewed to be a solution that puts a clear end to situations where users are more or less forced to agree to data combination practices for using a certain product of a gatekeeper: Gatekeepers need to ask for their explicit consent and need to respect their choice. Giving users more choice options with regard to treatment of their data is in general positive with regard to consumer autonomy and allows them to express better their privacy preferences. Users denying consent to data combination, in particular towards large firms, might be better protected against certain types of privacy risks, such as price discrimination due to detailed consumer profiles or identity thefts due to possible data breaches.[101] In general, it is supposed that there is a positive relationship between more competition and more privacy-friendly products.[102] Hence, the

98 See e.g. Aridor et al. (2023, 2025).

99 See Ullrich et al. (2024).

100 See also the comprehensive report on "Online platforms and digital advertising" of the CMA (2020), which e.g. analyzes the leading position of Facebook with regard to display advertising. Besides of data advantages being a crucial barrier for market entry and expansion of (potential) competitors in advertising, the need to reach a significant user base and the ability to profit from economies of scale are described to be further factors which are necessary for firms to compete effectively (paras. 5.153–5.168). This would imply that reducing only Meta's data advantage without applying accompanying policies (e.g. for strengthening consumer choice or the abilities of (potential) competitors) might not be sufficient for reaching any significant effects on contestability. As described by Mendelsohn & Färber (2025, p. 5), Art. 5(2) DMA clearly acknowledges such interplays between its goals, meaning that e.g. a specific level of data protection is required for reducing market power effectively; for further discussions on how to deal with interaction effects in situations with more than one market failure and more than one policy solution, see Kerber & Zolna (2022a).

101 See e.g. OECD (2020, p. 22).

102 See Blankertz (2020).

potential effects of Art. 5(2) DMA on competition could also affect privacy: If the choice of users resulted in a more competitive market, it might also come with additional offers of more privacy-oriented products. A “tying” of privacy policies by gatekeepers, i.e. forcing users to agree to data processing practices across products with the aim of leveraging market power to other markets, might not be that easily possible anymore.[103]

Nevertheless, more choice might not automatically lead to positive effects for the privacy of users: Just as in many other well-known situations in the digital world, it can be expected that users might still not be sufficiently informed to make a well-founded decision. In addition, gatekeepers might still try to find ways for “nudging” them towards the option that is more profitable for the gatekeeper, but not necessarily “better” for the users.[104] For example, users being faced with a choice screen warning them about losing quality of the product via reduced personalization or about the necessity to pay a monetary price might be prone to accept data combination practices, despite being savvy with regard to their privacy.[105] Certain “comfort” functions linked to data combination, which make the use of certain products clearly more efficient for users, will make it even harder for most users to decide for more privacy.[106] The same holds for granular choice options, which could be under certain circumstances overwhelming for users. If, in turn, there is no significant share of users refusing to data combination, users will still be confronted with imbalances of power towards the gatekeeper and not view any choice options to be a viable solution for improving their privacy. Establishing alternatively a per-se ban of data combination, as was discussed in the literature before the final version of the DMA was enacted, could be beneficial for protecting the privacy of users in general, but at the same time also detrimental for consumer autonomy.[107] Further research focusing on consumer-oriented questions of Art. 5(2) DMA, such as whether consumers do perceive more control regarding their actual privacy preferences or not, needs to be conducted.

To sum it up: The consent-based exemptions stipulated in Art. 5(2) DMA are putting the focus on the individual decisions of the users. The functioning of the obligation and each of its points (a)-(d), however, could still be prone to certain market failure problems with regard to information and behavioral problems of consumers as well as competition problems, in particular on CPS markets. It is therefore questionable if the

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103 See Condorelli & Padilla (2020).

104 See e.g. the explanations by Kerber & Zolna (2022b, pp. 54–55).

105 One further issue that should not be neglected is the presence of negative externalities via data sharing. Even if certain users take their privacy more seriously, they might be affected by other users who are unhesitant in sharing information and reveal in this way also information about other users. In turn, users might feel a lack of control about their privacy in either way and give up considering to take any privacy-enhancing measures; see e.g. Choi et al. (2019), Ichihashi (2021), Acemoglu et al. (2022), Bergemann et al. (2022). At the same time, however, there might also exist negative externalities of not sharing data: Due to the strengthened individual autonomy of a user by Art. 5(2) DMA, denying consent to data combination might pose threats to the autonomy of other users and the collective interest; see Graef et al. (2023, pp. 13–15).

106 See Krämer & Schnurr (2022, p. 315).

107 See Podszun (2022, p. 204).

provisions of Art. 5(2) DMA will ever work as intended and if any improvement regarding contestability and fairness could be expected, making more research necessary. But how could the functioning of Art. 5(2) DMA now be additionally affected by the EDPB opinion on “consent or pay” models? And to what extent is (or should be) such an interplay of both the DMA and the EDPB opinion respected in the non-compliance investigation of the EC and the according reactions of Meta?

## 4. A legal interplay, an investigation, and a possible solution for compliance

As seen in the previous section, the success of Art. 5(2) DMA and its actual economic effects stand and fall with the behavior of the consumers. Even though its approach of tackling both contestability and fairness appears to be very interesting at first sight, there appear on closer inspection a number of weaknesses which put the proper functioning of this obligation into question: Due to the presence of market failures related to information and behavioral problems, the paramount role of choice envisaged in the obligation remains to be seen critical. The implementation and the functioning of each of its points (a)-(d), however, becomes even more complex, as they have to be considered jointly with the requirements formulated in other recent decisions affecting Meta. The most relevant additional requirements are clearly the “third option” considerations formulated by the EDPB opinion on “consent or pay” models for behavioral advertisements. How will the considerations of this opinion increase the complexity for creating a compliant “consent or pay” model? It can be expected that the interplay of both Art. 5(2) DMA and the EDPB opinion will influence significantly the decision-making process of consumers, but might put at the same time even more pressure on them for reaching the envisaged goals of contestability and fairness. Furthermore, the actual economic effects might become even harder to predict. Under this light, it is also worthy to take a closer look at the EC’s enforcement of Art. 5(2) DMA via its non-compliance investigation against Meta: What exactly does the EC criticize about Meta’s proposed implementations? How does Meta try to be compliant with all legal requirements? And to what extent do the EC and Meta incorporate the complex, but influential interplay of both Art. 5(2) DMA and the EDPB opinion in their considerations? Such questions will be discussed in the following section of this paper.

### 4.1 The interplay of Art. 5(2) DMA and the EDPB opinion

Before I examine the potential interplay of Art. 5(2) DMA and the EDPB opinion in more detail, it makes sense to briefly recap on section 2: Due to the decisions related to competition law and data protection law, Meta can rely for unnecessary purposes, such as combining data from different sources or behavioral advertisements, realistically only on the legal basis of consent. How exactly the consent-based solution should look like became, however, part of debates due to the famous “obiter dictum” of the CJEU: On the one hand, users refusing to “data processing operations not necessary for the performance of the contract” must be offered an equivalent alternative without such data processing activities, while on the other hand it is seen to be adequate to offer this equivalent alternative “if necessary for an appropriate fee”.[108] In other words, it

[108] See CJEU (2023, para. 150).

seems like offering “consent or pay” models is, as long as prices are appropriate and as long as the requirements for valid consent are fulfilled, under certain circumstances a legitimate way to process data for any unnecessary purposes (combining data across platforms, behavioral advertisements, etc.). The EDPB issued an opinion on the legality of such models implemented by large firms and for the purpose of behavioral advertisements.[109] Of particular interest were its considerations with regard to offering an equivalent alternative, which make it clear that there should be, to fulfill the GDPR’s requirements for having a free choice and for giving valid consent, at least one free alternative without data processing for the purpose of behavioral advertisements.[110] In consequence, large firms could no longer rely on “consent or pay” models with only two options, as they would have to offer the alternative option without behavioral advertisements for free.[111] If a large firm did not want to forego potential profits of offering the alternative option for a fee, it would have to offer a “consent or pay” model with an additional free “third option”. By choosing this alternative without any monetary costs, users could be faced with less or even no collection of personal data, but with other forms of advertising (e.g. contextual advertising).

The actual (economic) consequences of implementing the “third option” are still unknown. Nevertheless, from a law and economics perspective it is very likely that the combination of both the “third option” and Art. 5(2) DMA will affect significantly the data processing activities of gatekeepers such as Meta. The following considerations, which are used to develop a proposal for an analytical framework, are therefore one possible way of interpreting a potential interplay (and can serve only as a starting point for further research): First and foremost, for fulfilling the requirements of the GDPR for valid consent, any large tech firm would need to ask users granularly for consent for each unnecessary purpose, such as content personalization or service improvement.[112] The classical way to comply with these requirements would be a choice screen with detailed information as well as a simple and neutral yes/no question for each purpose. The CJEU decision, however, opened up another alternative: “Consent or pay” models are, if necessary, also legitimate to be used for such purposes. In other words: If Meta deems a certain unnecessary purpose to be highly relevant (e.g. due to its relevance for its business model), it may rely under strict conditions on offering a choice between a paid and a free alternative for this specific purpose. Being now a gatekeeper and large online firm, firms such as Meta have to respect additional (legal) requirements with regard to receiving consent of users for two specific unnecessary purposes: Data

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[109] Behavioral advertisements are obviously the most relevant unnecessary purpose for which “consent or pay” models are used to obtain consent. Even though the EDPB opinion focused only on this purpose, it is very likely that similar criteria can be applied in a case-by-case analysis also on models based on other unnecessary purposes. In this section, however, I will assume that the considerations of the EDPB will only apply to the purpose of behavioral advertisements.

[110] See EDPB (2024a, pp. 18–21).

[111] The EDPB opinion is not a binding decision. It will, however, influence significantly the case-by-case review process of European DPAs with regard to the implementation of “consent or pay” models by large tech firms. The non-compliance investigation of the EC was also influenced by the EDPB’s considerations, but only to a very limited extent (see section 4.2).

[112] See e.g. EDPB (2024a, p. 31).

combination, which is additionally regulated by Art. 5(2) DMA, and behavioral advertisements, which will be additionally affected by the considerations of the EDPB opinion.

What could be conceivable implications for Meta? I will start with the consequences of the EDPB opinion: Before being able to process any on-platform data for behavioral advertisements on their CPS, Meta requires valid consent of users after presenting them (besides of the usual free option) a free and equivalent alternative without any data processing for this specific purpose. In other words, users need to be able to refuse freely the unnecessary purpose of processing their data for being faced with behavioral advertisements. Alternatively, in case Meta does not want to forego potential profits from offering this alternative via a “consent or pay” model, it needs to present the users also the “third option”. Thus, users could choose between a free option with behavioral advertisements, a paid option without any advertisements, and a free option with non-behavioral advertisements (e.g. contextual advertisements).

Under the light of the EDPB opinion, what are the potential consequences of Art. 5(2) DMA? The functioning of the obligation was already discussed in section 3, but needs to incorporate now the specific purpose of the data combination: If data combination is linked to the purpose of behavioral advertisements, Meta would need to obtain consent for this specific purpose by following both the requirements of the EDPB opinion and Art. 5(2) DMA. If data combination is linked merely to other purposes, such as non-behavioral advertisements, innovation (e.g. AI), or “comfort” functions for users (e.g. cross-posting of content), Meta would need to follow the requirements of Art. 5(2) DMA only. Thus, whenever a gatekeeper would like to combine data for the purpose of behavioral advertisements (which is usually the most valuable purpose for a firm, but likely less valuable for most users), the requirements of Art. 5(2) DMA with regard to consent are tightened even further by the considerations of the EDPB opinion. Consequently, it can be expected that users will be presented with even more granular and detailed choice options. And, compared to the discussion in section 3.4 and subject to how many users decide for each of these additional specific options, even more complex economic effects are expectable.

The following explanations illustrate in a simplified way how Meta, which might need to find an economically viable but also fully compliant solution, could implement the (legal) requirements created by the interplay of the EDPB opinion and Art. 5(2) DMA. Before using a CPS of Meta, users would likely need to give or deny consent to three different types of data processing operations that are not necessary for the performance of the contract: The ones related to behavioral advertisements (affected by both the EDPB opinion and Art. 5(2) DMA), the ones related to data combination practices which are not linked to behavioral advertisements (affected by Art. 5(2) DMA) and the ones related to remaining data processing operations (affected by the GDPR only).

First, Meta would need to ask granularly for consent to any purpose related to behavioral advertisements, regardless whether data processing is based on on-platform data

or on data combination.[113] As behavioral advertisements are of significant relevance for Meta's business model and its competitive advantage, the decisions of users will be of paramount relevance for the gatekeeper. Therefore, Meta might try to find a legally compliant solution that allows it to keep up, as far as possible, its ability to use on-platform and off-platform data. This resulting data advantage is, as seen in section 3.2, crucial for Meta's ability to monetize via (behavioral) advertisements. To satisfy the legal requirements, Meta could therefore rely for each purpose on a solution with two options (i.e. the well-known "standard" option and a free, but equivalent alternative). From an economic perspective, however, it is unlikely that Meta will choose this solution: Being confronted with a de facto yes/no decision, most users will have no incentive in agreeing to the "standard" option as they can avoid without any costs an unnecessary processing of their data for behavioral advertisements.[114] As this will clearly result in significant losses due to the inability to run a business based on (behavioral) advertisements, it would be in contrast more attractive for the gatekeeper to offer three options. Even though the "standard" option would still appear to be unattractive compared to the other options, users would, subject to their willingness-to-pay for privacy, have a realistic choice between the paid option and the "third option". Such a legally compliant solution would, besides of respecting both the EDPB opinion and Art. 5(2) DMA, allow for a better fulfillment of privacy preferences and guarantee that Meta could still benefit from payment revenues (paid option) and (non-behavioral) advertising revenues ("third option").[115]

Second, Meta would need to ask for granular consent to data combination practices which would be solely regulated by Art. 5(2) DMA. As already mentioned, these remaining practices could be related to innovation or "comfort" functions. Non-behavioral advertisements would not be relevant in the given example, as users were confronted with the stricter affected choice on (behavioral) advertisements beforehand. Hence, I will focus in a first step on "comfort" functions and in a second step on innovation. For certain consumers, "comfort" functions, such as the ability to post across platforms or to interact with a highly personalized AI assistant using information from different sources, could be considered to be relevant functions in the context of a certain

[113] It should not be forgotten that Art. 5(2) DMA (a)-(d) regulates four specific practices that are related to data combination and that consent needs to be granular. This means that with regard to data processing for the purpose of behavioral advertisements, consumers need to make at least five separate choices, i.e. four related to the data combination practices described in (a)-(d) and one related to on-platform data. This is in accordance with the GDPR: "[c]onsent is presumed not to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case" (See GDPR, recital 43). See also Podszun (2023, Rn. 21), who emphasizes that requiring a specific consent for each point of Art. 5(2) DMA might increase the amount of information and decisions consumers are facing. In turn, common consumer-related problems such as information overload or consent fatigue might occur.

[114] This would clearly imply that (most) consumers prefer to avoid being tracked and not to be confronted with behavioral advertisements. Moreover, consumers need to be able to fully understand both presented options and to make a rational decision. As the law requires also a neutral and non-manipulative design of choice screens, it should be avoided to frame any version as a "standard" option.

[115] Nevertheless, it is likely that these revenues are significantly lower than the previous revenues from behavioral advertisements. See also van den Boom (2024), who reports about some comments that in this setting there might be for consumers even no incentives to choose anything else than the "third option" (leading in turn to significant losses for Meta).

product. These functions do also appear to be rather beneficial for the average user than (behavioral) advertisements. At the same time, there might exist incentives for Meta to process and combine data generated via “comfort” functions and to find also direct or indirect monetization possibilities. However, these functions might not only be clearly of less relevance for its revenues and their competitive advantage than (behavioral) advertisements, but are also not in the focus for the functioning of its CPS. Thus, implementing a “consent or pay” model would be hardly justifiable, as the “obiter dictum” of the CJEU demands a clear necessity for demanding an (appropriate) fee for an equivalent alternative. Subject to Art. 5(2) DMA, the gatekeeper is required to offer for such data combination purposes an equivalent alternative that is merely less personalized (not non-personalized), but fulfills the GDPR’s requirements for consent to be free. Hence, for each “comfort” function there should be a free and simple yes/no choice, each related to the data combination practices (b), (c), and (d), which are regulated in Art. 5(2) DMA.[116]

With regard to innovation, the necessity of combining data appears to be rather given due to the fact that it could be of high relevance for Meta’s (future) revenues and competitive advantage. It is, nevertheless, almost impossible to implement a “consent or pay” model, as users could not rely on receiving clear benefits and would have no payment incentive. There exist even further unanswered questions: How valuable could be a user’s consent to data combination? To what extent could the (potential) benefits of a successful innovation be clearly assigned to on-platform data or combined data? And how should users who agreed to data combination profit more from an innovation than other users, e.g. by having earlier or exclusive access? Without any doubt, any activities related to innovation, such as R&D for AI products, can be (one day) highly beneficial for users. There exists, however, no alternative to offering users a free and simple yes/no choice regarding data combination for the purpose of innovation.[117]

Last but not least, Meta needs to ask for consent to purposes that are limited to processing of on-platform data (e.g. service improvement). These purposes are merely covered by the GDPR and, as users might not be interested in paying for such purposes, are likely to result in free and simple yes/no choices, too. To sum it up, due to the novel interplay of Art. 5(2) DMA and the EDPB opinion, Meta is forced to offer their users for different purposes different granular choice options. As users have to grant or deny consent for each of these multiple purposes, there will exist multiple different combinations of data processing which will result in different individual levels of data collection. In turn, this might not result in only one specific “consent or pay” price for a product but in granular prices for every single granular consent decision. Therefore, it will be even more complex to analyze any potential economic effects. Even if such a complex analysis cannot be conducted in this paper, the fact that the actual success of Art. 5(2) DMA will be highly dependent on the actual behaviors of the users remains

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116 Art. 5(2)(a) DMA would not be of any relevance here as it is limited to advertising.

117 This inevitably leads to questions of offering users an incentive, e.g. a financial compensation, for granting their consent to data combination. This, however, is a larger debate that cannot be addressed in this paper. See e.g. Kerber & Zolna (2025) for further information about this current debate.

valid. Some aspects which are relevant for their choices, such as the design of choice screens or the pricing policy for every single purpose, need to be critically addressed.

### 4.2 The EC's non-compliance investigation against Meta

Following the CJEU decision in the Meta case in July 2023, the designation as a gatekeeper by the EC in September 2023, as well as the urgent binding decision by the EDPB in November 2023, Meta had to consider several aspects for adapting its data processing practices. As a reaction, Meta decided in November 2023 to introduce for its CPS Facebook and Instagram the "consent or pay" model described in section 2.3. This model, however, did not remain without any criticism and induced the EC to launch an investigation regarding its compliance with the DMA. How does Meta actually try to meet with its solution the legal requirements of Art. 5(2) DMA and the considerations of the EDPB opinion? What exactly did the EC view to be problematic about Meta's specific solution? And to what extent is Meta's solution appropriate and the EC's criticism substantiated? For finding answers, I will first concentrate on Meta's explanations in its first DMA compliance report and later on the press releases and the (first) decision of the EC regarding the non-compliance investigation.

Following Art. 8 DMA and Art. 11 DMA, the designated gatekeepers and all their CPS need to comply with all the obligations stipulated in the DMA. To prove its adherence, each gatekeeper needs to publish six months after its designation a compliance report explaining how it is supposed to follow all relevant obligations. After the release of this first compliance report, gatekeepers are obliged to publish an updated report yearly. In March 2024, Meta described in its first report in greater detail how it intended to follow Art. 5(2) DMA. For all relevant products, users can choose between a "personalised service which involves data combination" and "a less personalized alternative designed to function without data combination".[118] Meta claimed that the choice will be presented neutrally and that users will be sufficiently informed about the choice options and their consequences as well as their possibilities to revoke their decision. Overall, users will be confronted with seven (as Meta calls them) "consent moments" or "choice moments", i.e. six choice screens asking users for consent to data combination (one for each product affected), as well as one additional choice screen asking for consent to the displaying of advertisements for all Meta products.[119]

The choice screens regarding data combination do not require for choosing the alternative option the payment of a fee, but are mostly linked to certain ("comfort") functions only: For example, users denying consent to processing of their personal data for the purpose of data combination between Facebook and Instagram (i.e. choosing the "less personalized" service) will e.g. not be able to cross-post between both CPS.[120] The choice screen related to displaying of advertisements across all Meta products (i.e. the CPS "Meta Ads"), however, does not offer an alternative option for free: Continuing

[118] See Meta (2024a, p. 10).

[119] See Meta (2024a, pp. 4/10). The six products are Instagram and five Facebook products (Facebook, Messenger, Marketplace, Gaming Play, Dating).

[120] See Meta (2024a, pp. 11-12). The accounts for which a user gives consent to data combination are linked in a so-called "Accounts Center".

with the example of Facebook and Instagram, users who do not want to consent to "an ad-supported service, which allows for the processing of third-party data for ads and combines their personal data from Facebook and/or Instagram to deliver personalised and relevant ads" have to choose an ads-free subscription service.[121] In other words, users have to choose between a free version with processing and combination for behavioral advertisements and an ads-free alternative without such processing and combination for the payment of a monthly fee. Meta argues that its implemented solution respects all legal requirements that were formulated by the DMA, the GDPR, and the CJEU decision.[122] Furthermore, users choosing the free option will receive certain granular choice options that allow them to adapt e.g. the types of advertisements they see or what data from third parties should be used.

Later in March 2024, however, the EC raised serious doubts with regard to the compliance of Meta (as well as Alphabet and Apple) with certain obligations of the DMA.[123] In the case of Meta, the EC initiated an investigation regarding the legality of Meta's binary "consent or pay" model under the light of Art. 5(2) DMA, as it did not view the offered alternative with costs to be an appropriate alternative. The investigation, which the EC aimed to finish within twelve months, could have led in case of finding an infringement to the payment of fines or even to structural remedies. The announcement of this investigation was accompanied by further remarks of Margrethe Vestager and Thierry Bretton, who were both at the time the commissioners responsible for enforcement of the DMA.[124] With regard to Meta, the latter emphasized that consent should be free, implying that a less personalized version should be financed via other means (e.g. by contextual advertising).[125] Already in July 2024, the EC then informed Meta about its preliminary findings in the investigation.[126] In the opinion of the EC, which coordinated its proceedings with the respective data protection authorities, Meta failed to implement a less personalized alternative that can be considered to be equivalent to the version with behavioral advertisements. Moreover, it did not grant users a free choice in terms of how their personal data should be combined.

The press release regarding the preliminary findings of the EC, however, did not deliver any more detailed information.[127] It is therefore e.g. not possible to say whether and to what extent the EC incorporated at this point a possible interplay with the EDPB opinion or how it viewed the specific solution of Meta including different types of choice

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121 See Meta (2024a, p. 15).

122 See Meta (2024a, pp. 15-17).

123 See EC (2024a).

124 See EC (2024b).

125 This is obviously in concordance with the EDPB opinion.

126 See EC (2024c).

127 Quite interesting is the EC's later announcement in September 2024 regarding the start of a collaboration with the EDPB on finding guidelines for the interplay between the DMA and the GDPR, which might ultimately result in highly relevant insights for the implementation of Art. 5(2) DMA. For further information, see EC (2024d).

screens.[128] Therefore, one can only assume which specific aspects of Meta's solution were viewed critically by the EC at this point of time. Some indications, however, can be obtained by looking at Meta's adjustments of its initial solution: Changing its "consent or pay" model regarding two aspects in November 2024 can be viewed as a clear reaction to the EC investigation as well as to the EDPB opinion. First, it reduced the price of the paid alternative by 40%, and second, it announced a "third option" without any costs, but with context-based advertisements that rely on a minimum amount of data.[129] To be more precise, this updated solution requires now for the monthly subscription €5.99/month (via web) or €7.99/month (via app), respectively. Adding an additional Facebook or Instagram account costs €4/month (via web) or €5/month (via app), respectively. The new "third option" with "less personalized ads" is described to display advertisements which are based on the context of a user's use of Facebook or Instagram as well as certain data points, such as a user's age or gender.

In April 2025, the EC decided partially on Meta by confirming its preliminary findings of July 2024 on Meta's binary "consent or pay" model.[130] Following the press release of the EC, Meta's approach failed to meet Art. 5(2) DMA as consumers were neither facing an alternative that could be considered to be "less personalized but equivalent" nor make a free decision regarding their consent to data combination practices. Thus, due to lack of compliance for eight months (i.e. until the introduction of an updated "consent or pay" model in November 2024), Meta was fined with €200 million. The more detailed decision was published in June 2025 and delivers background information on the EC's argumentation: According to the EC, the first subparagraph of Art. 5(2) DMA, i.e. "[…] unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of [the GDPR.]", imposes two separate requirements on gatekeepers which must be met jointly.[131] Hence, while the latter part does clearly refer to the GDPR's definitions for the term "consent", there does not exist any legal reference for the term "specific choice" of the former part (yet). In turn, the EC argues that "specific choice" should not only be interpreted literally, but also under the light of the purpose and the context of Art. 5(2) DMA (as e.g. described in recitals 36 and 37). Meta, however, stated that it refuses the EC's interpretation of two separate requirements and views the term "specific choice" to be closely linked to the term "consent" as defined by the GDPR (i.e. in the sense that consent must also

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128 See van den Boom (2024), who emphasizes that the EDPB opinion does not need to translate automatically in the implementation of Art. 5(2) DMA. For a highly critical view of the EC's investigation, see Frank & Lewis (2024).

129 See Meta (2024b). The gatekeeper clarifies that this additional alternative, which also includes advertisements that users are forced to view for a few seconds, is a reaction to "additional demands from regulators that go beyond what is written in the law". See, however, FN 111 for a different interpretation of the EDPB opinion.

130 See EC (2025a). This decision included, besides a ruling on Apple breaching anti-steering obligations, a delisting of Meta Marketplace as a CPS. The aspired goal of delivering a final decision latest until March 2025 was not met. Shortly after the aspired deadline expired, reports emerged claiming that the EC would postpone a final ruling regarding potential DMA infringements of Meta (and Apple) due to tariff talks with the US; see Schechner & Mackrael (2025).

131 See EC (2025b, paras. 33–42).

be “specific”).[132] In response, the EC rejected Meta’s arguments and put forward further arguments in favor of its own approach, such as the addition of two different verbs for each requirement in the final version of the DMA or that considering both requirements jointly is in concordance with the regulation’s intention of imposing even tighter obligations on the behaviors of gatekeepers.[133]

After it clarified its approach of considering “specific choice” and “consent” separately, the EC presented arguments why Meta infringed each requirement: On the one hand, as Meta’s solution was not viewed to be a less personalized but equivalent alternative, Meta failed to present end users with the specific choice regarding data combination for the purpose of behavioral advertisements.[134] The EC argues here with two aspects. First, there exist different conditions for accessing the paid option (e.g. additional transactional efforts for making a payment compared to simply giving consent via clicking a button), making it not equivalent to the free option.[135] This position is further substantiated by the fact that after six months of its introduction less than 1% of Meta’s monthly active users chose the paid option, implying that users do not consider it to be an attractive alternative. Second, the EC does not deem the CJEU decision in the Meta case to be applicable on Art. 5(2) DMA.[136] In other words, Meta cannot use this decision as a justification to rely on a “consent or pay” model for offering the less personalized but equivalent alternative. In addition, the EC is of the opinion that Meta failed to prove that the fee is actually appropriate or necessary. On the other hand, Meta did not receive via its “consent or pay” model valid consent of their end users.[137] Here, for proving an infringement, the EC presents three arguments which include also some considerations related to the EDPB opinion 08/2024. First, users might suffer from an imbalance of power between Meta and themselves as well as from being more or less dependent on using Meta’s products (e.g. due to lock-in effects).[138] In turn, having to make a choice via a “consent or pay” model to refuse the processing of their personal data does not constitute a free choice. Second, users of Facebook and Instagram who refuse consent to data combination with Meta Ads might suffer factual detriments.[139] This could include financial detriments (e.g. monthly fee payments) or social detriments (e.g. being forced to leave both social media platforms). Together with the third argument related to the lack of a “third option”, the EC closes its reasoning that users cannot give free and valid consent.[140]

In summary, the EC’s decision delivers some interesting considerations for compliance questions of Art. 5(2) DMA, but leaves certain other points unexamined. Four aspects

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132 See EC (2025b, paras. 43–47).

133 See EC (2025b, paras. 48–63).

134 See EC (2025b, paras. 87–88).

135 See EC (2025b, paras. 89–98).

136 See EC (2025b, paras. 99–109).

137 See EC (2025b, paras. 175–179).

138 See EC (2025b, paras. 180–188).

139 See EC (2025b, paras. 189–200).

140 See EC (2025b, paras. 201–202).

of the decision, which might become relevant for further discussions, should be emphasized here: First, the most important aspect of the EC's decision is clearly its interpretation that "specific choice" and "consent" are two different conditions which need to be met jointly by a gatekeeper to be exempted of the limitations imposed by Art. 5(2) DMA. This approach could give the EC more flexibility for controlling the compliance of a gatekeeper with the "specific choice" requirement, as it could focus in its assessment on the conditions of recitals 36/37 without being forced to take e.g. the GDPR or the CJEU decision into account.[141] To what extent this approach is in fact justified is likely to be part of upcoming debates and court decisions. Second, the EC and Meta have diverging views on the applicability of the CJEU decision and the EDPB opinion.[142] Also this is, however, primarily a legal question and will be probably clarified in court. For the remaining analysis regarding the compliance of Meta's "consent or pay" model, I will continue considering both the CJEU decision and the EDPB opinion. Third, the EC's criticism focuses only on the data combination solution related to the CPS of Meta Ads (which was presented via both CPS of Facebook and Instagram)".[143] Relevant aspects that were discussed in the framework presented in section 4.1, such as different types of purposes or the granularity of consent, were not of relevance for the EC's considerations. In section 4.3, however, I will present why these aspects actually should be considered critically with regard to the compliance of Meta's solution. And fourth, despite offering an interesting interpretation of Art. 5(2) DMA, the EC relies primarily on (classical) legal reasonings. Even though the decision refers to the EDPB opinion, it utilizes only some key aspects for proving an infringement of Art. 5(2) DMA and fails to incorporate any potential legal interplay. Economic arguments are also barely of relevance. For example, the appropriateness of the price for the paid option and its potential economic effects on contestability and fairness are not seriously discussed. Nevertheless, the EC continues its assessments as the ruling did not cover Meta's amendments to its "consent or pay" model.[144] It is therefore still unclear to what extent the updated solution will meet the expectations of the EC, implying that a final decision (which might include also a more thorough economic reasoning) must be awaited. In addition, Meta announced in July 2025 to appeal the EC's initial decision.[145] Thus, it remains to be seen how the decision on the initial solution (and probably also a decision on the updated solution) will be assessed in court and to what extent it might reduce the profitability of Meta's advertising-based business model.[146]

### 4.3 The compliance of Meta's solution

Whether Meta's updated solution will be considered by the EC as a compliant solution is not clear yet. It is, nevertheless, still possible to assess Meta's updated solution in

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141 See SCiDA (2025).

142 For example, Meta justifies its specific approach also with the CJEU decision but denies any legal relevance of the EDPB opinion; see EC (2025b, paras. 203–205).

143 See EC (2025b, paras. 83–86).

144 See EC (2025a).

145 See Meta (2025d).

146 See SCiDA (2025).

terms of its compliance with the DMA and the EDPB opinion. Thus, with the help of the proposed framework of section 4.1, I will try to analyze the most important parts of Meta's updated solution, as described in its second DMA compliance report, and will explain which parts of it I deem to be rather compliant with the interplaying requirements and which not. These insights will not only help to identify potential compliance issues on which both the EC and Meta might need to put their focus, but will also point out aspects which might deserve, under the light of the increased complexity stemming from the interplay of Art. 5(2) DMA and the EDPB opinion, more research efforts (e.g. with regard to economic effects).

Compared to the exemplary solution introduced in section 4.1, the most relevant difference of Meta's approach might be that it separates choices according to its CPS (and non-CPS), and not according to (granular) data processing purposes for each CPS. This leads in general to two different types of choices which are of relevance for compliance questions: First, an own choice with regard to consent related to the CPS of Meta Ads. And second, an own choice with regard to consent related to the CPS of Facebook and Instagram. At first sight, such a separation between advertising services and remaining CPS, which is likely motivated by economic interests due to the significant role of advertising for Meta's business model, seems to be quite unusual.[147] However, also this separation allows, at least in theory, to find compliant solutions for purposes affected by both the DMA and the EDPB opinion (i.e. behavioral advertisements) as well as for purposes affected by Art. 5(2) DMA only (e.g. "comfort" functions).

Going into more detail, however, it is clearly possible to identify certain shortcomings of Meta's solution which might put its compliance into question. Starting with the first type of choice, users are asked for consent related to the CPS of Meta Ads. Looking into Meta's updated compliance report published in March 2025, users have now in fact an additional choice: Anyone who chooses the "ad-supported service" (i.e. the free option) instead of the "subscription service" (i.e. the paid option) faces afterwards an additional choice screen.[148] In this new choice screen, users have to choose between the previously selected "ad-supported service" and an alternative for a less personalized version (i.e. the "third option"). To what extent can this solution be considered legally compliant? Even though the adaptions are improvements to the previous model, there exist serious points of criticism: First and foremost, users are facing non-granular all-or-nothing options. More specifically, anyone who decides for the free option has to consent to "the processing of third-party data for ads and [the data combination of] their personal data from Facebook and/or Instagram".[149] Only the paid option, leading to an ad-free experience, allows users to forego any such data processing and combination activities. This contradicts with Art. 5(2) DMA, which requires a specific and

147 Even though, as explained in FN 70, "online advertising services" are an own type of CPS, they cannot operate independently of other CPS and are only considered for regulation if there exists at least one other type of CPS. Moreover, advertisements are usually an integral function of a product (e.g. a social media platform), implying as well that consumers are focusing rather on core functions of a product (e.g. connecting with friends) instead of advertisements.

148 See Meta (2025b, pp. 14–17).

149 See Meta (2025b, p. 14).

separate choice for each point (a), (b), (c), and (d) for consent to be free and valid. Regarding the EDPB opinion, granularity seems to be given as users have at least three options which are related to the purpose of using on-platform data for behavioral advertisements.

Even though the initial choice screen of the updated version, containing the free and the paid option, seems to present both options by using more neutral colors and descriptions than before, there exist, however, some serious question marks with regard to different aspects of this and other choice screens: For example, one could criticize that the three options are not presented equally.[150] To be more precise, only after deciding in this initial choice screen for the free option, there appears another choice screen allowing to decide between the free option and the new "third option". In this next choice screen, it is also not clear what exactly less personalized in the context of the "third option" means, as Meta claims to use only "a minimal set of data points" but does not deliver precise information about what this minimal set includes (e.g. by providing a comprehensive list of data points processed). Additional aspects of the novel "third option", such as forcing users to view certain advertisements for a few seconds or restricting the ability of users to promote their content (e.g. via advertisements), put the equivalence of the service and eventually its compliance into further question. To fulfill the equivalence criteria, however, it might be necessary that both the paid option and the "third option" are perceived by the users as realistic alternatives to the free option.[151] Meta claims that its users have certain controls with regard the personalization of advertisements.[152] However, adapting these settings while being faced with different (choice) screens (or changing these settings later) appears to be relatively complex. In turn, users are likely to suffer from consent fatigue, leading de facto to a "nudging" to choose the "easiest" options which does not fulfill the criteria for a free choice.[153]

Regarding the second type of choice, similar aspects need to be considered. Following its compliance report, Meta allows users to decide regarding the combination of data between Facebook and Instagram.[154] This happens by linking accounts from each service in one so-called "Accounts Center" and allows for example the cross-posting of content across both CPS. From a consumer perspective, it is in general positive that they can decide without monetary costs in favor or against data combination for the purpose of such "comfort" functions. In addition, they have with the "Accounts Center" a more transparent overview about their linked accounts and can adapt their choices at any time. Nevertheless, there exist also certain weaknesses in terms of compliance:

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150 See Steinert (2024).

151 See e.g. Mendelsohn & Färber (2025, p. 6), who add that this might also require to understand better the actual choices of users facing all the three options. For similar considerations, see also the open questions regarding appropriateness of prices in the last part of this section.

152 See Meta (2025b, pp. 17–22).

153 See also BEUC (2025), which criticizes that the misleading choice screens steer users towards the "standard" option and that the alternative options fail to deliver an equivalent quality and a minimum of data collection.

154 See Meta (2025b, pp. 10–14).

Once more, the lack of granularity can be criticized as there is no separate choice for each relevant data combination practice of Art. 5(2) DMA, i.e. (b), (c), and (d). Furthermore, users linking accounts seem to be forced to consent also to other purposes.[155] The explanations embedded in the choice screen are not absolutely clear, but it seems that Meta will be allowed to process the combined data for more personalized advertisements, for product improvement, or for providing optional activities. Such a "bundling of consent" would clearly contradict the intentions of Art. 5(2) DMA, as it would impede consent to be free and valid.[156] In addition, it will very likely contradict with the intentions of users who might e.g. not want their combined data to be used for improving an integrated AI assistant. Also unclear is how this choice will affect a user's previous choice regarding Meta Ads: Will consent to data combination for "comfort" functions invalidate the choice for the less personalized alternative? Or will it not be possible for such a user to link accounts? It should be therefore a priority for Meta to clarify these specific misleading descriptions regarding data combination for "comfort" functions and, if necessary, to adapt its data processing practices. Should Meta also solve the lack of granularity regarding both the first and the second type of choices, improve different design issues of its choice screens, as well as prove that its offered alternatives could be perceived to be equal, it would be much closer to the goal of offering a legally compliant solution.

There is one further aspect which is of huge relevance for Meta's legal compliance, but, however, cannot be discussed in greater detail in this analysis: The appropriateness of the pricing in a "consent or pay" model, which was often in the focus of criticism regarding Meta's "consent or pay" model.[157] The price plays a crucial role for the legality of a "consent or pay" model and whether an alternative can be in fact considered to be equivalent or not. This became evident when, after the EC raised serious doubts regarding its compliance, Meta's reacted by adapting also its pricing policy.[158] In addition, even if choice options were presented in a clear and neutral manner, the actual pricing policy could influence the choice of users to an even greater extent: If a price appears unattractive to a certain user (i.e. is significantly higher than the user's willingness-to-pay), the user might be prone to accept the free option without being aware of all potential privacy consequences. But what price could then be considered to be "appropriate" for the "equivalent alternative" demanded by Art. 5(2) DMA or the EDPB opinion? Different regulatory authorities are currently working on this question, such as the DPA of the United Kingdom, the Information Commissioner's Office (ICO), which published a guidance on "consent or pay" models and focused also on the appropriateness of prices.[159] Numerous data protection authorities in Europe might have to

155 See Meta (2025b, p. 13, figure 1).

156 The (legal) requirements of both Art. 5(2) DMA and the EDPB opinion echo to some extent the "internal unbundling" solution of the BKartA and the "minimum standard of choice" requirement by the BGH (see section 2.1).

157 See e.g. noyb (2023b).

158 See Meta (2024b).

159 See ICO (2025). This first guidance, however, may be adapted again due to the introduction of the Data (Use and Access) Act in June 2025.

make first decisions on the legality of specific “consent or pay” models soon and the collaboration between the EC and the EDPB on questions regarding the interplay of the DMA and the GDPR could also result in novel insights regarding the appropriateness of prices.[160] Another approach is to rely on “classical” instruments: For example, it should also be possible to “control” an abusive price and the terms of a “consent or pay” model via Art. 102 TFEU.[161]

Unfortunately, the EC’s decision on Meta’s initial model did not focus on any deeper (economic) analysis of Meta’s pricing policy and it remains to be awaited if this will be different in its upcoming decision on the updated model. The EC claims, in the context of Meta’s initial model, that charging a price for the less personalized alternative would, compared to the free option, lead to unequal conditions of access.[162] Furthermore, the almost non-existing number of users choosing the paid option (i.e. less than 1%) is, legitimately, considered as a sign that users do not perceive the paid option of the initial solution to be an attractive alternative, implying that the price was clearly too high. Even if these arguments appear to be logical, they lack, as stated before, any meaningful economic rationale. At the same time, however, they allow to bring up important questions for further research on finding appropriate prices: Is it sufficient if a significant number of users perceives the paid option to be equally attractive (e.g. asked via surveys)? Or is it even necessary that a significant number of users does actually choose the paid option? Should a specific method be used to determine what a sufficiently significant number is? Or should the alternative be simply considered to be equal if (at least) 50% of users decide to choose it? How should the EC’s criticism regarding unequal conditions of access be understood? Does it imply that, as doing a payment will always require more effort than simply giving consent via a click, paid options will never be considered equal? Or would it force gatekeepers, only to keep conditions of access equal, to replace the free option with an option where users get paid for using their services? And to what extent could only certain regulations, such as price caps, help to achieve compliant prices and what could be the potential risks? All these questions cannot be answered easily and require more research. Thus, even if Meta’s prices are very likely too high, it is not possible in this analysis to show which prices are actually required to reach legal compliance. For being able to assess the highly relevant compliance of pricing policies in the context of “consent or pay” models, it is necessary that both legal and economic scholars take a deeper look on specific questions of pricing as well as of possible policy options.

## 5. Conclusion

What are the key findings of this analysis on the functioning of Art. 5(2) DMA? In theory, the obligation can have the potential to limit significantly the data combination abilities of a gatekeeper and, in turn, reduce unfair data advantages. Its actual effects on the

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160 See FN 127. Other approaches, such as strict price caps or price controls imposed by data protection authorities, might also become relevant in future debates; For a rather critical view of such approaches, see e.g. Nettesheim (2024).

161 See e.g. D’Amico et al. (2024, pp. 265–271), Mendelsohn & Färber (2024).

162 See EC (2025b, paras. 89–98).

DMA's goals of contestability and fairness, however, cannot be easily predicted: Even if a gatekeeper was not able to use certain practices anymore, it would remain questionable if these limitations would have any meaningful influence on relevant factors, such as the level of competition, the privacy and autonomy of consumers, or the respective advertising-based business model. Giving consumers a paramount role in this obligation is also an aspect that must be viewed critically: Despite granting consumers more choice, it is neither guaranteed that they will fully understand the additional options nor that they will decide in an effective way that will help to e.g. fulfil better their privacy preferences. This implies that, as the actual number of consumers granting or denying consent is crucial for the potential impact of the regulation, Art. 5(2) DMA might fail to achieve its intended outcomes.

Meta's approach of relying on a "consent or pay" model for reaching compliance with Art. 5(2) DMA is disputed and continues to be investigated by the EC. Even though the EDPB opinion and its presented solution of a "third option" might have clarified certain aspects for implementing such models, it has aggravated at the same time the understanding of the obligation: Any upcoming analysis must take the regulatory interplay of both Art. 5(2) DMA and the EDPB opinion into account. The analytical framework introduced in this paper is a first proposal for understanding better this interplay and that aims to shed more light on important elements which need to be considered, such as different types of purposes or the granularity of consent. Looking closer at the non-compliance investigation, it becomes evident that a regulatory interplay was neither in the focus of Meta nor of the EC. While the final results of the EC's investigation on Meta's initial solution need to be awaited, there are also points in the updated solution that can be criticized and might require further adaptions. At the same time, despite delivering an interesting interpretation of the conditions of Art. 5(2) DMA, the EC's decision on the initial solution lacks any deeper economic reasoning and leaves certain questions unanswered which are of huge relevance for compliance with Art. 5(2) DMA. And even if a compliant solution were to be found, it would still remain unclear whether Art. 5(2) DMA could fulfil its expectations. Thus, compliance questions, along with the ones regarding its functioning and its possible effects, also have to be tackled by researchers to determine the potential success of Art. 5(2) DMA.[163]

Besides of the aspects that were discussed in greater detail here, there are additional relevant topics which will likely receive more attention in the literature. One example is the "hybrid" nature of the obligation: Not only does it aim to solve problems with both contestability and fairness, but it also tries to remedy these problems by strengthening the position of both consumers and competitors.[164] A better understanding of Art. 5(2) DMA might therefore be valuable for on-going discussions in this field, e.g. on the relationship between competition law, data protection law, and consumer policy, or on

[163] Is should not be neglected that Art. 5(2) DMA needs to be understood as only one out of many obligations of the DMA, meaning that interaction effects between all obligations as well as their resulting effects might need to be analyzed in total.

[164] See also Kerber & Zolna (2022a, pp. 222–229) for an analytical framework considering interaction effects between two (or more) market failures as well as tackling these market failures with two (or more) interacting policies.

the role of the DMA among these laws.[165] The “ecosystem” concept might also need to be taken into greater account, as it might be unclear how splitting a data silo into several smaller ones will affect the complex gatekeeper structure, consisting of different products, services and advertising activities, as well as its actual behaviors in each market. As resulting limitations in data will make it harder for gatekeepers to innovate, e.g. in the field of AI, potential goal conflicts of contestability, fairness, and innovation should be examined and, if necessary, resolved with accompanying policies.

Ultimately, the success of Art. 5(2) DMA will very likely depend on the actual behavior of consumers: Its general idea of making any contestability improvements dependent on the actual choices of consumers is, at the very least, optimistic.[166] Granting consumers only more choices but no additional support for their decision-making process puts an effective implementation of the obligation at risk. It can be, undoubtedly, expected that the legal dispute between the EC and Meta will clarify how a gatekeeper needs to offer the specific choice and to obtain consent. These clarifications might, however, lead to even more complex solutions. Another point that should not be forgotten is the legal interplay with the EDPB opinion: As much as considering different types of purposes and offering a highly granular choice might appear reasonable from a legal perspective, it could result in even more obfuscation and cause most consumers to give up on making any well-founded and autonomous decision. Thus, if empowering consumers by giving them more choice resulted in a minority of users exerting their additional rights effectively, Art. 5(2) DMA would remain ineffective.

For the moment, is seems like Art. 5(2) DMA remains with an inner contradiction as, in particular by neglecting the weaknesses of consumers, the two different goals of contestability and fairness are not tackled with a fully integrated and effective approach. Theoretical and empirical research on consumer choices and how they could be further supported (e.g. by reducing the information overload or by simplifying choices) should be therefore a priority. This paper should be clearly understood as a starting point for such research and for any further analysis on this complicated, but promising obligation.

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[165] See in this context e.g. Kerber & Specht-Riemenschneider (2021, pp. 93–95), who discuss how the DMA could become a more integrative regulatory instrument, Botta & Borges (2024), who discuss whether Art. 5(2) DMA represents a “lex specialis”, and D’Amico (2025), who discusses to what extent the understanding of consent in Art. 5(2) DMA interacts and conflicts with the understanding of consent in the GDPR.

[166] If the original intention was in fact to expect consumers to remedy potential market failures with regard to competition, “nudging” solutions should have been included in the obligation. However, such solutions would clearly reduce the autonomy of consumers. See in this context also Graef (2021), Podszun (2022, p. 199), and Demircan (2023, pp. 151–154), who point out general doubts regarding the approach of putting consent in the focus for reaching contestability.

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