

This is an important document.

Pursuant to Section 133(10) of the Data Protection Act, 2018 (“the 2018 Act”), a controller or processor that, without reasonable excuse, fails to comply with (a) a requirement specified in an enforcement notice; or (b) subsection 7, shall be guilty of an offence and shall be liable (i) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (ii) on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or both.

Under Section 133(9) of the 2018 Act, the Data Protection Commission may, subject to Chapter 6, decide to impose an administrative fine on a controller or processor that, without reasonable excuse, fails to comply with a requirement specified in an enforcement notice served on the controller or processor under (inter alia) Section 115(2) of the 2018 Act. If the Data Protection Commission makes a decision to impose an administrative fine aforesaid, it shall, as soon as practicable after making its decision, give the controller or processor concerned a notice in writing informing the said controller or processor of its decision.

### **ENFORCEMENT NOTICE**

To: Meta Platforms Ireland Limited

A private company limited by shares, having its registered office at:

Merrion Road

Dublin

D04 X2K5

IRELAND

(“**MPIL**”)

Dated this the 10<sup>th</sup> day of November 2023

**SECTION A**  
**(List of Abbreviations)**

The following abbreviations appear in this Enforcement Notice:

<b>Abbreviation:</b>	<b>Used to Denote:</b>
“the <b>2018 Act</b> ”	The Data Protection Act, 2018
“ <b>Binding Decision 3/2022</b> ”	The decision adopted by the EDPB on 5 December 2022 pursuant to Articles 65(1)(a) and 62 of the GDPR in respect of certain processing undertaken by MPIL in respect of its Facebook platform.
“ <b>Binding Decision 4/2022</b> ”	The decision adopted by the EDPB on 5 December 2022 pursuant to Articles 65(1)(a) and 62 of the GDPR in respect of certain processing undertaken by MPIL in respect of its Instagram platform.
“ <b>DPC</b> ”	Data Protection Commission, being the national data protection supervisory authority for Ireland
“the <b>DPC Final Decision in respect of the Facebook Platform</b> ”	The decision adopted by the DPC on 31 December 2022 pursuant to Section 113(2)(b) of the Data Protection Act, 2018, and Articles 60 and 65 of the Regulation (EU) 2016/679 of GDPR, and further to Binding Decision 3/2022.
“the <b>DPC Final Decision in respect of the Instagram Platform</b> ”	The decision adopted by the DPC on 31 December 2022 pursuant to Section 113(2)(b) of the Data Protection Act, 2018, and Articles 60 and 65 of the Regulation (EU) 2016/679 of GDPR, and further to Binding Decision 4/2022.
“the <b>DPC’s Final Decisions</b> ”	Together, the DPC Final Decisions in respect of the Facebook and Instagram Platforms, respectively.
“ <b>EDPB</b> ”	The European Data Protection Board, as established under Article 68 GDPR.
“the <b>EDPB’s Binding Decisions</b> ”	Together, Binding Decision 3/2022 and Binding Decision 4/2022
“ <b>GDPR</b> ”	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016.
“ <b>Urgency Decision</b> ”	Urgent Binding Decision 1/2023, as adopted by the EDPB on 27 October 2023 pursuant to Article 66 of the GDPR, a copy of which is Appended hereto at <b>Schedule 1</b> .
The term “ <b>behavioural advertising</b> ” and such capitalised terms as appear in the within Notice have the meaning given to them in the DPC’s Final Decisions, the EDPB’s Binding Decisions or the Urgency Decision, as appropriate. The terms “ <b>Meta’s products</b> ” or “ <b>Meta Products</b> ” shall be taken to mean those products covered by MPIL’s privacy policy as applicable at the relevant time.	

## **SECTION B**

### **(Basis upon which this Enforcement Notice is issued)**

1. This Enforcement Notice is served by the DPC on MPIL, a controller, where the term “controller” bears the meaning set out at Article 4(7) GDPR.
2. The Notice is served:
  - I. Pursuant to Section 133(1) of the 2018 Act and Article 58(2)(f) GDPR;
  - II. In accordance with Section 115(2) of the 2018 Act;
  - III. Further to the earlier exercise by the DPC, by means of the DPC’s Final Decision in respect of the Facebook Platform, of a corrective power pursuant to Section 113(4)(a) of the 2018 Act, being the form of corrective power conferred on the DPC by Article 58(2)(d) GDPR, the content, scope and application of which was described in the said DPC’s Final Decision in respect of the Facebook Platform in the following terms:

“[This] Order requires [MPIL] to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Facebook Terms of Service, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraphs 132 and 133 of [Binding Decision 3/2022]. More specifically, in this regard, [MPIL] is required to take the necessary action to address the EDPB’s finding that Facebook is not entitled to carry out the Processing on the basis of Article 6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of [Binding Decision 3/2022]. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required

to satisfy the conditionality associated with that/those alternative legal basis/bases.”<sup>1</sup>

- IV. Further to the earlier exercise by the DPC, by means of the DPC’s Final Decision in respect of the Instagram Platform, of a corrective power pursuant to Section 113(4)(a) of the 2018 Act, being the form of corrective power conferred on the DPC by Article 58(2)(d) GDPR, the content, scope and application of which was described in the said DPC’s Final Decision in respect of the Instagram Platform in the following terms:

“[This] Order requires [MPIL] to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Instagram Terms of Service, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraphs 132 and 133 of [Binding Decision 3/2022]. More specifically, in this regard, [MPIL] is required to take the necessary action to address the EDPB’s finding that Facebook is not entitled to carry out the Processing on the basis of Article 6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of [Binding Decision 3/2022]. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.”<sup>2</sup>

- V. For the purpose of exercising a follow-on corrective power under and in accordance with Section 115(2) of the 2018 Act, namely, the imposition of a ban on processing as provided for in Article 58(2)(f) GDPR (being also a corrective power referred to in Section 115(1)(b) of the 2018 Act), the

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<sup>1</sup> At paragraph 10.44

<sup>2</sup> At paragraph 417(b)

exercise of such corrective power by the DPC being necessary in order to give effect to (i) the instruction contained in paragraph 324 of the Urgency Decision, being an instruction directed by the EDPB to the DPC; and (ii) findings made by the EDPB in its Urgency Decision, details of which are set out below, and which include, inter alia, a finding that MPIL “did not achieve compliance with the [DPC’s Final Decisions] within the deadline for compliance and is therefore currently in breach of its duty to comply with decisions by supervisory authorities;”<sup>3</sup>

and,

- VI. In circumstances where (i) the Urgency Decision is addressed to the DPC (and others); (ii) the Urgency Decision, and the findings contained therein, are binding upon the DPC pursuant to Article 66 GDPR; and (iii) the DPC is therefore bound to adopt the within “national decision”<sup>4</sup> containing the final measures ordered by the EDPB in accordance with the instruction at paragraph 324 of the Urgency Decision.

## **SECTION C**

### **(Background, findings of the EDPB, and operative provisions)**

1. By means of the DPC Final Decision in respect of the Facebook Platform, the DPC notified MPIL that it was required, amongst other things,

“ ... to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Facebook Terms of Service, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraphs 132 and 133 of the Article 65 Decision. More specifically, in this regard, Facebook is required to take the necessary action to address the EDPB’s finding that Facebook is not entitled to carry out the Processing on the basis of Article

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<sup>3</sup> At paragraph 167. See also paragraph 317.

<sup>4</sup> As described at paragraph 324 of the Urgency Decision.

6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of the Article 65 Decision. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.”<sup>5</sup>

2. By means of the (separate) DPC Final Decision in respect of the Instagram Platform, likewise directed to MPIL, the DPC notified MPIL that it was required, amongst other things,

“ ... to take the necessary action to bring its processing of personal data for the purposes of behavioural advertising (“the Processing”), in the context of the Instagram Terms of Service, into compliance with Article 6(1) GDPR in accordance with the conclusion reached by the EDPB, as recorded at paragraphs 132 and 133 of [Binding Decision 3/2022]. More specifically, in this regard, [MPIL] is required to take the necessary action to address the EDPB’s finding that Facebook is not entitled to carry out the Processing on the basis of Article 6(1)(b) GDPR, taking into account the analysis and views expressed by the EDPB in Section 4.4.2 of [Binding Decision 3/2022]. Such action may include, but is not limited to, the identification of an appropriate alternative legal basis, in Article 6(1) GDPR, for the Processing together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.”<sup>6</sup>

3. The DPC’s Final Decisions were adopted on 31 December 2022 pursuant to Section 113(2)(b) of the Data Protection Act, 2018 and Articles 60 and 65 of the GDPR, and further to the EDPB’s Binding Decisions.
4. By means of the Urgency Decision, the EDPB subsequently found as follows:

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<sup>5</sup> At paragraph 10.44.

<sup>6</sup> At paragraph 417(b).

- (1) That MPIL “did not achieve compliance with the [DPC’s Final Decisions] within the deadline for compliance and is therefore currently in breach of its duty to comply with decisions by supervisory authorities”<sup>7</sup>, namely, the DPC.
- (2) That MPIL “is inappropriately relying on Article 6(1)(b) GDPR to process location data and advertisement interaction data collected on its products for the purpose of behavioural advertising.”<sup>8</sup>
- (3) That MPIL “did not provide sufficient information to explain why other categories of data processed by [MPIL] do not amount to behavioural data, such as device data and advertisements shown. In this respect, the EDPB finds, in line with the view of the [DPC], that in relation to device data, if [MPIL] would use device data to identify different market segments, this would constitute a processing for behavioural advertising for which it would rely inappropriately on Article 6(1)(b), infringing Article 6(1) GDPR.”<sup>9</sup>
- (4) That “there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR for processing of personal data, including location data and advertisement interaction data collected, on Meta’s products for behavioural advertising purposes.”<sup>10</sup>
- (5) That MPIL “inappropriately relies on Article 6(1)(f) GDPR to process personal data collected on its products for the purpose of behavioural advertising.”<sup>11</sup>
- (6) That “there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR for processing personal data collected on Meta’s products for behavioural advertising purposes.”<sup>12</sup>

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<sup>7</sup> At paragraph 167. See also paragraph 317.

<sup>8</sup> At paragraph 98. See also paragraph 315.

<sup>9</sup> At paragraph 99. See also paragraph 315.

<sup>10</sup> At paragraph 152. See also paragraph 315.

<sup>11</sup> At paragraph 148. See also paragraph 316.

<sup>12</sup> At paragraph 153. See also paragraph 316.

- (7) That “failing to put an end to the processing activities at stake and to enforce the [DPC’s Final Decisions] exposes data subjects to a risk of serious and irreparable harm.”<sup>13</sup>
- (8) That “the regular cooperation or consistency mechanisms cannot be applied in their usual manner, and that due to the risk of serious and irreparable harm without urgent final measures, there is a need to derogate from the regular cooperation and consistency mechanisms to order final measures due to the urgency of the situation.”<sup>14</sup>
- (9) That “there is urgency for [the DPC] to order final measures in this case”<sup>15</sup> in circumstances where “further enforcement measures are necessary.”<sup>16</sup>
- (10) That “the presumption set by Article 61(8) GDPR is applicable in this specific case. Consequently, the EDPB finds that urgency may be presumed on the basis of Article 61(8) GDPR, which further corroborates the need to derogate from the regular cooperation and consistency mechanisms.”<sup>17</sup>
- (11) That it is “appropriate, necessary and proportionate to order final measures consisting in a ban on processing, to be adopted on the basis of Article 58(1)(f) GDPR”.<sup>18</sup>
- (12) That “in this particular case, it is proportionate for the ban on processing to be effective one week after the notification of the final measures to the controller.”<sup>19</sup>
- (13) That “the ban should refer to Meta IE’s processing of personal data collected on Meta’s products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR. The processing activities to which the

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<sup>13</sup> At paragraph 205. See also paragraph 318.

<sup>14</sup> At paragraph 220. See also paragraph 318.

<sup>15</sup> At paragraph 258. See also paragraph 320.

<sup>16</sup> At paragraph 277. See also paragraph 320.

<sup>17</sup> At paragraph 257. See also paragraph 319.

<sup>18</sup> At paragraph 296. See also paragraph 321.

<sup>19</sup> At paragraph 301. See also paragraph 322.



ban refers are: (i) the processing of personal data, including location data and advertisement interaction data, collected on Meta’s products for behavioural advertising purposes, having established in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR; (ii) processing of personal data collected on Meta’s products for behavioural advertising purposes, having ascertained in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR.”<sup>20</sup>

(14) That “the appropriate territorial scope is for the final measures to be applicable throughout the entire EEA.”<sup>21</sup>

(15) That “the addressee of the final measures consisting of a ban on processing should be [MPIL], which shall take the necessary measures to ensure compliance with the decision as regards processing activities in the context of all its establishments in the EEA.”<sup>22</sup>

(16) That “the national decision needs to be adopted by the IE SA without undue delay and at the latest by two weeks after the EDPB has notified its urgent binding decision to the IE SA and to all the CSAs.”<sup>23</sup>

5. Having regard to its findings, to include those identified above, the EDPB issued an instruction to the DPC by means of its Urgency Decision, expressed in the following terms:

“The EDPB instructs [the DPC] to adopt a national decision containing the final measures ordered by the EDPB without undue delay and at the latest by two weeks after the EDPB has notified its urgent binding decision to [the DPC] and to all the CSAs. The [DPC] shall notify the national decision, attaching the urgent binding decision of the EDPB, to [MPIL] without undue delay.”<sup>24</sup>

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<sup>20</sup> At paragraph 302.

<sup>21</sup> At paragraph 303.

<sup>22</sup> At paragraph 304.

<sup>23</sup> At paragraph 312.

<sup>24</sup> At paragraph 324.

6. As noted above, the “national decision” to be adopted by the DPC is one “consisting in a ban on processing, to be adopted on the basis of Article 58(1)(f) GDPR” and referring to “[MPIL’s] processing of personal data collected on Meta’s products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR. The processing activities to which the ban is to refer are: (i) the processing of personal data, including location data and advertisement interaction data, collected on Meta’s products for behavioural advertising purposes, having established in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR; (ii) processing of personal data collected on Meta’s products for behavioural advertising purposes, having ascertained in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR.”<sup>25</sup>
7. Noting its obligations under Article 65(6), GDPR, and having regard to the provisions of Sections 115(2) and 133 of the 2018 Act, the within notice constitutes the national decision referenced in the Urgency Decision and is issued by the DPC (i) to give effect to the Urgency Decision, and, in particular, to comply with the instruction given at paragraph 324 thereof; and (ii) for the purposes of exercising the power conferred on me by Article 58(2)(f) GDPR. Accordingly, I hereby impose (and I require MPIL to implement and give effect to) a ban on processing by MPIL of personal data collected on Meta’s products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR.
8. As instructed by the EDPB, and having regard to the EDPB’s findings of urgency as referred to above, such ban shall become effective one week after the notification of same to MPIL, i.e. one week after service of this national decision on MPIL.
9. In accordance with the findings and direction of the EDPB as identified above, the processing activities to which the said ban on processing refers are:
  - (1) the processing of personal data, including location data and advertisement interaction data, collected on Meta’s products for behavioural advertising purposes, the infringement of Article 6(1) GDPR having established arising from inappropriate reliance by MPIL on Article 6(1)(b) GDPR; and,

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<sup>25</sup> At paragraph 302. See also paragraph 323.

- (2) the processing of personal data collected on Meta's products for behavioural advertising purposes, the infringement of Article 6(1) GDPR having ascertained in this respect arising from inappropriate reliance by MPIL on Article 6(1)(f) GDPR.

### **Notification of Compliance**

Having complied with the requirements contained in the within notice, and in accordance with subsections 133(7)(a)(i) and (ii) of the 2018 Act, MPIL shall, as soon as may be, and in any event not more than 28 days after such compliance, notify the DPC and any data subject concerned of the steps taken to comply with the within notice.

### **Consequences arising from any Failure to Comply**

MPIL's attention is drawn to Sections 133(9) and 133(10) of the 2018 Act, details of which are set out on the first page of this notice, and which provide:

- (1) In the case of Section 113(9), for the making of a decision by the DPC to impose an administrative fine on a controller or processor that, without reasonable excuse, fails to comply with a requirement specified in an enforcement notice served on the controller or processor under Section 115(2) of the 2018 Act; and,
- (2) In the case of Section 113(10), that a controller or processor that, without reasonable excuse, fails to comply with a requirement specified in an enforcement notice shall be guilty of an offence and shall be liable (i) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (ii) on conviction on indictment, to a fine not exceeding €250,000 or imprisonment for a term not exceeding 5 years or both.

### **Right of Appeal**

Pursuant to Section 150(1) of the 2018 Act, MPIL may, within 28 days from the date on which the within notice is served, appeal against a requirement specified in the notice.

Signed:

A handwritten signature in black ink, appearing to read 'Helen Dixon', is written above a horizontal line.

Helen Dixon,  
Commissioner for Data Protection

Dated this 10<sup>th</sup> day of November 2023

**SCHEDULE 1**

**(Urgent Binding Decision 1/2023, adopted by the EDPB on 27 October 2023)**

# Binding decision of the Board (Art. 66)



**Urgent Binding Decision 01/2023 requested by the  
Norwegian SA for the ordering of final measures regarding  
Meta Platforms Ireland Ltd (Art. 66(2) GDPR)**

**Adopted on 27 October 2023**

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## The European Data Protection Board

Having regard to Article 66 of Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter ‘**GDPR**’)<sup>1</sup>,

Having regard to the EEA Agreement and in particular to Annex XI and Protocol 37 thereof, as amended by the Decision of the EEA joint Committee No 154/2018 of 6 July 2018<sup>2</sup>,

Having regard to Articles 11, 13, 23 and 39 of the EDPB Rules of Procedure<sup>3</sup>, hereinafter the ‘**EDPB RoP**’.

Whereas:

(1) The main role of the European Data Protection Board (hereinafter the ‘**EDPB**’ or the ‘**Board**’) is to ensure the consistent application of the GDPR throughout the EEA. To this effect, it can adopt opinions and binding decisions under different circumstances described under Articles 63 to 66 GDPR, within the consistency mechanism. The GDPR also established a cooperation mechanism, as it follows from Article 60 GDPR that the lead supervisory authority (hereinafter ‘**LSA**’) shall cooperate with the other supervisory authorities concerned (hereinafter ‘**CSAs**’) in an endeavour to reach consensus.

(2) Pursuant to Article 66(1) GDPR, in exceptional circumstances, where a supervisory authority (‘**SA**’) considers that there is an urgent need to act in order to protect the rights and freedoms of data subjects, it may, by way of derogation from the consistency mechanism referred to in Articles 63, 64 and 65 GDPR or the procedure referred to in Article 60 GDPR, immediately adopt provisional measures intended to produce legal effects on its own territory with a specified period of validity which shall not exceed three months.

(3) In accordance with Article 66(2) GDPR, where a supervisory authority has taken a measure pursuant to Article 66(1) GDPR and considers that final measures need urgently be adopted, it may request an urgent opinion or an urgent binding decision from the Board, giving reasons for requesting such opinion or decision.

(4) In accordance with Article 13(2) EDPB RoP, the supervisory authority requesting an urgent binding decision shall submit any relevant document. When necessary, the documents submitted by the competent supervisory authority shall be translated into English by the EDPB Secretariat. Once the Chair and the competent supervisory authority have decided that the file is complete, it is communicated via the EDPB Secretariat to the members of the Board without undue delay.

(5) Pursuant to Article 66(4) GDPR and Article 13(1) EDPB RoP, the urgent binding decision of the EDPB shall be adopted by simple majority of the members of the EDPB within two weeks following the decision by the Chair and the competent supervisory authority that the file is complete.

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<sup>1</sup> OJ L 119, 4.5.2016, p. 1.

<sup>2</sup> References to ‘Member States’ made throughout this decision should be understood as references to ‘EEA Member States’. References to ‘EU’ should be understood, where relevant, as references to ‘EEA’.

<sup>3</sup> EDPB Rules of Procedure, adopted on 25 May 2018, as last modified and adopted on 6 April 2022.



# 1 SUMMARY OF FACTS

1. This document contains an urgent binding decision adopted by the EDPB pursuant to Article 66(2) GDPR, following a request made by the Norwegian supervisory authority - 'Datatilsynet' (hereinafter, the '**NO SA**') within the framework of the urgency procedure under Article 66 GDPR.

## 1.1 Summary of the relevant events

2. On 31 December 2022, the Irish supervisory authority ('Data Protection Commission', hereinafter the '**IE SA**') issued a final decision concerning the inquiry IN-18-5-5 (hereinafter, the '**IE SA FB Decision**', related to the Facebook Service) and a final decision concerning the inquiry IN-18-5-7 (hereinafter, the '**IE SA IG Decision**', related to the Instagram Service) in which it found that Meta Platforms Ireland Ltd (hereinafter, '**Meta IE**') did not rely on a valid legal basis for processing personal data for behavioural advertising purposes<sup>4</sup>. These two decisions (hereinafter, collectively, the '**IE SA Decisions**') were adopted on the basis of EDPB Binding Decisions 3/2022 and 4/2022, adopted by the EDPB pursuant to Article 65(1) (a) GDPR on 5 December 2022 (hereinafter, the '**EDPB Binding Decisions**')<sup>5</sup>.
3. Each of the IE SA Decisions concluded that Meta IE was not entitled to rely on Article 6(1)(b) GDPR to carry out processing of personal data for the purpose of behavioural advertising in the context of the Facebook Terms of Service / Instagram Terms of Use<sup>6</sup> and included an order, addressed to Meta IE, to bring its processing of personal data for behavioural advertising purposes into compliance with Article 6(1) GDPR within three months<sup>7</sup>.
4. On 5 April 2023, the IE SA shared with the CSAs<sup>8</sup>, using the Internal Market Information system (hereinafter, '**IMI**')<sup>9</sup>, Meta IE's compliance reports regarding the Facebook Service (IN-18-5-5) and the Instagram Service (IN-18-5-7) (hereinafter collectively, the '**Meta IE Compliance Reports**' or the '**Compliance Reports**')<sup>10</sup> and supporting material that Meta IE submitted to the IE SA on 3 April 2023

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<sup>4</sup> Decision of the Irish Data Protection Commission of 31 December 2022, DPC Inquiry Reference: IN-18-5-5, concerning a complaint directed against Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) in respect of the Facebook Service (the '**IE SA FB Decision**'); Decision of the Irish Data Protection Commission of 31 December 2022, DPC Inquiry Reference: IN-18-5-7, concerning a complaint directed against Meta Platforms Ireland Limited (formerly Facebook Ireland Limited) in respect of the Instagram Service (the '**IE SA IG Decision**').  
<sup>5</sup> EDPB Binding Decision 3/2022, adopted on 05 December 2022 (hereinafter '**EDPB Binding Decision 3/2022**'); EDPB Binding Decision 4/2022 adopted on 05 December 2022 (hereinafter '**EDPB Binding Decision 4/2022**'). In each of these binding decisions the EDPB instructed the IE SA to alter its Finding 2 of its Draft Decision, which concluded that Meta IE may rely on Art. 6(1)(b) GDPR in the context of its offering of the Facebook Terms of Service or the Instagram Terms of Use and to include an infringement of Art. 6(1) GDPR based on the shortcomings that the EDPB has identified in the EDPB Binding Decisions. The reasoning of the EDPB is available in paragraphs 94-133 and 484 of EDPB Binding Decision 3/2022 and in paragraphs 97-137 and 451 of EDPB Binding Decision 4/2022.

<sup>6</sup> IE SA FB Decision, Finding 2, p. 49; IE SA IG Decision, Finding 2, p. 49.

<sup>7</sup> IE SA FB Decision, paragraphs 8.8, 10.44; IE SA IG Decision, paragraphs 212, 417. The deadline for compliance with the orders in the IE SA Decisions fell on 5 April 2023.

<sup>8</sup> In the cases leading to the adoption of the IE SA Decisions, all EEA SAs were CSAs pursuant to the GDPR (IE SA FB Decision, Schedule 1, paragraph 1.10; IE SA IG Decision, Appendix 1 - Schedule 1, paragraph 6).

<sup>9</sup> More specifically, the IE SA shared on 5 April 2023 the Meta IE Compliance Reports via two IMI workflows, one for the IE SA FB Decision and one for the IE SA IG Decision respectively (hereinafter, collectively, the '**IE SA IMI Informal Consultations**' or the '**IMI Informal Consultations**').

<sup>10</sup> Meta IE's Compliance Report regarding the Facebook Service (IN-18-5-5) of 3 April 2023 (hereinafter, '**Meta IE Compliance Report on IE SA FB Decision**'), paragraphs 2.1 and 2.3 and Meta IE's Compliance Report

with the aim of showing compliance with the IE SA Decisions. In its Compliance Reports, Meta IE indicated that it changed its legal basis for the majority<sup>11</sup> of its processing of personal data for behavioural advertising purposes from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR as of 5 April 2023, which was the deadline for compliance with the IE SA Decisions<sup>12</sup>. Specifically for reliance on Article 6(1)(f) GDPR, Meta IE provided legitimate interests assessments as supporting materials<sup>13</sup> (hereinafter collectively, the '**Meta IE Legitimate Interests Assessments**'). Without providing its own analysis on the Compliance Reports, the IE SA invited all the CSAs to assess the extent to which the measures implemented by Meta IE achieved compliance with the orders in the IE SA Decisions and welcomed feedback from the CSAs by 5 May 2023. The deadline was later on extended to 15 May 2023<sup>14</sup>.

5. On the same day, the NO SA emailed the IE SA in respect of Meta IE's change of legal basis to legitimate interest, expressing strong doubts as to whether this legal basis could be validly relied on and asking for the IE SA's preliminary view on this.
6. On 6 April 2023, upon request of the IE SA, the EDPB Secretariat circulated a message from the IE SA to the members of the Enforcement expert subgroup within the EDPB. Such message aimed to attract all CSAs' attention to the IE SA IMI Informal Consultations circulated by the IE SA via IMI<sup>15</sup>. On the same day, the IE SA replied to the NO SA's email of 5 April 2023, pointing to the message from the IE SA to the CSAs circulated by the EDPB Secretariat.
7. On 13 April 2023, the IE SA shared with the CSAs via IMI two further letters from Meta IE (one on the IE SA FB Decision and one on the IE SA IG Decision) dated 12 April 2023, providing further information on its compliance efforts in relation to the IE SA Decisions.
8. On 14 April 2023, the NO SA responded negatively to a meeting request from Meta IE dated 28 March 2023, pointing out that the case is handled by the IE SA as the LSA.
9. Some CSAs asked for clarifications on the procedure being followed, for example on the reasons why the IE SA did not at that point share its assessment of Meta IE's compliance with the orders in the IE SA Decisions. The IE SA clarified, first, that the assessment of compliance with the orders in the IE SA Decisions would be carried out on a joint basis, more specifically by way of an assessment carried out by the CSAs at the same time as the LSA, and that this sequencing of the process was aimed to ensure a timely and consistent approach, in line with the deadline for compliance determined by the EDPB,

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regarding the Instagram Service (IN-18-5-7) of 3 April 2023 (hereinafter, '**Meta IE Compliance Report on IE SA IG Decision**'), paragraphs 2.1 and 2.3.

<sup>11</sup> According to the Compliance Reports, Meta IE continued to process limited categories of non-behavioural information to show advertising on Facebook or Instagram based on Art. 6 (1) (b) GDPR. See Meta IE Compliance Report on IE SA FB Decision, paragraphs 3.1.3 and 5.8.2, and Meta IE Compliance Report on IE SA IG Decision, paragraphs 3.1.3 and 5.8.2.

<sup>12</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 2.1; Meta IE Compliance Report on IE SA IG Decision, paragraph 2.1.

<sup>13</sup> Meta IE's Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision.

<sup>14</sup> Following requests from two of the CSAs, the deadline to share feedback was extended until 15 May 2023. In fact, the IE SA waited for a few more days, giving the opportunity to further CSAs to share their views.

<sup>15</sup> In the same message, the IE SA also specified: 'As you will also recall, IE SA confirmed, during the Article 65 [GDPR] discussions, that any assessment of compliance with the orders made [in the IE SA Decisions] would be carried out on a joint basis, the same as in previous cases, whereby the IE SA together with all CSAs would jointly assess the extent to which any action taken has achieved compliance with the terms of the order'.

formulated on the basis that urgent action was required to be taken by Meta IE to address the infringement<sup>16</sup>. The IE SA also clarified that it would not issue a new draft decision<sup>17</sup>.

10. Several CSAs provided their feedback on the way in which Meta IE complied with the IE SA Decisions.
- The Österreichische Datenschutzbehörde (Austrian supervisory authority - hereinafter, the '**AT SA**') shared its views that processing operations in connection with behavioural advertising could not be based on Article 6(1) (f) GDPR<sup>18</sup>.
  - The Integritetsskyddsmyndigheten (Swedish supervisory authority - hereinafter, the '**SE SA**') stressed the importance of adhering to any applicable EDPB guidelines<sup>19</sup>.
  - The Hamburgische Beauftragte für Datenschutz und Informationsfreiheit (hereinafter, the '**DE Hamburg SA**') shared its views stating that 'at this stage, consent would be the only possible legal basis to comply with' the orders in the IE SA Decisions, and expressing concerns regarding the indications that sensitive data are processed without consent and regarding the processing activities for which Meta IE continued to rely upon Article 6(1)(b) GDPR<sup>20</sup>.
  - The Autoriteit Persoonsgegevens (Dutch supervisory authority - hereinafter the '**NL SA**') shared its views that 'the interests listed by [Meta IE] in the/its Legitimate Interest Assessment cannot be considered as "legitimate interests" in the sense of Article 6(1) (f) GDPR', the processing of personal data is not 'necessary' for the purpose of the declared interests, and the 'fundamental rights and freedoms of the data subject override the interest of [Meta IE] and the third parties involved'<sup>21</sup>.
  - The NO SA transmitted on 5 May 2023 a formal mutual assistance request under Article 61 (1) GDPR<sup>22</sup> (hereinafter, the '**NO SA Mutual Assistance Request**') to the LSA using the dedicated

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<sup>16</sup> These clarifications were made by the IE SA on 26 April 2023 as a reply to a question of the FR SA of 25 April 2023 made in the IE SA IMI Informal Consultations.

<sup>17</sup> The SE SA asked for clarification on the procedure being followed on 4 May 2023 via the IMI Informal Consultations. The IE SA replied on 5 May 2023.

<sup>18</sup> These views were shared as a reply to the IE SA IMI informal consultation concerning only the IE SA FB Decision (Comment of the AT SA of 18 April 2023), see footnote 9. The AT SA also indicated that a balancing test was also difficult because the term 'Behavioural Advertising Processing' was not defined in the Privacy Policy and what this actually entailed was not entirely clear. The AT SA also made reference to the reasoning in its relevant and reasoned objection to the IE SA's draft decision in the procedure leading to the adoption of the IE SA FB Decision.

<sup>19</sup> Comment of the SE SA of 4 May 2023 as a reply to the IE SA IMI Informal Consultations, see footnote 9.

<sup>20</sup> Comment of the DE Hamburg SA of 4 May 2023 as a reply to the IE SA IMI Informal Consultations, see footnote 9. In its comments, the DE Hamburg SA stated that there 'are strong indications that sensitive data stemming from different sources are processed without consent against the Art. 9 (1) GDPR' and that 'consent [is] the only possible legal basis for that kind of processing' and made further remarks on this issue. The DE Hamburg SA also stated that the 'processing described or indicated in the updated Terms of Use and [Meta IE] Privacy Notice cannot be based on Art. 6 (1) (b) GDPR'.

<sup>21</sup> Comment of the NL SA of 4 May 2023, paragraph 3 - attached as a reply to the IE SA IMI Informal Consultations, see footnote 9. The NL SA, in its comments, also 'urgently asks the [IE SA] to swiftly undertake adequate actions in order to cease the continuous illegality of the invasive processing of personal data of millions of users' (paragraph 4). In addition to providing detailed views on the applicability of Art. 6(1)(f) GDPR (paragraphs 8-63), the NL SA also stressed its concerns about the processing of special categories of data and about the compatibility of the processing of the amount of data at stake with the principles of data minimisation and purpose limitation (paragraphs 6-7).

<sup>22</sup> Comment of the NO SA of 5 May 2023 as a reply to the IE SA IMI Informal Consultations (see footnote 9), attaching a copy of the NO SA Mutual Assistance Request introduced on 5 May 2023.

IMI flow<sup>23</sup>. The NO SA requested the IE SA to (1) issue a temporary ban on Meta IE's processing of personal data for behavioural advertising purposes based on Article 6(1)(f) GDPR and (2) share a timeline with the NO SA and the CSAs specifying how the IE SA will ensure in an expedient manner that Meta IE complies with Article 6(1) GDPR.

- The Agencia Española de Protección de Datos (Spanish supervisory authority - hereinafter the 'ES SA') shared its views stating that 'the submitted Legitimate Interest Assessment does not demonstrate that the processing carried out by [Meta IE] with the purpose of behavioural advertisement be based on Article 6(1)(f) GDPR since it does not meet the requirements of this Article'<sup>24</sup>.
- The Tietosuojavaltuutetun toimisto (Finnish supervisory authority - hereinafter the 'FI SA') shared its views on 15 May 2023 that 'based on the information available, it does not seem that [Meta IE] would have brought all its processing activities into compliance with the GDPR and would meet the requirements of the GDPR'<sup>25</sup>.
- In addition, the Garante per la protezione dei dati personali (Italian supervisory authority - hereinafter, the 'IT SA') shared its views on 23 May 2023 saying that '[Meta IE's] proposal is not such as to adequately implement the order to bring the processing into compliance insofar as it misclassifies part of the user-related information and thereby applies the legal basis of

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<sup>23</sup> The formal NO SA Mutual Assistance Request contained two requests labelled as follows: 'Pursuant to Art. 61(1) GDPR, the following requests are made: i. We kindly request that the IE SA issues a temporary ban on [Meta IE]'s processing of personal data for behavioural advertising purposes on Facebook and Instagram based on Art. 6(1)(f) GDPR, in accordance with Art. 58(2)(f) GDPR. The ban should last until the lead and concerned supervisory authorities are satisfied that [Meta IE] has provided adequate and sufficient commitments to ensure compliance with Art. 6(1) GDPR and Art. 21 GDPR, in line with Art. 31 GDPR. This will give us the opportunity to further engage with [Meta IE] and make sure that it commits to fully respect its obligations under the GDPR, while preventing any further risks for data subjects stemming from [Meta IE]'s non-compliant behavioural advertising practices. Please note that in our view, behavioural advertising includes any activities where advertising is targeted on the basis of a data subject's behaviour or movements, including advertising based on perceived location'. ii. 'We kindly request that the IE SA shares a timeline specifying how it will ensure in an expedient manner that [Meta IE] complies with Art. 6(1) GDPR. We should be grateful if the IE SA, by 5 June 2023, would share the timeline and confirm that a temporary ban will be issued. If the IE SA is not in a position to comply with our request regarding [Meta IE], we may need to consider our options in relation to the adoption of provisional measures in Norway pursuant to Art. 66 GDPR. We hope that this will not be necessary and look forward to cooperating further with the IE SA within the framework of the cooperation mechanisms set out in Chapter VII GDPR'.

<sup>24</sup> These views were shared as a reply in the IE SA IMI informal consultation concerning only the IE SA IG Decision (Comment of the ES SA of 12 May 2023). More specifically, the ES SA argued that the interests listed by Meta IE are 'purely economic or commercial interests' of Meta IE or third parties, and that in respect of the condition of necessity of the processing 'the direct link between the processing and the legitimate interest should be established and prove that there are no less intrusive alternatives for the data subjects that could serve the interest equally effectively' (p. 4). The ES SA also noted some shortcomings in the balancing test carried out by Meta IE (Comment of the ES SA of 12 May 2023, p. 5).

<sup>25</sup> Comment of the FI SA of 15 May 2023 as a reply to the IE SA IMI Informal Consultations (see footnote 9). More specifically, the FI SA expressed doubts about legitimate interest being the most suitable legal basis in the case at hand and argued that the Legitimate Interests Assessment carried out by Meta IE 'seems to be rather one-sided and superficial and fails to convince why the interests of [Meta IE] or third parties should override the interests and fundamental rights of the data subjects' (Comment of the FI SA of 15 May 2023, p. 2) and 'fails to take duly into consideration the volume of the processing and the high number of users of the said services' (Comment of the FI SA of 15 May 2023, p. 2-3). The FI SA also noted that certain categories of personal data seem to still be unlawfully collected for behavioural advertising purposes under Art. 6(1)(b) GDPR (Comment of the FI SA of 15 May 2023, p. 2).

contractual performance under Article 6(1)(b) GDPR to the serving of ads which, actually, are behavioural in nature'<sup>26</sup>; the IT SA also highlighted some concerns concerning the switch to legitimate interest for the other processing activities for behavioural advertising purposes<sup>27</sup>.

11. The IE SA shared with Meta IE the feedback received from the CSAs and invited Meta IE to provide submissions on these views by 2 June 2023<sup>28</sup>.
12. On 30 May 2023, the NL SA sent the IE SA a request for mutual assistance under Article 61 GDPR (hereinafter, the '**NL SA Mutual Assistance Request**') asking the IE SA to provide its conclusion as to whether Meta IE could rely on Article 6 (1) (f) GDPR, its conclusion as to whether Meta IE complies with the IE SA Decisions and as to a timeframe, which appropriate and expedient action will be taken to ensure that Meta IE acts in compliance with Article 6 GDPR<sup>29</sup>.
13. On 31 May 2023, the IE SA provided an update to all CSAs via the IE SA IMI Informal Consultations (hereinafter, the '**IE SA Update to CSAs of 31 May 2023**', informing them about the NL SA Mutual Assistance Request and highlighting that it will be in a position to complete its own assessment of the Meta IE Compliance Reports and share its assessment with the NO SA and NL SA (who lodged Article 61 GDPR requests) and all other CSAs by the end of June 2023. In particular, the IE SA indicated that they had 'received all of the assessments from CSAs' and 'forwarded them to [Meta IE] for it to consider the views expressed and to detail any changes that it proposes to implement on foot of the CSA assessments'. Furthermore, the IE SA stated that it will 'complete its own assessment of [Meta IE]'s compliance reports' after receiving Meta IE's response. The IE SA also stated 'it will be in a position to complete its own assessment of [Meta IE]'s compliance reports and to share its assessment with the Norwegian and Dutch supervisory authorities (both of which have lodged Article 61 requests for mutual assistance) and with all other CSAs by the end of June 2023'.
14. Also, on 31 May 2023, Meta IE sent a letter to the IE SA providing its views and comments on the process that was being followed by the IE SA and asking for an extension of its deadline to provide a reply. In this context, it also provided some comments to the IE SA on the CSAs' feedback and some preliminary comments on the requests for urgent enforcement action from some CSAs.

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<sup>26</sup> Comment of the IT SA of 23 May 2023 as a reply to the IE SA IMI Informal Consultations (see footnote 9). As indicated in footnote 11, Meta IE indicated in its Compliance Reports the fact that it continued to process some data under Art. 6(1)(b) GDPR. The IT SA argued in this respect that '[Meta IE]'s distinction between non-behavioural and behavioural advertising can be said to be artificial and based merely on language' (Comment of the IT SA of 23 May 2023, p. 1)

<sup>27</sup> Comment of the IT SA of 23 May 2023 as a reply to the IE SA IMI Informal Consultations (see footnote 9). More specifically, according to the IT SA, 'it is as if the controller was shifting the burden of proof regarding legitimate interest as the legal basis of processing on the data subjects – who conversely should be called into play as key actors in the two subsequent steps of the legitimate interest test, i.e. when assessing the necessity of the processing and performing the required balancing exercise' (Comment of the IT SA of 23 May 2023, p. 2). The IT SA also underlined that 'the processing operations underpinning the use of Online Behavioural Advertising should more appropriately be grounded in consent as a legal basis within the meaning of Art. 6(1) (a) GDPR' (p.3).

<sup>28</sup> On 12 May 2023 and 16 May 2023, the IE SA sent two letters to Meta IE, providing Meta IE with the first replies received from CSAs informing Meta IE that some CSAs requested an extension of time to provide a response. On 25 May 2023, the IE SA transmitted to Meta IE the latest comments from CSAs with respect to the way in which Meta IE complied with the IE SA Decisions. The IE SA invited Meta IE to provide submissions by 2 June COB. On 26 May 2023, the IE SA shared an update with all CSAs, informing them that their responses were forwarded to Meta IE, whose response was awaited by 2 June 2023.

<sup>29</sup> The IE SA provided a reply on 31 May 2023. On the same day, the IE SA provided an update to CSAs in the IMI Informal Consultations, described in the following paragraph.

15. On 2 June 2023, the IE SA provided a reply to the NO SA Mutual Assistance Request. In the notification form used, the IE SA stated that it could not comply with the request (by checking a pre-code text box), and invited the NO SA to look at the 'detailed response uploaded by the [IE SA]' in the IE SA IMI Informal Consultations (see above, paragraph 13).
16. On 9 June 2023, the NO SA further replied to the IE SA, via the IE SA IMI flow relating to the NO SA Mutual Assistance Request, asking whether the IE SA could 'share their preliminary thoughts or non-bindingly indicate whether [it] may potentially be inclined to follow [the NO SA Mutual Assistance Request]'. In the same message the NO SA indicated that it would in any case await the IE SA's response towards the end of June.
17. On 13 June 2023, the IE SA informed all CSAs via the IE SA IMI Informal Consultations that it would await the judgment of the Court of Justice of the European Union in Case C-252/21 (*Meta Platforms Inc. v Bundeskartellamt*) (hereinafter, the '**CJEU Bundeskartellamt Judgment**') before sharing its assessment of the Meta IE Compliance Reports<sup>30</sup>. The IE SA, noting the NO SA Mutual Assistance Request and the NL SA Mutual Assistance Request, indicated their intention to finalise their assessment as soon as possible after the CJEU Bundeskartellamt Judgment expected on 4 July 2023.
18. On 14 June 2023, the IE SA sent a letter to Meta IE replying to its letter of 31 May 2023. The IE SA explained its intention to wait for the CJEU Bundeskartellamt Judgment before circulating its provisional assessment of the steps taken by Meta IE in purported compliance with the orders in the IE SA Decisions, as well as the expected next steps leading to the issuance of the final outcome of the assessment of compliance. In the same letter, the IE SA informed Meta IE that it no longer required it to make submissions in reply to the CSAs' initial observations.
19. On 21 June 2023, Meta IE shared with the IE SA its views on the concerns raised by some of the CSAs and regarding potential urgent proceedings. On 23 June 2023, the IE SA shared via the IMI Informal Consultations the communication received from Meta IE on 21 June 2023. The IE SA stated that Meta IE specified that this communication is without prejudice to Meta IE's position that it brought its processing into compliance with the orders in the IE SA Decisions.
20. On 30 June 2023, Meta IE shared by letter additional information with the IE SA regarding the IE SA's proposed compliance assessment. In this letter, Meta IE outlined its views on the next steps envisaged by the IE SA and provided information and arguments on what it considered to be misunderstandings underpinning the views provided by the CSAs on the Meta IE Compliance Reports<sup>31</sup>.
21. On 4 July 2023, the Court of Justice of the European Union delivered the CJEU Bundeskartellamt Judgment<sup>32</sup>. On 6 July 2023, the IE SA indicated to all the CSAs via the IE SA IMI Informal Consultations

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<sup>30</sup> The CJEU had just announced that it would deliver the judgment before the IE SA gave this update to the CSAs.

<sup>31</sup> Letter from Meta IE to the IE SA of 30 June 2023. Meta IE's comments on the next steps envisaged by the IE SA are available in paragraphs 1-3 of this letter. Meta IE also provided clarifications, information and arguments on what it considered to be misunderstandings underpinning the views provided by the CSAs on the Meta IE Compliance Reports in paragraph 7. By way of example, Meta IE stated that it 'does not engage in a "balancing" exercise on receipt of a valid objection', that the IE SA Decisions only apply to processing for behavioural advertising purposes (and not to processing of non-behavioural information for advertising purposes), and that the assessment of 'Behavioural Advertising Processing' only concerns data relating to activity on Facebook and Instagram (on-platform data). Meta IE also clarified that it relies on Art. 6(1)(a) GDPR to process information provided to Meta IE by third party advertising partners ('off-platform data') for the purposes of showing personalised advertisements.

<sup>32</sup> Judgment of the Court of Justice of the European Union of 4 July 2023, *Meta Platforms Inc. v Bundeskartellamt*, C-252/21, EU:C:2023:537.

that it was considering such judgment in the context of finalising its provisional assessment of the steps taken by Meta IE in purported compliance with the IE SA Decisions<sup>33</sup>.

22. On 11 July 2023, the IE SA issued a provisional position paper ('**IE SA Provisional Position Paper**') in which it preliminarily concluded that Meta IE had not complied with the orders in the IE SA Decisions, and shared it with the CSAs alongside a letter dated 30 June 2023 received from Meta IE<sup>34</sup>. The IE SA invited the CSAs to share their views on the IE SA Provisional Position Paper by 21 July 2023<sup>35</sup>.
23. Between 20 July 2023 and 21 July 2023, two CSAs shared their views on the IE SA Provisional Position Paper via the IE SA IMI Informal Consultations<sup>36</sup>. The IE SA shared these CSAs' views with Meta IE on 21 July 2023.
24. On 14 July 2023, the NO SA imposed a temporary ban on Meta IE and Facebook Norway AS ('**Facebook Norway**') regarding the processing of personal data of data subjects in Norway for behavioural advertising for which Meta IE relies on Article 6(1)(b) GDPR or Article 6(1)(f) GDPR (the '**NO SA Order**' or the '**Provisional Measures**'). On the same day, the NO SA informed by email the IE SA of the Provisional Measures being taken on the basis of Article 66(1) GDPR. On 7 August 2023, the NO SA rejected Meta IE's and Facebook Norway's request for deferred implementation of the NO SA Order.
25. On 20 July 2023, the IE SA shared an update to the CSAs via the IE SA IMI Informal Consultations, informing the CSAs of its views on the NO SA Order. It also stated that it did not mean to refuse to comply with the NO SA Mutual Assistance Request as this was a result of '*incorrectly (and inadvertently)*' checking a box and that, in its view, its communication to the NO SA of 2 June 2023 was referring to two documents shared with all CSAs on 31 May 2023<sup>37</sup>, which '*directed to the subject matter of the NO SA [Mutual Assistance Request]*' and were '*clearly engaging with the substance of the NO SA [Mutual Assistance Request] [...]*'.
26. On 24 July 2023, the NO SA answered to questions from a politician in the Irish national parliament on the NO SA Mutual Assistance Request. In its reply, the NO SA describes the reply provided by the IE SA to the NO SA Mutual Assistance Request and explains the reasons behind the issuance of the Provisional Measures, expressing its concerns that 'while it is very clear that [Meta IE] does not comply with the GDPR, failing to take specific and resolute enforcement action would lead to a cat-and-mouse game whereby [Meta IE] is able to evade compliance indefinitely' and that 'simply stating that [Meta IE] does not comply with the GDPR [...] without imposing any specific order spelling out what [Meta IE] must potentially do to comply with the law and by which date, will allow [Meta IE] to further delay compliance'.

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<sup>33</sup> In the same communication, the IE SA also indicated they expected to be in a position to circulate their provisional assessment the following week, and that they would then give the CSAs a period of ten days to respond. While the NO SA and the IE SA indicated that this update occurred on 5 July 2023, according to the IMI reports relating to the IE SA IMI Informal Consultations, this update seems to have been sent on 6 July 2023.

<sup>34</sup> This letter was already mentioned above in paragraph 20.

This update was shared by the IE SA via the IE SA IMI Informal Consultations. Together with the IE SA Provisional Position Paper and the Letter from Meta IE to the IE SA of 30 June 2023, the IE SA also shared again the Meta IE Compliance Reports (already shared on 5 April 2023 with the CSAs).

<sup>35</sup> In the same communication, the IE SA also indicated that it would then provide the CSAs' views on the IE SA Provisional Position Paper to Meta IE inviting it to make its submissions by 4 August 2023.

<sup>36</sup> The NL SA shared its views via a document attached on 20 July 2023 and the DE Hamburg SA via a document attached on 21 July 2023.

<sup>37</sup> See paragraph 13 above.

27. On 27 July 2023, Meta IE sent a letter to the IE SA stating that it intends to ground its processing for behavioural advertising purposes<sup>38</sup> on consent (Article 6(1)(a) GDPR) (by way of “**Meta IE’s Consent Proposal**”/“**Meta IE’s Consent Proposal**”) [REDACTED]<sup>39</sup>. The IE SA shared this letter with the CSAs via the IE SA IMI Informal Consultations.
28. On the same day, Meta IE sent a letter to the NO SA, making reference to the letter sent to the IE SA and requesting the NO SA to lift the Provisional Measures in light of Meta IE’s commitments to the LSA to ensure compliance by way of relying upon consent.
29. On 1 August 2023, the IE SA replied to Meta IE taking note of Meta IE’s intention to implement the necessary measures to enable it to rely on Article 6(1)(a) GDPR [REDACTED]<sup>40</sup>.
30. Meanwhile, on 1 August 2023, Meta IE and Facebook Norway lodged a complaint with the NO SA requesting that it lifts the NO SA Order. On 3 August 2023, the NO SA rejected this complaint and on the following day the NO SA sent a letter to Meta IE and Facebook Norway requesting confirmation as to whether the NO SA Order would be complied with.
31. On 4 August 2023, Meta IE provided its response to the IE SA Provisional Position Paper. On the same date, Meta IE and Facebook Norway replied to the NO SA that they have, in their view, complied with the NO SA Order, and requested the Oslo District Court to grant a preliminary injunction against the NO SA Order.
32. On 7 August 2023, the NO SA decided to impose a coercive fine on Meta IE and Facebook Norway for the non-compliance with the NO SA Order. On 14 August 2023, Meta IE requested the deferred implementation of the coercive fine imposed on Meta IE and Facebook Norway, at least until the Oslo District Court has ruled on Meta IE’s and Facebook Norway’s applications for a preliminary injunction. On 25 August 2023, the NO SA rejected Meta IE’s and Facebook Norway’s request for deferred implementation of the coercive fine.
33. On 8 August 2023, Meta IE and Facebook Norway sent a letter to the Ministry of Local Government and Regional Development of Norway, asking it to consider Meta IE’s and Facebook Norway’s complaints against the NO SA Order submitted to the NO SA on 1 August 2023<sup>41</sup>. The Ministry of Local

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<sup>38</sup> [REDACTED]

<sup>39</sup> [REDACTED]

<sup>40</sup> This letter was shared by the IE SA with the CSAs via the IE SA IMI Informal Consultations. The IE SA also highlighted that all the correspondence from Meta IE should be treated as confidential.

<sup>41</sup> Meta IE sustained that the Ministry should have declared the complaint valid and the decision should have been repealed, indicating that ‘the audit did not give [Meta IE] necessary notice of its proposed actions and did not give [Meta IE] the necessary opportunity to be heard’. In addition, Facebook Norway was of the opinion that the NO SA wrongfully indicated Facebook Norway as an addressee of the decision.



Government and Regional Development of Norway responded on 10 August 2023, refusing to accommodate the request and indicating that it did not have the authority to handle complaints against the NO SA Order.

34. On 10 August 2023, Meta IE sent a letter to the IE SA [REDACTED] [REDACTED] highlighted its concerns arising from the Article 66 GDPR proceedings arising from the Provisional Measures and running in parallel to the process led by the IE SA.

35. The IE SA responded on 11 August 2023. In its letter, the IE SA [REDACTED] [REDACTED] highlighted that it considered it is not for it to second-guess the decision of the NO SA to trigger the application of the urgency procedure and that the Article 66 GDPR procedure would take its own course.

36. The proceedings concerning the request for preliminary injunction lodged with the Oslo District Court further developed and the parties submitted written pleadings<sup>42</sup>.

37. [REDACTED] [REDACTED]<sup>43</sup>.

38. On 18 August 2023, the IE SA shared with all CSAs its final position paper ('**IE SA Final Position Paper**'), in which the IE SA concluded that Meta IE failed to demonstrate compliance with the orders in the IE SA Decisions<sup>44</sup>. The IE SA also indicated its view that in light of the Meta IE's Consent Proposal, it is fair

<sup>42</sup> On 10 August 2023 and 11 August 2023, respectively, Meta IE and Facebook Norway and the NO SA submitted their written pleadings to the Oslo District Court. Meta IE requested provisional injunctions to avoid damage following an alleged invalid administrative decision and Facebook Norway claimed that the NO SA's justification was inadequate. The NO SA responded to the request for a preliminary injunction claiming, *inter alia*, that there was no case processing error that may have affected the content of the decision, the conditions for urgent measures for adopting its decision were met, the decision did not violate Article 84 GDPR (proportionality) and that an injunction by the Oslo District Court would have been in a manifest disparity with the damages or inconveniences Norway would have been inflicted. Meta IE then submitted further written pleadings to the Oslo District Court on 14 August 2023. On 15 August 2023, Meta IE and Facebook Norway complained against the NO SA about the NO SA's rejection of their complaint. Meta IE and Facebook Norway reiterate that the appeal before the Ministry should be admissible and that they have the right to appeal the decision of the Ministry (contrary to the Ministry's declaration) according to administrative law. On 16 August 2023, the NO SA submitted further written pleadings to the Oslo District Court, while Meta IE and Facebook Norway submitted their additional written pleadings on 18 August 2023.

<sup>43</sup> [REDACTED]

<sup>44</sup> Together with the IE SA Final Position Paper, the IE SA shared with the CSAs the same supporting materials as shared together with the IE SA Provisional Position Paper. See above paragraph 22. Also, on 17 August 2023, the IE SA provided an update to all CSAs via the IE SA IMI Informal Consultations, informing them mainly of the fact that the copies of the relevant communications to which the IE SA was party were transmitted to the NO SA and Meta IE to ensure that both the NO SA and Meta IE were in a position to put the full suite of communications before the Oslo District Court.

and reasonable to give Meta IE an opportunity to demonstrate that it can rely on consent as its lawful basis rather than engaging in enforcement measures<sup>45</sup>.

- 39. On 25 August 2023, Meta IE and Facebook Norway submitted, each, to the NO SA their comments on the NO SA's intended request for an urgent binding decision from the EDPB pursuant to Article 66 (2) GDPR, which was specified in the NO SA Order.
- 40. On 28 August 2023, Meta IE and Facebook Norway complained against the NO SA regarding the coercive fine it had imposed. Meta IE and Facebook Norway asked the NO SA to revoke the enforcement decision or, at least, to lower the amount.
- 41. On 6 September 2023, the Oslo District Court decided not to grant the petitions from Meta IE and Facebook Norway for a preliminary injunction against the NO SA Order.

42. [REDACTED]

43. [REDACTED]

44. On 21 September 2023, the NO SA sent a letter to the IE SA outlining their views on the current state of play. More specifically, the NO SA stated that it considered there is still an urgent need for a ban of the unlawful processing of personal data carried out by Meta IE despite the Meta IE's Consent Proposal<sup>48</sup>, and that such a ban would [REDACTED] represent an incentive for Meta IE to swiftly bring processing into compliance<sup>49</sup>. Thus, the NO SA asked the IE SA to reconsider their position, outlined in the IE SA Final Position Paper that enforcement

<sup>45</sup> IE SA Final Position Paper, paragraph 9.2.

<sup>46</sup> [REDACTED]

<sup>48</sup> Letter of the NO SA to the IE SA of 21 September 2023, p. 2.

[REDACTED]

<sup>49</sup> Letter of the NO SA to the IE SA of 21 September 2023, p. 3.

measures are not necessary at this point in time<sup>50</sup>. The letter also mentioned that the NO SA requested submissions from Meta IE about its intention to ask the EDPB for an urgent binding decision, but may consider not making such request should the IE SA decide to adopt enforcement measures<sup>51</sup>.

45. On 26 September 2023, Meta IE and Facebook Norway made submissions in relation to the request of the NO SA for an urgent binding decision of the EDPB and the NO SA lodged its request to the EDPB on IMI. Further details on this are available below<sup>52</sup>.
46. On 27 September 2023, the IE SA replied to the letter of the NO SA of 21 September 2023, outlining its views on the NO SA's position and course of action. More specifically, the IE SA recalled that the EDPB explicitly declined to instruct the IE SA to impose a temporary ban in the EDPB Binding Decisions and explained that each of the IE SA Decisions 'made provision for enforcement measures, namely, the orders for compliance, under which [Meta IE]'s proposals for the adoption of one or more alternative legal bases for the [processing operations at stake] would be assessed, and ruled on, on their respective merits'<sup>53</sup>. The IE SA also expressed the view that 'it is inaccurate to suggest that the [IE SA] could impose an immediate ban on processing, whilst continuing to progress its assessment of [Meta IE]'s proposed consent-based model, in conjunction with its CSA colleagues'<sup>54</sup>.
47. On 11 October 2023, the NO SA replied to the letter of the IE SA of 27 September 2023. In this letter, the NO SA expressed its concern that despite the LSA and CSAs 'agreeing that [Meta IE] cannot base processing of personal data for behavioural advertising on Article 6(1)(b) GDPR or Article 6(1)(f) GDPR, [Meta IE] continues to violate Article 6(1) GDPR and the [IE SA Decisions], and such violation continues to be tolerated'<sup>55</sup>. The NO SA reiterated its view that 'corrective measures can and should be imposed on [Meta IE] as soon as possible to stop [Meta IE]'s current illegal processing activities'<sup>56</sup>.
48. The IE SA further replied on 13 October 2023. In its letter, the IE SA argued that the request of the NO SA to the EDPB amounts, in substance, to a demand for enforcement action against the IE SA for its (alleged) failure to implement the IE SA Decisions and to an attempt to use the Article 66 GDPR procedure as a means to procure an order from the EDPB to compel the IE SA to impose an EEA-wide ban on Meta IE's processing of personal data for behavioural advertising purposes<sup>57</sup>. The IE SA also expressed its view that it did put in place an enforcement procedure following the IE SA Decisions, consistent with the EDPB Binding Decisions<sup>58</sup>.
49. On 16 October 2023, Meta IE and Facebook Norway initiated legal proceedings before the Oslo District Court to demand the invalidation of the NO SA Order.

## 1.2 Submission of the request to the EDPB and related events

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<sup>50</sup> Letter of the NO SA to the IE SA of 21 September 2023, p. 3.

<sup>51</sup> Letter of the NO SA to the IE SA of 21 September 2023, p. 3.

<sup>52</sup> See paragraph 67 below.

<sup>53</sup> Letter of the IE SA to the NO SA of 27 September 2023, p. 3.

<sup>54</sup> Letter of the IE SA to the NO SA of 27 September 2023, p. 4.

<sup>55</sup> Letter of the NO SA to the IE SA of 11 October 2023, p. 1.

<sup>56</sup> Letter of the NO SA to the IE SA of 11 October 2023, p. 1.

<sup>57</sup> Letter of the IE SA to the NO SA of 13 October 2023, p. 2-3, in which the IE SA also states that: 'while, subject to ongoing litigation in Norway, [Meta IE]'s Norwegian subsidiary is accruing liabilities on a daily basis by reference to the fine recently applied by NO SA, [Meta IE]'s processing operations as they relate to behavioural advertising remain unchanged at this point'.

<sup>58</sup> Letter of the IE SA to the NO SA of 13 October 2023, p. 3-6.

50. As mentioned above, on 26 September 2023, the NO SA used IMI to request the EDPB to adopt an urgent binding decision pursuant to Article 66(2) GDPR, with the effect of ordering the implementation of final measures (hereinafter, the '**NO SA Request to the EDPB**' or '**Request to the EDPB**').
51. Following the submission of the NO SA Request to the EDPB, the EDPB Secretariat assessed the completeness of the file on behalf of the Chair of the EDPB.
52. In the context of the assessment of the completeness of the file, the EDPB Secretariat contacted the NO SA on 4 October 2023 and 11 October 2023 requesting further documents and clarifications. In both cases, the NO SA responded on the same day by providing clarifications and uploading additional documents on IMI.
53. The EDPB Secretariat also contacted the IE SA on 5 October 2023, requesting additional documents and clarifications. Following a request sent by the IE SA to extend the deadline initially set on 6 October, the EDPB Secretariat extended the deadline to 9 October 2023. On 9 October, the IE SA replied by attaching some of the additional documents and providing some clarifications. On the basis of the reply, the EDPB Secretariat requested on the same day some further information and provided clarifications on the questions it had previously asked. On 10 October 2023, the IE SA responded to the EDPB Secretariat's email of 9 October 2023, highlighting the need for appropriate time to carry out verifications. On 11 October 2023, the EDPB Secretariat responded to the IE SA's email identifying certain items as matters of priority. On 12 October 2023, the IE SA responded to the EDPB Secretariat's request providing several documents and clarifications.
54. A matter of particular importance that was scrutinised by the EDPB Secretariat was the right to good administration, as required by Article 41 of the Charter of Fundamental Rights of the European Union (hereinafter, the '**Charter**'). Further details on this topic are provided in Section 3 of this urgent binding decision.
55. On 12 October 2023, the decision on the completeness of the file was then taken by the Chair of the EDPB and on 13 October 2023 by the NO SA in line with Article 13(2) of the EDPB RoP. The file was circulated by the EDPB Secretariat to all the members of the EDPB on 13 October 2023.
56. On 17 October 2023, following a request of the IE SA to include an additional letter sent by the IE SA to the NO SA on 13 October 2023, the EDPB decided to include it in the file, on the basis of Article 11(2) EDPB RoP.

## 2 COMPETENCE OF THE EDPB TO ADOPT AN URGENT BINDING DECISION UNDER ARTICLE 66(2) GDPR

57. The EDPB is competent to issue an urgent binding decision under Article 66(2) GDPR to the extent that the following conditions are met: an SA has taken provisional measures pursuant to Article 66(1) GDPR, and there is a request from this SA pursuant to Article 66(2) GDPR.<sup>59</sup>

### 2.1 The SA has taken provisional measures under Article 66(1) GDPR

58. On 14 July 2023, the NO SA adopted provisional measures pursuant to Article 66(1) GDPR, prohibiting Meta IE from processing the personal data of data subjects residing in Norway for targeting

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<sup>59</sup> See Art. 66(2) GDPR and EDPB Urgent Binding Decision 01/2021 on the request under Article 66(2) GDPR from the Hamburg (German) Supervisory Authority for ordering the adoption of final measures regarding Facebook Ireland Limited (hereinafter '**EDPB Urgent Binding Decision 01/2021**'), adopted on 12 July 2021, section 2.

advertisements on the basis of observed behaviour for which Meta IE relies on Article 6(1)(b) GDPR or Article 6(1)(f) GDPR.

59. The EDPB therefore considers that this condition is satisfied.

## 2.2 Existence of a request pursuant to Article 66(2) GDPR coming from a SA in the EEA

60. On 26 September 2023, the NO SA requested the EDPB to adopt an urgent binding decision pursuant to Article 66(2) GDPR, by introducing a formal request in the IMI system (Article 17 of the EDPB RoP).

61. The EDPB therefore considers that this condition is satisfied.

## 2.3 Conclusion

62. The EDPB concludes it is competent to adopt an urgent binding decision under Article 66(2) GDPR.

# 3 THE RIGHT TO GOOD ADMINISTRATION

63. The EDPB is subject to Article 41 of the Charter (right to good administration). This is also reflected in Article 11(1) EDPB RoP.

64. Similarly to what is provided under Article 65(2) GDPR, an urgent binding decision of the EDPB is addressed to the lead supervisory authority and all the supervisory authorities concerned, and is binding on them<sup>60</sup>. It is not aimed to address directly any third party.

65. Nevertheless, the EDPB assessed whether all the documents it received to be used in order to take its decision were known by Meta IE and Facebook Norway, and whether Meta IE and Facebook Norway were offered the opportunity to exercise their right to be heard on all the elements of fact and law to be used by the EDPB to take its decision.

66. In this respect, the NO SA informed the EDPB Secretariat that it made available all the documents it submitted to the EDPB to Meta IE and Facebook Norway. The other documents (submitted by the IE SA), if not already known to the companies, were made available to them by the EDPB Secretariat by way of letters of 13 October 2023<sup>61</sup> and 18 October 2023<sup>62</sup>.

67. On 17 September 2023, the NO SA sent a letter to Meta IE and Facebook Norway asking for their submissions on its draft request for an Article 66(2) GDPR urgent binding decision from the EDPB. Following extensions of the deadline initially set, these submissions were provided on 26 September 2023 (hereinafter, '**Meta IE's Submissions of 26 September 2023**' and '**Facebook Norway's Submissions of 26 September 2023**'). These submissions also attached Meta IE's and Facebook Norway's previous submissions of 25 August 2023 concerning the intention of the NO SA to request an urgent binding decision of the EDPB ('**Meta IE's Submissions of 25 August 2023**' and '**Facebook Norway's Submissions of 25 August 2023**'). In addition to these submissions, the file submitted to the EDPB also included multiple documents produced by Meta IE and/or Facebook Norway in the context of the assessment of compliance with the IE SA Decisions and/or in the context of the legal proceedings

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<sup>60</sup> Art. 65(2) GDPR. According to Art. 66(4) GDPR, this provision is derogated in respect of the deadline for adoption; therefore, the last sentence of Art. 65(2) GDPR fully applies.

<sup>61</sup> Letter of the EDPB Chair to Meta IE and Facebook Norway of 13 October 2023.

<sup>62</sup> Letter of the EDPB Chair to Meta IE and Facebook Norway of 18 October 2023.

concerning the NO SA Order<sup>63</sup>, where Meta IE's and Facebook Norway's positions in respect of the elements being considered by the EDPB were clarified.

68. On the basis of the assessment performed by the EDPB Secretariat, Meta IE and Facebook Norway had not yet had an opportunity to make their views known on some elements of fact and law included in some documents of the file to be used by the EDPB to take its decision. The Chair of the EDPB invited by way of her letter of 13 October 2023<sup>64</sup> Meta IE and Facebook Norway to provide written submissions to the EDPB on these elements. These submissions, together with annexes, were provided by Meta IE and Facebook Norway on 16 October 2023 (**'Meta IE's Submissions of 16 October 2023'** and **'Facebook Norway's Submissions of 16 October 2023'**)<sup>65</sup> and were subsequently added to the file.
69. On 18 October 2023, the Chair of the EDPB sent a new letter to Meta IE and Facebook Norway informing them of the document added to the file on 17 October 2023 and providing them with an opportunity to make written submissions on it. Meta IE and Facebook Norway made written submissions on 19 October 2023 (**'Meta IE and Facebook Norway's Submissions of 19 October 2023'**), which were added to the file.
70. The EDPB notes that Meta IE and Facebook Norway received the opportunity to make their views regarding all the legal and factual elements used by the EDPB to take this decision. Therefore, in case Meta IE and Facebook Norway would be found to be entitled to a right to be heard in this procedure, it would be in any case fully respected.

## 4 ON THE NEED TO REQUEST FINAL MEASURES

71. The EDPB considers that in order for an urgent binding decision adopted pursuant to Article 66(2) GDPR to order final measures two cumulative conditions need to be fulfilled: the existence of one (or several) infringement(s) and the existence of an urgency situation justifying a derogation from the regular cooperation procedure.
72. Consequently, the sections below assess first the existence of infringements (Section 4.1), then the existence of an urgency situation (Section 4.2).

### 4.1 On the existence of infringements

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<sup>63</sup> By way of example, these documents included the Letter from Meta IE to the IE SA of 31 May 2023, the letter from Meta IE to the IE SA of 21 June 2023, the Letter from Meta IE to the IE SA of 30 June 2023, Meta IE's Response to the IE SA Provisional Position Paper of 4 August 2023, Letter from Meta IE to the IE SA of 27 July 2023, Letter from Meta IE to the NO SA of 27 July 2023.

<sup>64</sup> Letter of the Chair of the EDPB to Meta IE and Facebook Norway of 13 October 2023, replying to their letter of 28 September 2023 where they requested that Meta IE and Facebook Norway be granted access to any documents in the administrative file, and to be afforded an opportunity to make submissions after reviewing the file in advance of the EDPB reaching a final decision.

<sup>65</sup> On 18 October 2023, Meta IE and Facebook Norway provided new versions of two of their annexes. In these letters of 16 October 2023, Meta IE and Facebook Norway also informed the EDPB that they filed a complaint before the Oslo District Court challenging and seeking to invalidate the NO SA Order on the merits.

## 4.1.1 On the infringement of Article 6(1) GDPR

### 4.1.1.1 Summary of the overall position of the NO SA

73. The NO SA requested the EDPB to adopt an urgent binding decision ordering final measures to be taken across the EEA to ensure that *‘personal data shall not be processed for behavioural advertising based on Article 6(1)(b) [GDPR] or Article 6(1)(f) GDPR in the context of the Services’*<sup>66</sup>. In the NO SA Request to the EDPB, the NO SA defines *‘behavioural advertising’* as *‘targeting ads on the basis of observed behaviour’*<sup>67</sup>. In the view of the NO SA, this includes *‘targeting ads on the basis of inferences drawn from observed behaviour as well as on the basis of data subjects’ movements, estimated location and how data subjects interact with ads and user-generated content’*<sup>68</sup>. This definition is in line with their understanding of the scope of the IE SA Decisions<sup>69</sup>.
74. In the NO SA Request to the EDPB, the NO SA states that *‘[Meta IE] has failed to ensure compliance with (...) [the IE SA Decisions]’*<sup>70</sup>. According to the NO SA, there is consensus among the CSAs that Meta IE’s processing of personal data for behavioural advertising purposes is currently infringing the GDPR, and in particular Article 6(1)(b) GDPR, Article 6(1)(f) GDPR, and the duty to comply with the decisions of the SAs<sup>71</sup>.
75. The NO SA’s analysis is based on the following elements:
- Despite the IE SA Decisions, Meta IE still relies on Article 6(1)(b) GDPR to process (1) location information, including GPS location, data subjects’ activity on Meta products and the places data subjects like to go and the businesses and people data subjects are near; and (2) information about ads that Meta IE shows and how data subjects engage with those ads; for the purpose of behavioural advertising<sup>72</sup>.
  - Meta IE relies on Article 6(1)(f) GDPR to process some personal data for the purpose of behavioural advertising, while Article 6(1)(f) GDPR is not an appropriate legal basis for this processing<sup>73</sup>.
  - The IE SA also considers that Meta IE failed to demonstrate that it has a lawful basis to process platform behavioural data for behavioural advertising<sup>74</sup>, and did not provide any documentation confirming that it stopped processing personal data for the purpose of behavioural advertising on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR<sup>75</sup>.

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<sup>66</sup> NO SA Request to the EDPB, p. 12.

<sup>67</sup> NO SA Request to the EDPB, p. 12.

<sup>68</sup> NO SA Request to the EDPB, p. 3-4, referring to the NO SA Order.

<sup>69</sup> NO SA Order, p. 3.

<sup>70</sup> NO SA Request to the EDPB, p. 6.

<sup>71</sup> NO SA Request to the EDPB, p. 5-7.

<sup>72</sup> NO SA Request to the EDPB, p. 4 which refers to the NO SA Order. See also NO SA Order, section 7.2.1.1.

<sup>73</sup> NO SA Request to the EDPB, p. 4. The NO SA Request to the EDPB only mentions that Meta IE changed its legal basis for **‘some of its processing’** of personal data. Meta IE clarifies in its Letter to the IE SA of 30 June 2023 that these changes relate to the personal data collected on its products (paragraph 7c). A description of this data is provided in section 2.3 of the Meta IE Compliance Reports.

<sup>74</sup> NO SA Request to the EDPB, p. 5.

<sup>75</sup> NO SA’s Decision to Impose a Coercive Fine on Meta IE and Facebook Norway of 7 August 2023, p. 4.

76. The NO SA states that Meta IE has already been given enough time to bring its processing into compliance with Article 6(1) GDPR, and takes the view that *'[Meta IE] is making use of dilatory strategies'*<sup>76</sup>.
77. The NO SA considers that there is sufficient information to allow the EDPB to conclude that infringements are taking place<sup>77</sup>.

#### 4.1.1.2 Inappropriate reliance on Article 6(1)(b) GDPR

##### 4.1.1.2.1 Summary of the position of the NO SA

78. The NO SA takes the view that Meta IE's infringement of Article 6(1)(b) GDPR in the context of its behavioural advertising processing activities was confirmed by the EDPB Binding Decisions and the IE SA Decisions which concluded, in line with the views expressed in previous EDPB guidelines, that Article 6(1)(b) GDPR is an unsuitable legal basis for behavioural advertising processing activities, both generally and in the case at issue<sup>78</sup>.
79. The NO SA finds that Meta IE has incorrectly understood what constitutes *'processing of personal data for the purposes of behavioural advertising'* in the IE SA Decisions<sup>79</sup>. It states that Meta IE's processing of data subjects' location data<sup>80</sup> and engagement with ads<sup>81</sup> is part of Meta IE's processing of personal data for the purpose of behavioural advertising concerned by the IE SA Decisions<sup>82</sup>, and that, pursuant to those decisions, such processing which is based on Article 6(1)(b) GDPR, is unlawful<sup>83</sup>.

##### 4.1.1.2.2 Summary of the position of the controller

80. Meta IE states that, prior to the IE SA Decisions, it relied on Article 6(1)(b) GDPR in a good faith manner and its *'bona fide belief that it was lawful for it to do so'*<sup>84</sup>, considering that different national courts found that Meta IE may validly rely on Article 6(1)(b) GDPR to process personal data for the purposes of behavioural advertising<sup>85</sup>.

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<sup>76</sup> NO SA Request to the EDPB, p. 6.

<sup>77</sup> NO SA Request to the EDPB, p. 7.

<sup>78</sup> NO SA Request to the EDPB, footnotes 4 and 10, referring to EDPB Guidelines 8/2020 on the targeting of social media users, paragraphs 49 and 71.

<sup>79</sup> NO SA Order, section 7.2.1.1, p. 14 (referring to the IE SA FB Decision paragraph 10.44(b) and the IE SA IG Decision paragraph 417(b), respectively).

<sup>80</sup> According to the NO SA, *'[Meta IE]'s use of location data to inform which ads are displayed to data subjects clearly constitutes Behavioural Advertising. It is unclear to us what this location is estimated on the basis of, if not the data subject's behaviour'*. NO SA Order, section. 7.2.1.1, p. 15.

<sup>81</sup> According to the NO SA, *'For information about data subjects' engagement with ads, we understand that data subjects may click on "Hide Ad" and that one effect of this would be that the particular ad is not shown to that data subject again. We agree with [Meta IE]'s assertion set out in its letter of 30 June 2023 that this in itself does not constitute processing for Behavioural Advertising. However, to the extent that this or any other engagement with an ad is used to inform which other ads a data subject should see, we find that the processing of personal data does take place for Behavioural Advertising'*, NO SA Order, section. 7.2.1.1, p. 15.

<sup>82</sup> NO SA Order, section. 7.2.1.1, p. 15. The NO SA also states this in the NO SA Mutual Assistance Request, p. 5.

<sup>83</sup> NO SA Order, p. 15.

<sup>84</sup> Meta IE's Submissions of 25 August 2023, paragraph 65.

<sup>85</sup> Meta IE's Submissions of 25 August 2023, paragraph 65; Written Pleading of 18 August 2023 from Meta IE to Oslo District Court, p. 6.



81. Meta IE acknowledges that the IE SA Decisions concluded differently to these cases<sup>86</sup>, and argues that it took since then substantial steps to bring its processing activities into *‘what it believes was compliance with those decisions’*<sup>87</sup>. Meta IE states that it changed its legal basis from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR for the processing of personal data collected on Meta’s products for the purposes of behavioural advertising to comply with the IE SA Decisions<sup>88</sup>. It states further that it relies on Article 6(1)(a) GDPR to process personal data obtained from third party advertising partners<sup>89</sup>.
82. In relation to the definition of what behavioural advertising encompasses, Meta IE states that its processing of personal data for the purpose of behavioural advertising comprises the use of *‘information collected on Meta’s products about a user’s behaviour over time in order to assess and understand users’ interests and preferences’*. According to Meta IE, this includes signals such as *‘a user’s activity across Meta’s products, engagement with content such as other users’ posts or which pages they visit, the individuals and groups they communicate with, and/or what the user searches for’*<sup>90</sup>. Meta IE states that it processes this personal data to assess and understand users’ interests and preferences, and to provide them with behavioural advertisements<sup>91</sup>.
83. However, Meta IE takes the view that its processing of a) demographic data (including location data), b) In-use app, browser and device data c) advertisement shown and d) advertisement interaction data<sup>92</sup> does not constitute behavioural advertising, and therefore falls beyond the scope of the IE SA Decisions<sup>93</sup>. In this respect, Meta IE argues that its processing of such data on the basis of Article 6(1)(b) GDPR is valid<sup>94</sup>.

84.

[REDACTED]

<sup>95</sup>.

#### 4.1.1.2.3 Analysis of the EDPB

85. The EDPB Binding Decisions instructed, *inter alia*, the IE SA to find an infringement of Article 6(1) GDPR on the ground that Meta IE inappropriately relied upon Article 6(1)(b) GDPR to process personal data for the purposes of behavioural advertising, and therefore lacked a legal basis to process this data for this purpose<sup>96</sup>. In relation to this, the EDPB also instructed the IE SA to include in each of its final

<sup>86</sup> Written Pleading of 18 August 2023 from Meta IE to Oslo District Court, p. 6.

<sup>87</sup> Meta IE’s Submissions of 25 August 2023, paragraph 65; Written Pleading of 18 August 2023 from Meta IE to Oslo District Court, p. 6.

<sup>88</sup> Meta IE Compliance Report on IE SA FB Decision, paragraphs 2.1 and 2.3 and Meta IE Compliance Report on IE SA IG Decision, paragraphs 2.1 and 2.3.

<sup>89</sup> Such data includes information from third party websites, apps and certain offline interactions (such as purchases). See Meta IE Letter to the IE SA of 30 June 2023, paragraph 7c and footnote 150 below.

<sup>90</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 2.2; Meta IE Compliance Report on IE SA IG Decision, paragraph 2.2

<sup>91</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 2.2; Meta IE Compliance Report on IE SA IG Decision, paragraph 2.2.

<sup>92</sup> As described in section 5.8.2 of the Meta IE Compliance Reports.

<sup>93</sup> Meta IE’s Request for preliminary injunction of 4 August 2023, p. 27.

<sup>94</sup> Meta IE’s Request for preliminary injunction of 4 August 2023, p. 27.

<sup>95</sup>

<sup>96</sup> EDPB Binding Decision 3/2022, paragraphs 133 and 484; EDPB Binding Decision 4/2022, paragraphs 137 and 451.

decisions an order for Meta IE to bring its processing of personal data for the purpose of behavioural advertising in the context of the Facebook and Instagram services into compliance with Article 6(1) GDPR within three months<sup>97</sup>.

86. On the basis of the EDPB Binding Decisions, the IE SA Decisions ordered Meta IE to bring its processing into compliance with Article 6(1) GDPR<sup>98</sup>, the IE SA ordered Meta IE to take the necessary actions to bring into compliance with Article 6(1) GDPR and to address the finding that Meta IE is not entitled to process personal data for the purpose of behavioural advertising on the basis of Article 6(1)(b) GDPR<sup>99</sup>. The EDPB notes that the IE SA made clear that such action may include, but is not limited to, the identification of an appropriate alternative legal basis in Article 6(1) GDPR<sup>100</sup>.
87. In the Compliance Reports, Meta IE indicated that it changed the legal basis it relies on for the processing of personal data collected on its products for behavioural advertising purposes from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR as of 5 April 2023, which was the deadline for compliance with the IE SA Decisions<sup>101</sup>. Meta IE also states that it still relies on Article 6(1)(b) GDPR to process what it considers to be *'limited categories of non-behavioural information'* to show advertising on Facebook and Instagram<sup>102</sup>.
88. In the IE SA Final Position Paper assessing Meta IE's compliance with the IE SA Decisions and taking into consideration the comments received by the CSAs on such compliance, the IE SA addressed two key questions relevant for the purpose of this section of this urgent binding decision: the definition of behavioural advertising and whether the processing of Meta IE for advertising purposes relying upon Article 6(1)(b) GDPR falls within such definition<sup>103</sup>.
89. As to the definition of behavioural advertising, the IE SA referred to the definition provided by the Article 29 Working Party in its Opinion 2/2010<sup>104</sup> being referred to by Meta IE in the Compliance Reports<sup>105</sup>:

*'Behavioural advertising is advertising that is based on the observation of the behaviour of individuals over time. Behavioural advertising seeks to study the characteristics of this behaviour through their actions (repeated site visits, interactions, keywords, online content) in order to develop a specific profile and thus provide data subjects with advertisements tailored to match their inferred interests'*<sup>106</sup>.

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<sup>97</sup> EDPB Binding Decision 3/2022, paragraphs 288 and 493; EDPB Binding Decision 4/2022, paragraphs 290 and 459.

<sup>98</sup> See IE SA FB Decision, paragraph 10.44b; IE SA IG Decision, paragraph 212. See also IE SA Final Position Paper, paragraph 2.1.

<sup>99</sup> IE SA FB Decision, paragraph 10.44b and IE SA IG Decision, paragraph 212.

<sup>100</sup> IE SA FB Decision, paragraph 10.44b and IE SA IG Decision, paragraph 212.

<sup>101</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 2.1; Meta IE Compliance Report on IE SA IG Decision, paragraph 2.1.

<sup>102</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 3.1.3; Meta IE Compliance Report on IE SA IG Decision, paragraph 3.1.3.

<sup>103</sup> IE SA Final Position Paper, paragraphs 7.3 - 7.22.

<sup>104</sup> IE SA Final Position Paper, paragraph 7.5, referring to Article 29 Working Party Opinion 2/2010 adopted on 22 June 2010, p. 5.

<sup>105</sup> Meta IE Compliance Report on IE SA FB Decision, p. 4; Meta IE Compliance Report on IE SA IG Decision, p.4.

<sup>106</sup> Article 29 Working Party Opinion 2/2010 adopted on 22 June 2010, p. 5.

90. To define whether the processing of Meta IE for advertising purposes relying upon Article 6(1)(b) GDPR falls within such definition, the IE SA also referred to the description of Meta IE's processing for behavioural advertising purposes provided by the EDPB in the EDPB Binding Decisions<sup>107</sup>:

*'[Meta IE] collects data on its individual users and their activities on and off its Facebook social network service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user's computer or mobile device. According to the descriptions provided, [Meta IE] links these data with the user's Facebook account to enable advertisers to tailor their advertising to Facebook's individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user's physical location to display content relevant to the user's location'*<sup>108</sup>.

91. The IE SA noted that Meta IE relies on Article 6(1)(b) GDPR for a more limited set of personal data for advertising purposes in the Facebook and Instagram services<sup>109</sup>. The EDPB notes that Meta IE argues that it is relying on Article 6(1)(b) GDPR for the processing of 'limited non-behavioural information' to show advertisements, as described in its Compliance Reports<sup>110</sup>:

*'a) Demographic data. This consists of age users provide, gender users provide, and estimated general location. The use of demographic data is required to ensure advertising is appropriate in accordance with the Terms of Use/Service. For example, (...) (c) relying on location is necessary to ensure advertisements that [Meta IE] show users are in an appropriate language and relate to an appropriately located company or service (e.g., [Meta IE] does not show users advertisements for products which are not available in their country);*

*b) In-use app, browser and device data. (...) This includes the type of device being used, the language chosen on the device at that time and the version of the Facebook/Instagram app being used. These data points are necessary to deliver advertisements appropriately. For example, to properly format the advertisement to meet the viewing requirements of the device, to avoid users being shown advertisements for apps which are not supported by the operating system on their device, and ensure that the advertisement is in the chosen language of the user;*

*c) Advertisements shown. This consists of information on whether the advertisement is rendered and delivered to a user. This information is a basic metric which [Meta IE] needs in order, for example, to ensure the number of advertisements that [Meta IE] shows to users is at an appropriate level and to ensure that the same advertisements are not being directed to the user repeatedly. The information does not indicate whether the user has actually noticed the advertisement;*

*d) Advertisement interaction data. This consists of two forms of information provided by users if they choose to interact with advertisements: (a) to provide negative feedback on their advertising experience, for example by selecting to "hide" or report an advertisement; and (b)*

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<sup>107</sup> IE SA Final Position Paper, paragraph 7.4, referring to EDPB Binding Decision 3/2022, paragraphs 95-96 and EDPB Binding Decision 4/2022, paragraphs 98-99.

<sup>108</sup> EDPB Binding Decision 3/2022, paragraphs 95-96 and EDPB Binding Decision 4/2022, paragraphs 98-99.

<sup>109</sup> IE SA Final Position Paper, paragraphs 2.2, 4.5 and 7.6.

<sup>110</sup> As referred to in the IE SA Final Position Paper, paragraph 7.6.

*to provide positive feedback on their advertising experience, for example by clicking advertisements they find relevant’.* <sup>111</sup>

92. The EDPB notes the IE SA’s following findings:

- In relation to location data, the IE SA took the view that Meta IE did not provide sufficient information to allow the IE SA to understand why location data would fall outside the definition of behavioural data<sup>112</sup>. According to the IE SA, Meta IE did not explain whether it is processing the user’s physical location or the location that they proactively provide to Meta IE to target ads to them.
- In relation to device data, the IE SA indicated that device information could also be used to identify different market segments, which in turn could be processed for behavioural advertising purposes<sup>113</sup>.
- In relation to advertisements shown, the IE SA indicated that more clarity from Meta IE would be required as to whether Meta IE only analyses records of ads shown (which, according to the IE SA, are not amounting to behavioural data) or also behavioural ads presented by other tools through a shared interface screen, which would also add to the behavioural processing by Meta IE<sup>114</sup>.
- In relation to advertisement interaction data, the IE SA underlined that ‘interaction data’ was listed in the definition of behavioural advertising in the Article 29 Working Party Opinion, which was incorporated by Meta IE into its Compliance Reports<sup>115</sup>. The IE SA therefore underlined the lack of clarity on how Meta IE would then distinguish ‘advertisement interaction data’, listed in point d) above from ‘interaction data’ included in the Article 29 Working Party Opinion 2/2010. The IE SA raised concerns as to the fact that Meta IE stated that it relies on Article 6(1)(b) GDPR in circumstances where the user provides positive advertising feedback<sup>116</sup>. According to the IE SA, this falls within the definition of behavioural

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<sup>111</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 5.8.2; Meta IE Compliance Report on IE SA IG Decision, paragraph 5.8.2.

<sup>112</sup> In particular, the IE SA stated that *‘[Meta IE] has explained the uses of this data, but not why these uses do not amount to behavioural processing. For example, it is unclear if location data is used by [Meta IE] to tailor ads to users on the basis of visits to certain types of shops, their travel to business hubs or holiday destinations, or the times of year at which they travel. If [Meta IE] use location data in these ways, then this would be processing personal data for the purposes of behavioural advertising, both by reference to the EDPB’s description of such advertising, as set out at paragraph 7.4 above, and by reference to the Article 29 Working Party Opinion relied on by [Meta IE]’*, IE SA Final Position Paper, paragraph 7.11.

<sup>113</sup> The IE SA stated that *‘it is unclear whether [Meta IE] identifies device information as a different market segment. While the processing of device information to serve ads may not amount to behavioural advertising, it is possible that [Meta IE] identifies certain devices as a different market segment. The type of device could indicate spending power or history, which could be processed for behavioural purposes’*, IE SA Final Position Paper, paragraph 7.12.

<sup>114</sup> IE SA Final Position Paper, paragraph 7.13.

<sup>115</sup> Article 29 Working Party Opinion 2/2010 adopted on 22 June 2010, p. 5 referred to in Meta IE Compliance Report on IE SA FB Decision, p. 4 and Meta IE Compliance Report on IE SA IG Decision, p. 4.

<sup>116</sup> The IE SA’s concerns relate in particular to Meta IE’s statement that when *‘the user provides positive advertising feedback (e.g., actively choosing to click on a specific ad they find relevant and want to see), [Meta IE] similarly needs to use that information to ensure it is providing the user with an appropriate and relevant personalised advertising experience pursuant to the Terms of Service’*, see IE SA Final Position Paper, paragraph 7.14, referring to Meta IE Compliance Report on IE SA FB Decision, paragraph 5.8.2 and Meta IE Compliance Report on IE SA IG Decision, paragraph 5.8.2.

advertising provided by the Article 29 Working Party Opinion 2/2010 as it involves Meta IE *'inferring conclusions about user preferences from users' interaction with an advertisement'*<sup>117</sup>. Following further information provided by Meta IE on 30 June 2023 to the IE SA on negative advertising feedback<sup>118</sup>, the IE SA indicated that, to the extent that Meta IE *'processes personal data solely to prevent a specific hidden ad being shown to a user, then the [IE SA] agrees that this does not amount to behavioural advertising. However, to the extent that [Meta IE] infers a user's advertising preferences from the fact that they have hidden an ad, then this does fall within the definition of behavioural advertising'*<sup>119</sup>. The IE SA added that *'[Meta IE] submissions are too vague to determine whether it processes personal data just to hide the specific ad, or whether it draws inferences from the choice to hide an ad. The reference in the justification of this processing to a user's "personal advertising experience" indicates that the decision to hide one ad could be used to infer preferences about the ads that a user receives more generally'*<sup>120</sup>. The EDPB notes that this appreciation is in line with the observations made by the DE Hamburg SA<sup>121</sup>. The IE SA therefore provided that *'it appears from the information provided by [Meta IE] that it uses data about hidden ads to engage in behavioural advertising'*. The IE SA also provided similar conclusions for the positive feedback, raising that *'Using information about click-throughs to determine what types of ads a user wants to see in the future falls plainly within the definition of behavioural advertising provided by [Meta IE] to the [IE SA]'*<sup>122</sup>.

93. In light of the above, the EDPB notes that the IE SA found that Meta IE still conducts some processing for the purposes of behavioural advertising in reliance on Article 6(1)(b) GDPR<sup>123</sup>.
94. In addition, the IE SA also indicated the lack of sufficient information to explain why categories (a) to (d) were not behavioural data<sup>124</sup>. The EDPB also notes that on this basis, the IE SA found that Meta IE had not demonstrated compliance with the IE SA Decisions as regards reliance on Article 6(1)(b) GDPR for behavioural advertising<sup>125</sup>.
95. The EDPB notes that this view was also expressed by certain CSAs replying to the IE SA IMI Informal Consultations. More specifically, the FI SA stated that *'the following personal data seems to be still unlawfully collected for behavioural advertising purposes under Article 6(1)(b) [GDPR]: "Information*

<sup>117</sup> IE SA Final Position Paper, paragraph 7.15.

<sup>118</sup> Meta IE said that *'with respect to negative advertising feedback, if a user selects the option that is available to "Hide Ad – never see this ad again," then [Meta IE] needs to use that information to ensure that choice regarding the user's personal advertising experience (i.e., what advertisements they do not want to see) is respected'*, IE SA Final Position Paper, paragraph 7.16.

<sup>119</sup> IE SA Final Position Paper, paragraph 7.16, referring to the comments of the DE Hamburg SA on the IE SA Provisional Position Paper.

<sup>120</sup> IE SA Final Position Paper, paragraph 7.16.

<sup>121</sup> *'Allowing [Meta IE] to further justify whether it processes personal data only to hide a particular ad, or whether it draws inferences from the decision to hide an ad, is nothing more than leaving a choice not to describe the actual purpose of the processing, to formally fall short of the definition of behavioural advertising. In doing so, hiding certain ads without anything deriving from that decision would contradict [Meta IE]'s business model. To the extent that this or other engagement with an ad is used to learn what other ads a data subject should see, Hamburg SA notes that the processing of personal data serves purposes of behavioural advertising'*, Views of DE Hamburg SA of 4 May 2023; as referred to in the IE SA Final Position Paper, paragraph 7.17.

<sup>122</sup> IE SA Final Position Paper, paragraph 7.19.

<sup>123</sup> IE SA Final Position Paper, paragraph 6.2 and paragraph 8.1.

<sup>124</sup> IE SA Final Position Paper, paragraph 7.22.

<sup>125</sup> IE SA Final Position Paper, paragraphs 7.1, 7.22 and 8.1.

*about ads we show you and how you engage with those ads” and “Location information”*.<sup>126</sup> The IT SA also stated that *‘[Meta IE]’s proposal is not such as to adequately implement the order to bring the processing into compliance insofar as it misclassifies part of the user-related information and thereby applies the legal basis of contractual performance under Article 6(1)(b) GDPR to the serving of ads which, actually, are behavioural in nature’*<sup>127</sup>.

96. The EDPB observes that if any of the data listed in paragraph 91 of this urgent binding decision may be considered as falling within the scope of the definition of behavioural advertising, there are grounds for finding that Meta IE is infringing Article 6(1) GDPR. This is because Meta IE would still be processing personal data for the purpose of behavioural advertising on the basis of Article 6(1)(b) GDPR, although it was considered unlawful by the IE SA Decisions<sup>128</sup>.

97. In this respect, the EDPB shares the IE SA’s view that Meta IE still conducts some processing of personal data for the purposes of behavioural advertising in reliance on Article 6(1)(b) GDPR<sup>129</sup>, at least for the following categories of data:

- **Location data** - the EDPB finds, in line with the view of the IE SA, that Meta IE failed to demonstrate that its processing of location data does not constitute processing for the purpose of behavioural advertising<sup>130</sup>. It is unclear to the EDPB, as it is to the NO SA and the IE SA, on which basis the location is estimated, if not the data subject’s behaviour. The EDPB consequently finds, in line with the view of the NO SA, that Meta IE’s processing of location data to inform which ads are displayed to data subjects constitutes behavioural advertising<sup>131</sup>.
- **Advertisement interaction data** - the EDPB finds, in line with the view of the IE SA, that Meta IE failed to demonstrate that its processing of advertisement interaction data does not constitute processing for the purpose of behavioural advertising. The EDPB shares the view of the IE SA that *‘[Meta IE] is recording the behaviour of the users when they are presented with ads and use that to tailor future presentation of ads’*<sup>132</sup>. The EDPB consequently finds that Meta IE’s processing of advertisement interaction data constitutes behavioural advertising for the following reasons:
  - As rightly pointed out by the IE SA, the EDPB recalls that interaction is listed among the data types in the definition of behavioural advertising in the Article 29 Working Party Opinion 2/2010<sup>133</sup>.
  - The EDPB observes that irrespective of whether the data subject provides negative or positive feedback on the ads they see, Meta IE states that the interactions will be used to provide an *‘appropriate and relevant advertising experience’*<sup>134</sup> which indicates that Meta IE is inferring conclusions about user preferences from such interaction.

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<sup>126</sup> Views of the FI SA of 15 May 2023, p. 2.

<sup>127</sup> Views of IT SA on IE SA FB Decision of 23 May 2023, p. 2, and views of IT SA in IE SA IG Decision of 23 May 2023, p. 2.

<sup>128</sup> In this respect, the IE SA Decisions implemented the findings described in the EDPB Binding Decision 3/2022, paragraphs 94-133 and the EDPB Binding Decision 4/2022, paragraphs 97-137.

<sup>129</sup> See paragraphs 92-93 above.

<sup>130</sup> IE SA Final Position Paper, paragraph 7.11.

<sup>131</sup> IE SA Final Position Paper, paragraph 7.11.

<sup>132</sup> IE SA Final Position Paper, paragraph 7.14.

<sup>133</sup> IE SA Final Position Paper, paragraph 7.14.

<sup>134</sup> Meta IE Compliance Report on IE SA FB Decision, p. 16.

- With respect to negative feedback (i.e., where the data subject clicks to hide/report an ad), the EDPB observes that Meta IE states that it needs to use this information ‘to ensure that choice regarding the user’s personal advertising experience (i.e., what advertisements they do not want to see) is respected’<sup>135</sup>. The EDPB also observes that Meta IE states that the options ‘Hide Ad’ and ‘Report Ad’ are used to ‘directly influence the ads [users] see’<sup>136</sup>. The EDPB shares the view of the IE SA that ‘the reference in the justification of this processing to a user’s “personal advertising experience” indicates that the decision to hide one ad could be used to infer preferences about the ads that a user receives more generally’<sup>137</sup> and therefore that ‘it appears from the information provided by [Meta IE] that it uses data about hidden ads to engage in behavioural advertising’<sup>138</sup>.
  - With respect to positive feedback, the EDPB observes that Meta IE states that when ‘the user provides positive advertising feedback (e.g., actively choosing to click on a specific ad they find relevant and want to see), [Meta IE] similarly needs to use that information to ensure it is providing the user with an appropriate and relevant personalised advertising experience pursuant to the Terms of Service’<sup>139</sup>. Consequently, the EDPB also shares the view of the IE SA that this practice falls within the definition of behavioural advertising provided by the WP29 Opinion as it involves Meta IE ‘inferring conclusions about user preferences from users’ interaction with an advertisement’<sup>140</sup>.
98. In conclusion, the EDPB finds that Meta IE is inappropriately relying on Article 6(1)(b) GDPR to process location data and advertisement interaction data collected on its products for the purpose of behavioural advertising.
99. In addition, the EDPB shares the view of the IE SA that Meta IE did not provide sufficient information to explain why other categories of data processed by Meta IE do not amount to behavioural data, such as device data and advertisements shown<sup>141</sup>. In this respect, the EDPB finds, in line with the view of the IE SA, that in relation to device data, if Meta IE would use device data to identify different market segments, this would constitute a processing for behavioural advertising for which it would rely inappropriately on Article 6(1)(b), infringing Article 6(1) GDPR<sup>142</sup>.

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<sup>135</sup> Letter from Meta IE to the IE SA of 30 June 2023, p. 5.

<sup>136</sup> Meta IE’s submissions of 16 October 2023 to the Oslo District Court. For Instagram specifically, also see the screenshots included in p. 35 of the Annex 3 to the Compliance Report on IE SA IG Decision.

<sup>137</sup> IE SA Final Position Paper, paragraph 7.16.

<sup>138</sup> IE SA Final Position Paper, paragraph 7.18.

<sup>139</sup> Meta IE Compliance Report on IE SA FB Decision, paragraph 5.8.2 and Meta IE Compliance Report on IE SA IG Decision, paragraph 5.8.2.

<sup>140</sup> IE SA Final Position Paper, paragraph 7.15.

<sup>141</sup> See paragraph 89 above.

<sup>142</sup> The IE SA stated that ‘it is unclear whether [Meta IE] identifies device information as a different market segment. While the processing of device information to serve ads may not amount to behavioural advertising, it is possible that [Meta IE] identifies certain devices as a different market segment. The type of device could indicate spending power or history, which could be processed for behavioural purposes’, IE SA Final Position Paper, paragraph 7.12.

#### 4.1.1.3 Inappropriate reliance on Article 6(1)(f) GDPR

##### 4.1.1.3.1 Summary of the position of the NO SA

100. The NO SA considers that Article 6(1)(f) GDPR does not constitute an appropriate legal basis under Article 6(1) GDPR for Meta IE's behavioural advertising processing<sup>143</sup>.
101. The NO SA refers to the IE SA Final Position Paper, in which the IE SA concluded that Meta IE continues to fail to rely on a valid legal basis to process personal data for behavioural advertising purposes under Article 6(1) GDPR, despite Meta IE's switch to Article 6(1)(f) GDPR as a legal basis for its behavioural advertising processing on 5 April 2023<sup>144</sup>. The NO SA outlines that this conclusion was supported by several CSAs explicitly, without any objection being raised by the other CSAs<sup>145</sup>.
102. Further, the NO SA states that paragraph 117 of the CJEU Bundeskartellamt Judgment validates the conclusion that Article 6(1)(f) GDPR does not constitute an appropriate legal basis for Meta IE's behavioural advertising processing<sup>146</sup>. In this respect, the NO SA acknowledges Meta IE's view that the judgment is irrelevant and relates to a different aspect of Meta IE's processing for behavioural advertising<sup>147</sup>. However, the NO SA argues that the ruling does apply to Meta IE's behavioural advertising practices in general and, therefore, that it cannot be disregarded<sup>148</sup>.

##### 4.1.1.3.2 Summary of the position of the controller

103. In its Compliance Reports, Meta IE states that it has changed its legal basis from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR for 'Behavioural Advertising Processing' - solely for personal data collected on Meta's products<sup>149</sup> - to comply with the IE SA Decisions<sup>150</sup>.
104. As mentioned in paragraph 81 above, Meta IE defines the scope of this processing operation processed on the basis of Article 6(1)(f) GDPR as follows:

*'Behavioural Advertising Processing comprises the use by [Meta IE] of information collected on [Meta's] products about a user's behaviour over time in order to assess and understand users'*

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<sup>143</sup> NO SA Request to the EDPB, p. 4.

<sup>144</sup> NO SA Request to the EDPB, p. 5. As specified in paragraph 104 below, Meta IE defines the scope of this processing operation processed on the basis of Art. 6(1)(f) GDPR as relating to personal data collected on Meta's products.

<sup>145</sup> NO SA Request to the EDPB, p. 5.

<sup>146</sup> NO SA Request to the EDPB, p. 5.

<sup>147</sup> NO SA Request to the EDPB, p. 6. As specified in paragraphs 109 and 142 below, in paragraph 1.5 (A) of Meta IE's Response to the IE SA's Provisional Position Paper of 4 August 2023, Meta IE considers that the Bundeskartellamt Judgment 'does not rule out Article 6(1)(f) [GDPR] "as a matter of principle" as a valid legal basis for [Meta IE]'s Behavioral Advertising Processing. The judgment assessed Article 6(1)(f) [GDPR] (and the element of "necessity") in the context of different processing than is at-issue here (i.e., data collected off-[Meta], and to a limited extent cross-product data processing, as opposed to data collected on-[Meta] products). (...) Further, the CJEU did not (and could not as a matter of law) issue a blanket finding that users' interests will always outweigh [Meta IE]'s and third parties' legitimate interests in the context of personalised advertising (...).'

<sup>148</sup> NO SA Request to the EDPB, p. 6.

<sup>149</sup> Meta IE indicates to rely on Art. 6(1)(a) GDPR to process personal data about users' activity off-Meta's products (such as on third-party websites, apps and certain offline interactions (e.g., purchases)), obtained by Meta IE from third party advertising partners for the purposes of showing personalised advertising to these users on Facebook or Instagram (see Meta IE Compliance Report on IE SA FB Decision, p. 12, paragraph 3.1.2, and Meta IE Compliance Report on IE SA IG Decision, p. 13, paragraph 3.1.2).

<sup>150</sup> Meta IE Compliance Report on IE SA FB Decision, p. 4, and Meta IE Compliance Report on IE SA IG Decision, p. 4.



*interests and preferences. This includes signals such as a user's activity **across [Meta's] products**, engagement with content such as other users' posts or which pages they visit, the individuals and groups they communicate with, and/or what the user searches for. [Meta IE] uses all of these signals to assess and understand users' interests and preferences and to provide them with behavioural advertisements.'* (emphasis added in bold)<sup>151</sup>

105. With respect to the above, the EDPB notes that the personal data processed for behavioural advertising purposes on the basis of Article 6(1)(f) GDPR is collected 'on' and 'across' Meta's products and that these terms are used interchangeably by Meta IE.
106. Meta IE also refers to its updated privacy policies for Facebook and Instagram, which provide the list of categories of personal data processed for this purpose<sup>152</sup>.
107. In Meta IE's view, it was entitled to consider that it could switch to Article 6(1)(f) GDPR for its behavioural advertising processing to comply with the IE SA Decisions<sup>153</sup>. According to Meta IE, neither the EDPB Binding Decisions nor the IE SA Decisions ordered Meta IE to rely on a specific legal basis under Article 6(1) GDPR, such as Article 6(1)(a) GDPR<sup>154</sup>. Meta IE argues that it is only once the IE SA adopted the IE SA Final Position Paper on 18 August 2023 that an authority concluded that Meta IE's reliance on Article 6(1)(f) GDPR was insufficient to comply with the IE SA Decisions<sup>155</sup>. Meta IE argues that prior to this date '*[s]ome SA submissions are inconsistent with one another and cannot be reconciled (for example (...) certain SAs appear to consider that consent is the only viable basis possible whereas others accept Article 6(1)(f) GDPR is viable)*'<sup>156</sup>.
108. Meta IE carried out Legitimate Interests Assessments annexed to its Compliance Reports<sup>157</sup>, in which it concludes that Article 6(1)(f) GDPR constitutes an appropriate legal basis for behavioural advertising<sup>158</sup>. Meta IE reiterates this conclusion on 4 August 2023, after having made a commitment to switch to Article 6(1)(a) GDPR through the Meta IE's Consent Proposal<sup>159</sup>. In addition, Meta IE highlighted that it '*expended significant resources*' and implemented '*very substantial steps*' to switch from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR to comply with the deadline of 5 April 2023<sup>160</sup>.
109. With respect to the CJEU Bundeskartellamt Judgment, Meta IE takes the view that this case '*does not rule out Article 6(1)(f) [GDPR] as a matter of principle as a valid legal basis*' for Meta IE's behavioural

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<sup>151</sup> Meta IE Compliance Report on IE SA FB Decision, p. 4, and Meta IE Compliance Report on IE SA IG Decision, p. 4.

<sup>152</sup> Meta IE Compliance Report on IE SA FB Decision, p. 4-5, and Meta IE Compliance Report on IE SA IG Decision, p. 4-5.

<sup>153</sup> Meta IE's Submissions of 26 September 2023, p. 10, and Meta IE's Submissions of 25 August 2023, p. 22. See also Meta IE's letter to the IE SA of 27 July 2023, p. 1-2.

<sup>154</sup> Meta IE's Submissions of 26 September 2023, p. 10, and Meta IE's Submissions of 25 August 2023, p. 4 and 16.

<sup>155</sup> Meta IE's Submissions of 26 September 2023, p. 11 and Meta IE's Submissions of 16 October 2023, p.5.

<sup>156</sup> Letter from Meta IE to the IE SA regarding process and urgency of 31 May 2023, p. 3.

<sup>157</sup> Meta IE's Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision.

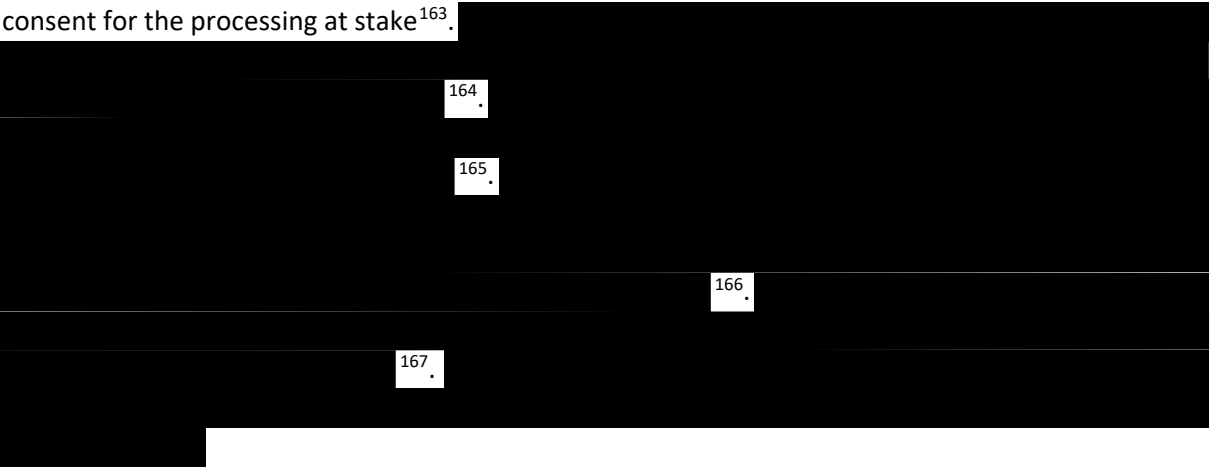
<sup>158</sup> Annex 4 to the Meta IE Compliance Report on IE SA FB Decision and to Meta IE Compliance Report on IE SA IG Decision, p. 4, and Meta IE Compliance Report on IE SA FB Decision, p. 11, Meta IE Compliance Report on IE SA IG Decision, p. 12.

<sup>159</sup> Meta IE's Request for preliminary injunction, 4 August 2023, p. 27.

<sup>160</sup> Meta IE's Submissions of 26 September 2023, p. 10 and Meta IE's Submissions of 16 October 2023, p.5. See also Meta IE's Submissions of 25 August 2023, p. 33.

advertising processing activities, given that the CJEU *‘did not (and could not as a matter of law) issue a blanket finding that users’ interests will always outweigh [Meta IE]’s and third parties’ legitimate interests in the context of personalised advertising’*<sup>161</sup>. It argues that the CJEU Bundeskartellamt Judgment relates to a different processing than the processing covered by the EDPB Binding Decisions and the IE SA Decisions. More specifically, Meta IE points out that this judgment relates to personal data collected off-Meta, as opposed to data collected on-Meta products. Notably, Meta IE states that the scope of the case, *‘excludes processing for behavioural advertising purposes when using personal data collected across different [Meta IE]’s products’*, while acknowledging that the case focuses *‘to a lesser extent’* on *‘the processing of personal data collected across various [Meta IE]’s products’*<sup>162</sup>.

110. Lastly, despite considering that it can lawfully rely on Article 6(1)(f) GDPR, Meta IE announced that, taking into account the *‘different views’* of the IE SA both in the IE SA Provisional Position Paper and regarding the interpretation of the CJEU Bundeskartellamt Judgment, it was willing to switch to consent for the processing at stake<sup>163</sup>.



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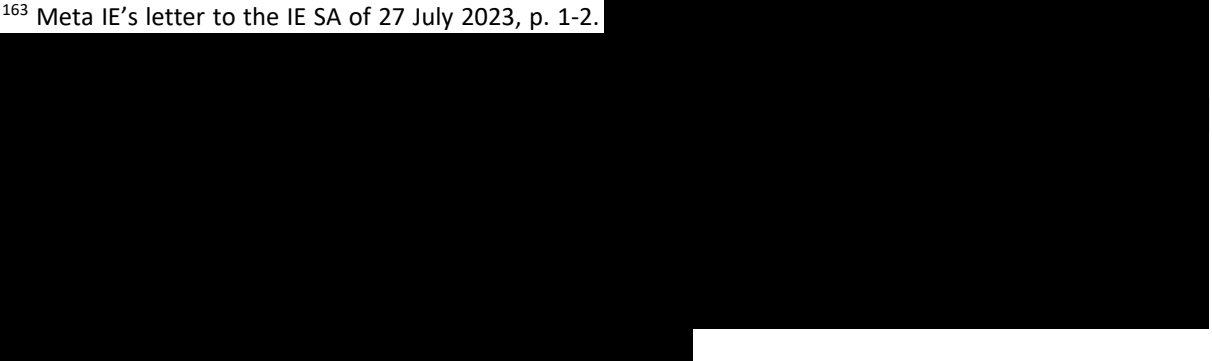
4.1.1.3.3 Analysis of the EDPB

111. In the IE SA Decisions, Meta IE was directed to take the necessary action to address the finding that Meta IE is not entitled to carry out the processing operations at stake on the basis of Article 6(1)(b) GDPR, was ordered to bring its processing of personal data for the purposes of behavioural advertising into compliance with Article 6(1) GDPR and it was specified that such action is *‘not limited to the*

<sup>161</sup> Meta IE’s Response to IE SA’s Provisional Position Paper, 4 August 2023, section 1.5 (A) and also section 2 for a more detailed analysis.

<sup>162</sup> Meta IE’s Request for preliminary injunction, 4 August 2023, p. 27.

<sup>163</sup> Meta IE’s letter to the IE SA of 27 July 2023, p. 1-2.



<sup>164</sup> Meta IE’s letter to the IE SA of 27 July 2023, p. 2.

<sup>165</sup> Meta IE’s letter to the IE SA of 27 July 2023, p. 2.

<sup>166</sup> IE SA’s letter to Meta IE of 11 August 2023, p. 2.

<sup>167</sup> IE SA’s letter to Meta IE of 11 August 2023, p. 2.

*identification of an appropriate alternative legal basis’, but may include the implementation of ‘any necessary measures required to satisfy the conditionality associated with that/those alternative legal basis/bases’*<sup>168</sup>.

112. The EDPB notes that, according to Meta IE Compliance Reports and the IE SA Final Position Paper, Meta IE relies on Article 6(1)(f) GDPR to process personal data collected on Meta’s products<sup>169</sup> for the purposes of behavioural advertising since 5 April 2023<sup>170</sup>.
113. Pursuant to Article 6(1)(f) GDPR, Recital 47 GDPR and the CJEU’s settled case-law<sup>171</sup>, **three cumulative conditions** must be met to be able to rely on Article 6(1)(f) GDPR, *‘namely, first, the pursuit of a legitimate interest by the data controller or by a third party; second, the need to process personal data for the purposes of the legitimate interests pursued; and third, [according to a balancing test] that the interests or fundamental freedoms and rights of the person concerned by the data protection do not take precedence over the legitimate interest of the controller or of a third party’*<sup>172</sup>.
114. More specifically, **the first condition relates to the existence of legitimate interests pursued by the controller or a third party.**
115. Meta IE has identified different interests that it considers legitimate and on which it relies for the processing at stake. These interests are pursued either by Meta IE or third parties, namely businesses that use Facebook/Instagram and other users of Meta’s products<sup>173</sup>. More specifically, Meta IE identified the four following legitimate interests:
  - (1) Meta IE’s *‘interest and the interests of other users to provide a positive user experience that users will want to engage with, and which is tailored to users - providing quality targeted and personalised ads is a core element of the wider user experience across Meta Products’*,
  - (2) Meta IE’s *‘interest and the interests of other users to enable [Meta IE] to generate revenue and continue to innovate, improve and develop the Meta Products and new technologies’*,
  - (3) Meta IE’s and third parties’ (e.g. advertisers) interests *‘to provide businesses, both big and small, the opportunity to connect with the users who are most likely to be interested in their products and services’*, and
  - (4) Meta IE’s *‘interests and the interests of third parties (e.g. advertisers) and other users, for businesses, both big and small, to be able to promote their products and services to users’*<sup>174</sup>.

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<sup>168</sup> IE SA FB Decision, paragraph 8; and IE SA IG Decision, paragraph 212.

<sup>169</sup> IE SA Final Position Paper, paragraph 7.23, p. 11-12, referring to Meta IE’s Letter to the IE SA of 30 June 2023, and Meta IE Compliance Report on IE SA FB Decision, p. 4, and Meta IE Compliance Report on IE SA IG Decision, p. 4.

<sup>170</sup> IE SA Final Position Paper, paragraph 7.25, p. 12, and Meta IE Compliance Report on IE SA FB Decision, p. 4, and Meta IE Compliance Report on IE SA IG Decision, p. 4.

<sup>171</sup> As recently recalled in the CJEU Bundeskartellamt Judgment, paragraph 106, which refers to previous case-law. The IE SA Final Position Paper also recalls and applies this test in paragraphs 7.27 and seq., p. 12-21.

<sup>172</sup> See paragraph 106 of the CJEU Bundeskartellamt Judgment.

<sup>173</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6, and Meta IE Compliance Report on IE SA IG Decision, p. 6.

<sup>174</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6, and Meta IE Compliance Report on IE SA IG Decision, p. 6.

116. These four categories of interests are further broken down in several sub-interests in Meta IE Legitimate Interests Assessments<sup>175</sup>. For example, the first and the second legitimate interests also include the following sub-interest: *'[For other Facebook and Instagram users:] The enjoyment of Facebook and Instagram services free of charge'*.<sup>176</sup>
117. As recalled by the IE SA, the given legitimate interests must be *'sufficiently clearly articulated and [be] real and present, corresponding to current activities or to benefits that are expected in the near future'*<sup>177</sup>.
118. The EDPB notes that the IE SA concluded that the interests listed by Meta IE in its Compliance Reports can meet these criteria<sup>178</sup>.
119. **The second condition relates to the necessity of the processing for the pursuit of those interests (or 'necessity test').**
120. In its Compliance Reports, Meta IE considers that: (1) the processing at stake is necessary to pursue and achieve the legitimate interests identified by Meta IE<sup>179</sup>, (2) this processing is reasonable and proportionate to achieve the legitimate interests pursued<sup>180</sup> and (3) no viable alternatives exist that would allow the legitimate interests to be achieved<sup>181</sup>.
121. In that regard, the IE SA considers that Meta IE failed to demonstrate in its Compliance Reports that its behavioural advertising processing was necessary to the different legitimate interests it identified<sup>182</sup>. More specifically, the IE SA points out that Meta IE's explanations regarding the impact of the processing at stake are *'too vague'* and therefore they do not allow the IE SA to determine that there is a less intrusive alternative that Meta IE could pursue<sup>183</sup>. In addition, the IE SA considers that Meta IE Legitimate Interests Assessments do not apply the necessity test for each of the legitimate interest on which it relies<sup>184</sup>.
122. More specifically, regarding the first interest set out by Meta IE, the IE SA refers to the EDPB Binding Decision 3/2022 and concludes that behavioural advertising is not in the interest of *all* Meta IE's users, but only of *some* users<sup>185</sup>. Therefore, according to the IE SA, Meta IE has not explained the need to

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<sup>175</sup> Meta IE Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, p. 9-13.

<sup>176</sup> Meta IE Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, p. 9. This sub-interest is further detailed on p. 12 of Meta's Legitimate Interests Assessments.

<sup>177</sup> IE SA Final Position Paper, paragraph 7.33, referring to the EDPB Binding Decision 02/2022, paragraph 110.

<sup>178</sup> IE SA Final Position Paper, paragraph 7.33, p. 13-14.

<sup>179</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6 and Meta IE Compliance Report on IE SA IG Decision, p.6, both referring to sections 2.b, 2.c., and 3.a of Meta IE Legitimate Interests Assessments.

<sup>180</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6 and Meta IE Compliance Report on IE SA IG Decision, p. 7, both referring to section 3.b of Meta IE Legitimate Interests Assessments.

<sup>181</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6 and Meta IE Compliance Report on IE SA IG Decision, p. 7, both referring to sections 3.c, 3.d, and 3.e of Meta IE Legitimate Interests Assessments.

<sup>182</sup> IE SA Final Position Paper, paragraph 7.50, p. 18.

<sup>183</sup> IE SA Final Position Paper, paragraph 6.3, p. 5.

<sup>184</sup> IE SA Final Position Paper, paragraph 7.41, referring to Meta IE Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision.

<sup>185</sup> IE SA Final Position Paper, paragraphs 7.43-7.44, p. 16.

process the personal data of all of its users *'for the purposes of realising the interests of those users who want to receive behavioural advertising'*<sup>186</sup>.

123. Further, regarding the second, third and fourth interests put forward by Meta IE in its Compliance Reports<sup>187</sup>, the IE SA concludes that Meta IE's arguments are not sufficiently substantiated because of the vagueness and the lack of specificity of the analysis<sup>188</sup>. In particular, Meta IE has not explained which specific categories of personal data Meta IE needs to process or which processing operations need to take place to achieve the above interests<sup>189</sup>.
124. When conducting the 'necessity test' in the Meta IE Legitimate Interests Assessments, Meta IE claims that *'Without the Processing, which as explained above is essential in order to monetise Facebook and Instagram, [Meta IE] would not be able to provide the services to users free of charge in the same manner as it does currently. This in turn would jeopardise the attainment of the legitimate interests identified above'*<sup>190</sup>. According to Meta IE, if it did not carry out the processing of personal data collected on its products for the purpose of behavioural advertising and if it only carried out the 'limited' processing it engages in when data subjects object, it *'would significantly impact the user experience on Facebook and Instagram (in part, due to less innovation happening on the platforms due to reduced revenue) and it would also impact [Meta IE]'s ability to provide Facebook and Instagram free of charge (regardless of the financial means of the user) to users as this is largely due to the revenues that [Meta IE] makes from enabling advertisers to effectively advertise to Instagram and Facebook users'*<sup>191</sup>.
125. However, the IE SA points out that Meta IE's privacy policy states that Meta IE is pursuing a legitimate interest *'to generate revenue'*, which is different than providing services for free<sup>192</sup>. According to the IE SA, given that other types of advertising may also generate revenue, it cannot be concluded that behavioural advertising is necessary to generate *'any revenue at all'*<sup>193</sup>.
126. The IE SA also highlights that *'there is no explanation as to why it is necessary to process all the data categories that [Meta IE] uses for behavioural advertising in order to provide the services for free'*<sup>194</sup>. Against this background, the IE SA concludes that Meta IE's claim that it is necessary to carry out behavioural advertising to provide Meta IE's services is not sufficiently granular<sup>195</sup>. In particular, it is unclear whether, through this argument, Meta IE is saying that (1) Meta IE is unable to provide Facebook and Instagram for free unless it processes the personal data of *all* of its users for the purpose

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<sup>186</sup> IE SA Final Position Paper, paragraph 7.44, p. 16.

<sup>187</sup> Meta IE Compliance Report on IE SA FB Decision, p. 6, and Meta IE Compliance Report on IE SA IG Decision, p. 6.

<sup>188</sup> IE SA Final Position Paper, paragraphs 7.45 and 7.50, p. 16 and 18.

<sup>189</sup> IE SA Final Position Paper, paragraph 7.45, p. 16.

<sup>190</sup> Meta IE Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, p. 21, section 3a.

<sup>191</sup> Meta IE Legitimate Interests Assessments Behavioural Advertising Processing of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, p. 24, section 3d.

<sup>192</sup> IE SA Final Position Paper, paragraph 7.46, p. 17.

<sup>193</sup> IE SA Final Position Paper, paragraph 7.46, p. 17.

<sup>194</sup> IE SA Final Position Paper, paragraph 7.47, p. 17.

<sup>195</sup> IE SA Final Position Paper, paragraph 7.47, p. 17.

of behavioural advertising, or (2) Meta IE is still able to provide Facebook and Instagram for free by processing the personal data of *some* of its users who do not object to behavioural advertising<sup>196</sup>.

127. The IE SA's conclusion for the second condition was shared by a number of CSAs in their comments and reactions on the Compliance Reports:

- On 4 May 2023, the NL SA outlined that *'[t]he massive processing of users' (special) personal data for the purpose of behavioural advertising is not 'necessary' for the purposes of the declared interests'*<sup>197</sup>.
- On 23 May 2023, the IT SA notes in relation to Meta IE Legitimate Interests Assessments that *'it is as if the controller were shifting the burden of proof regarding legitimate interest as the legal basis of processing on the data subjects – who conversely should be called into play as key actors in the two subsequent steps of the legitimate interest test, i.e. when assessing the necessity of the processing and performing the required balancing exercise'*<sup>198</sup>.
- In the NO SA Order, the NO SA argues that Meta IE fails to show that it fulfils the 'necessity test' based on (1) the absence of assessment of the necessity of each interest put forward by Meta IE, (2) the absence of a substantiated assessment regarding alternative advertising models that could be viable, (3) the incorrect finding in Meta IE Legitimate Interests Assessments that its behavioural advertising processing is unlikely to have an adverse impact on data subjects, and (4) the inappropriate reference to the fact that other businesses are also carrying out behavioural advertising, which does not have an impact on the lawfulness of such processing<sup>199</sup>.

128. According to the settled case-law of the CJEU, when applying the necessity test, *'it should be borne in mind that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary'*<sup>200</sup>.

129. In its Bundeskartellamt Judgment, the CJEU also recalled that this second condition requires *'to ascertain that the legitimate data processing interests pursued cannot reasonably be achieved just as effectively by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Articles 7 and 8 of the Charter'*<sup>201</sup>. This condition must also be examined in conjunction with the principle of data minimisation under Article 5(1)(c) GDPR<sup>202</sup>.

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<sup>196</sup> IE SA Final Position Paper, paragraph 7.47, p. 17.

<sup>197</sup> Views of the NL SA of 4 May 2023 on Meta IE's choice of a new legal basis for the processing of personal data by Meta IE in the framework of Behavioural Advertising on its platforms Facebook and Instagram, paragraph 3.

<sup>198</sup> Views of IT SA on the IE SA FB Decision of 23 May 2023, p. 2, and views of IT SA on the IE SA IG Decision of 23 May 2023, p. 2.

<sup>199</sup> NO SA Order, p. 17-18.

<sup>200</sup> Judgment of 4 May 2017, *Rīgas satiksme*, C-13/16, ECLI:EU:C:2017:43, paragraph 30 and cited case-law; Judgment of 11 December 2014, *Ryneš*, C-212/13, ECLI:EU:C:2014:2428, paragraph 28; Judgment of 11 December 2019, *Asociația de Proprietari bloc M5A-ScaraA*, C-708/18, ECLI:EU:C:2019:1064, paragraph 46.

<sup>201</sup> CJEU Bundeskartellamt Judgment, paragraph 108.

<sup>202</sup> CJEU Bundeskartellamt Judgment, paragraph 109.

130. In the EDPB Binding Decisions, the EDPB considered that there are realistic, less intrusive alternatives to behavioural advertising, making the processing at stake not ‘necessary’<sup>203</sup>.
131. In light of the above, the EDPB considers that there are grounds for concluding, as the IE SA did<sup>204</sup>, that Meta IE failed to fulfil the second condition of the ‘necessity test’ to be able to rely on Article 6(1)(f) GDPR for the processing of personal data collected on Meta’s products for purposes of behavioural advertising, in particular whether there are no other means that are less intrusive alternatives<sup>205</sup> and regarding compliance with the principle of data minimisation under Article 5(1)(c) GDPR<sup>206</sup>.
132. The **third condition relates to the ‘balancing test’**.
133. In its Compliance Reports referring to the Meta IE Legitimate Interests Assessments, Meta IE has concluded that, in light of the ‘*extensive measures and safeguards*’ it implemented, the potential risks to data subjects identified are ‘*appropriately mitigated*’<sup>207</sup>.
134. More specifically, Meta IE refers *inter alia* to the following safeguards: the measures implemented to ensure transparency towards data subjects (e.g. through privacy policies and ‘Help center’ articles), the publication of advertising policies for users, the existence of restrictions on targeting criteria, the existence of control tools (in relation to advertising in general or to specific ads that are displayed to users)<sup>208</sup>, the possibility to object to the processing<sup>209</sup> and the possibility to exercise data subjects’ data protection rights<sup>210</sup>. Meta also argues that the language introduced to explain the change of legal basis and the impact on users, including their ability to object to the behavioural advertising processing at stake, ‘*have been implemented to ensure that users have a reasonable expectation of Behavioural Advertising Processing and are aware of their right to object to this processing*’<sup>211</sup>. In Meta IE’s Legitimate Interests Assessments, Meta further claims that ‘*Users reasonably expect the processing of Platform Behavioural Information for behavioural advertising, taking into account the robust*

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<sup>203</sup> EDPB Binding Decision 3/2022, paragraph 121 and the EDPB Binding Decision 4/2022, paragraph 124. As eluded to in the EDPB Binding Decisions, the AT SA, PL SA (only for EDPB Binding Decision 3/2022) and SE SAs mention as examples contextual advertising based on geography, language and content, which do not involve intrusive measures such as profiling and tracking of users. This analysis was made in the context of the legal basis of Art. 6(1)(b) GDPR.

<sup>204</sup> IE SA Final Position Paper, paragraph 7.50, p. 18 and paragraph 6.3., p. 5.

<sup>205</sup> IE SA Final Position Paper, paragraphs 7.46-7.48, p. 17.

<sup>206</sup> IE SA Final Position Paper, paragraph 7.45, p. 16, and an analysis of the principle of data minimisation is included in paragraph 7.59, p. 19, with respect to the balancing test.

<sup>207</sup> Meta IE Compliance Report on IE SA FB Decision, p. 10 and Meta IE Compliance Report on IE SA IG Decision, p. 11, both referring to sections 4 and in particular sections 4.2.b and 4.2.c of Meta IE Legitimate Interests Assessments.

<sup>208</sup> Meta IE Legitimate Interests Assessments, of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, section 4.2.c. on the implemented safeguards. Some safeguards are reiterated in Meta IE Compliance Report on IE SA FB Decision, p. 7-10 and Meta IE Compliance Report on IE SA IG Decision, p. 7-12.

<sup>209</sup> Meta IE Legitimate Interests Assessments, of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, section 4.2.e. on the opt-out tools.

<sup>210</sup> Meta IE Legitimate Interests Assessments, of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, section 4.2.f. on data protection rights.

<sup>211</sup> Meta IE Compliance Report on IE SA FB Decision, p. 7 and Meta IE Compliance Report on IE SA IG Decision, p. 7.

*transparency [Meta] has implemented (...), which contributes to managing user expectations around the Processing and personalised advertising more broadly*<sup>212</sup>.

135. In that regard, the EDPB notes that the IE SA concluded that, due to the failure to facilitate the right to object under Article 21 GDPR<sup>213</sup>, the lack of any consideration of the right to private life (as enshrined in Article 7 of the Charter)<sup>214</sup> or data minimisation<sup>215</sup>, and the insufficient consideration of the impact of the processing on the purpose limitation principle<sup>216</sup>, Meta IE has not demonstrated that its legitimate interests in processing for behavioural advertising outweigh the fundamental rights and freedoms of data subjects<sup>217</sup>. In particular regarding the right to object, the IE SA pointed out *inter alia* that ‘*there is no ability in these [objection] tools to turn off processing of data collected directly by [Meta IE] for advertising purposes, including content, audio, metadata about content, apps and features used, transactions, hashtag and the time, frequency and duration of activities on [Meta IE] products*’ as these categories of data would still be used for the purpose of behavioural advertising according to Meta IE’s privacy policy<sup>218</sup>.
136. The IE SA also refers to a previous CJEU judgment of 24 September 2019, where the CJEU held that the data subjects’ fundamental rights under Articles 7 and 8 of the Charter ‘*override, as a rule (...) the economic interest*’ of a private operator<sup>219</sup>.
137. The conclusion of the IE SA regarding the third condition was shared by a number of CSAs in their comments and reactions on the Meta IE Compliance Reports:
- On 4 May 2023, the NL SA concluded that ‘*[t]he fundamental rights and freedoms of the data subject override the interest of [Meta IE] and the third parties involved*’<sup>220</sup>. The NL SA raised the following considerations:
    - ‘*some of the data processed by [Meta IE] for the purpose of behavioural advertising are **special, sensitive kinds of personal data**, which increase the weight attached to the interests of data subjects in the balancing act*<sup>221</sup>’
    - ‘*Not only the type but also the **sheer amount of data** that is processed by a company with the size of [Meta IE] should be taken into account in the balancing act. For the purposes of behavioural advertisement, [Meta IE] processes a broad spectrum of (special) personal data from millions of users. These data are analysed and possibly stored, adjusted, and reused on a daily basis.*<sup>222</sup>’

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<sup>212</sup> Meta IE Legitimate Interests Assessments, of 3 April 2023, Annex 4 to Meta IE Compliance Report on IE SA FB Decision and Annex 4 to Meta IE Compliance Report on IE SA IG Decision, p. 7.

<sup>213</sup> IE SA Final Position Paper, paragraphs 7.60.-7.66., p. 19-21.

<sup>214</sup> IE SA Final Position Paper, paragraphs 7.57, p. 19.

<sup>215</sup> IE SA Final Position Paper, paragraph 7.59, p. 19.

<sup>216</sup> IE SA Final Position Paper, paragraph 7.58, p. 19.

<sup>217</sup> IE SA Final Position Paper, paragraph 7.67, p. 21, and paragraph 6.3., p. 5.

<sup>218</sup> IE SA Final Position Paper, paragraph 7.65., p. 20-21, referring in footnote 29 to p. 54-55 of Meta IE’s privacy policy.

<sup>219</sup> IE SA Final Position Paper, paragraph 7.57., p. 19, referring to Judgment of the Court of Justice of the European Union of 24 September 2019, *GC and Others*, C-136/17; ECLI:EU:C:2019:773, paragraph 53. In this case, the private operator was a search engine. Also see case-law cited.

<sup>220</sup> Views of the NL SA of 4 May 2023 on Meta IE’s choice of a new legal basis for the processing of personal data by Meta IE in the framework of Behavioural Advertising on its platforms Facebook and Instagram, paragraph 3.

<sup>221</sup> Views of the NL SA of 14 May 2023, paragraph 43.

<sup>222</sup> Views of the NL SA of 14 May 2023, paragraph 44.



- *'With regard to **user expectations**, the NL SA points out that, in line with the principle of accountability, the assessment of user expectations should take place **before** the processing is initiated under Art. 6(1)(f) GDPR. Controllers cannot simply "retroactively adjust" the expectations of existing users and bring processing in line with Art. 6(1)(f) GDPR, simply by providing them with some information – especially not when the essence of this information is hard to grasp.<sup>223'</sup>*
  - *'Furthermore, as also concluded by the EDPB in its decision 3/2022,20 the NL SA agrees with the EDPB that users do not sign up to [Meta IE]'s services to be served personalized content but for the sake of connecting with friends and family. Even in its changed Terms of Service, [Meta IE] presents its services as "services that enable people to connect with each other, build communities...". The connection to people/friends/family is therefore still the service with which [Meta IE] seeks to attract new users. Even though "building businesses" is inserted as a third "goal" of the services of [Meta IE], this does not create the reasonable expectation that users' personal data will be processed for the purpose of behavioural advertising'<sup>224</sup>.*
  - *'NL SA therefore concludes that users do not expect or should reasonably expect that their data are processed for the sake of behavioural advertising as done by [Meta IE].<sup>225'</sup>*
  - *'Considering the **gravity of the risks identified**, NL SA finds that [Meta IE] indeed treads very lightly on these risks and their mitigation.<sup>226'</sup>*
  - *'The NL SA therefore finds that the right to object as provided for in the GDPR, a core right when processing is undertaken on the basis of Art. 6(1)(f) GDPR, is therefore not properly respected by [Meta IE]'<sup>227</sup>.*
- On 12 May 2023, the ES SA identified the following shortcoming in Meta IE's assessment of the balancing test:
    - *'Regarding the **impact on data subjects**, it is not established that it does not concern sensitive data.*
    - *As regards the **way in which data is processed**, data is processed massively, comprehensively and in combination with all types of data obtained from other sources, without taking into account the principle of data minimization.*
    - *As regards the **data subject's reasonable expectations**, the data typology reflected in the privacy policy is not easily understandable to the average user, who does not know exactly what data is being processed and what the extent of such processing is. In order for the user to know what type of data is being processed and how they are being processed, the user must also look up several documents.*
    - *As regards the **position of the controller and the data subject**, there is no balance of power, Meta [IE] is a large company which imposes its conditions on its users without they have the possibility of choosing or not certain processing operations and which of*

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<sup>223</sup> Views of the NL SA of 14 May 2023, paragraph 45.

<sup>224</sup> Views of the NL SA of 14 May 2023, paragraph 46.

<sup>225</sup> Views of the NL SA of 14 May 2023, paragraph 49.

<sup>226</sup> Views of the NL SA of 14 May 2023, paragraph 51.

<sup>227</sup> Views of the NL SA of 14 May 2023, paragraph 63.

*their data are processed. There is also no analysis of how the [processing] affects vulnerable sectors, and how to mitigate possible negative effects.*

- *Finally, with regard to the **additional safeguards** included to prevent undue impact on data subjects, as already stated, the principle of data minimization is not taken into account, there is no indication of what actions [Meta IE] takes to prevent the processing of sensitive data indirectly and, as explained below, the GDPR is not complied with regard to the right to object.’<sup>228</sup> [emphasis added in bold]*

- On 15 May 2023, the FI SA stated that *‘[Meta IE]’s legal interests assessment (...) seems to be rather one-sided and superficial and fails to convince why the interests of [Meta IE] or third parties should override the interests and fundamental rights of the data subjects’<sup>229</sup>.*
- On 23 May 2023, the IT SA notes in relation to Meta IE Legitimate Interests Assessments that *‘it is as if the controller were shifting the burden of proof regarding legitimate interest as the legal basis of processing on the data subjects – who conversely should be called into play as key actors in the two subsequent steps of the legitimate interest test, i.e. when assessing the necessity of the processing and performing the required balancing exercise’<sup>230</sup>.*
- In the NO SA Order, the NO SA rejects Meta IE’s assumption that the data subjects undisputedly want and expect behavioural advertising based on monitoring and profiling of their behaviour<sup>231</sup>. Therefore, according to the NO SA, Meta IE’s assessment of the elements of Article 6(1)(f) GDPR has been skewed<sup>232</sup>. In addition, the NO SA refers to the paragraph 117 of the CJEU Bundeskartellamt Judgment, which held that *‘data subjects cannot reasonably expect that the operator of the social network will process that user’s personal data, without his or her consent, for the purposes of personalised advertising’<sup>233</sup>. Further, the NO SA considers that informing data subjects about behavioural advertising processing does not mean that it falls within their reasonable expectations and in any case, data subjects are not realistically able to read the privacy policies of every service used, including Meta IE’s privacy policies<sup>234</sup>. The NO SA also argues that Meta IE fails to show that Meta IE’s interests outweigh the rights and freedoms of data subjects<sup>235</sup>.*

138. The IE SA made an overall conclusion on the three-step test<sup>236</sup> that Meta IE has not demonstrated compliance with Article 6(1)(f) GDPR for the processing at stake<sup>237</sup>. The IE SA highlighted, both in the IE SA Provisional Position Paper and IE SA Final Position Paper that this conclusion stems from the following reasons: (1) *‘[Meta IE] has not made out that the processing is necessary for legitimate interests. Its explanations of the impact of the processing on its business are too vague to allow the [IE*

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<sup>228</sup> Views of the ES SA of 12 May 2023, p. 5.

<sup>229</sup> Views of the FI SA of 15 May 2023, preliminary remarks on Meta’s new legal basis in relation to the processing of personal data for the purposes of behavioural advertising in Facebook and Instagram services, p. 2.

<sup>230</sup> Views of IT SA on the legal basis order and transparency order relating to the IE SA FB Decision, p. 2, and views of IT SA on the legal basis order and transparency order relating to the IE SA IG Decision of 23 May 2023, p. 2.

<sup>231</sup> NO SA Order, p. 15-16.

<sup>232</sup> NO SA Order, p. 15-16.

<sup>233</sup> NO SA Order, p. 17.

<sup>234</sup> NO SA Order, p. 16.

<sup>235</sup> NO SA Order, p. 17-23.

<sup>236</sup> IE SA Final Position Paper, paragraphs 7.27-7.28, p. 12-13, referring to the CJEU Bundeskartellamt Judgment, paragraph 126.

<sup>237</sup> IE SA Final Position Paper, paragraph 7.30, p. 13.

SA] to determine that there is no less intrusive alternative that can be pursued', (2) '[Meta IE] has not demonstrated that the balancing favours its processing. In particular, the opt-out mechanism provided does not comply with the GDPR'<sup>238</sup>. The conclusions of the IE SA regarding the results of the three-step test was shared by a number of CSAs, which also raised the inappropriate reliance by Meta IE to Article 6(1)(f) GDPR:

- On 18 April 2023, the AT SA stated that processing operations in connection with 'behavioural advertising processing' cannot be based on Article 6(1)(f) GDPR<sup>239</sup>.
- On 12 May 2023, the ES SA indicated that Meta IE Legitimate Interests Assessments 'did not demonstrate that the processing carried out by Meta IE with the purpose of behavioural advertisement can be based on [A]rticle 6(1)(f) [GDPR] since it does not meet the requirements of this article'<sup>240</sup>.
- In the NL SA Mutual Assistance Request sent on 30 May 2023, the NL SA expressed concerns as to Meta IE's reliance on Article 6(1)(f) GDPR, taking into account 'the fact that the controller could not have been unaware of already established guidance from the EDPB, nor of the position of several CSAs on the matter, but chose to explore the path of Article 6(1)(f) [GDPR] regardless'<sup>241</sup>. The NL SA states that 'Meta [IE] cannot invoke Article 6(1)(f) [GDPR] as a valid legal basis to process the personal data of its users for the purposes of behavioural advertising', and that this conclusion is 'in line with several EDPB and WP29 Guidance documents, which underpin that the appropriateness of using Article 6(1)(f) [GDPR] as a legal basis for the processing concerned is highly questionable'<sup>242</sup>.

139. In previous judgments, the CJEU clarified that when carrying out the 'balancing test', the data controller 'must take account of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter'<sup>243</sup>.

140. In its Bundeskartellamt Judgment, the CJEU held the following obiter dictum:

*'as can be seen from recital 47 of the GDPR, the interests and fundamental rights of the data subject may in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect such processing'<sup>244</sup>.*

*'(...) such processing must also be necessary in order to achieve that interest and the interests or fundamental freedoms and rights of the data subject must not override that interest. In the context of that balancing of the opposing rights at issue, namely, those of the controller, on the one hand, and those of the data subject, on the other, account must be taken, as has been noted (...) above, in particular of the reasonable expectations of the data subject as well as the scale of the processing at issue and its impact on that person.'<sup>245</sup>*

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<sup>238</sup> IE SA Final Position Paper, paragraph 6.3, p. 5 ; IE SA Provisional Position Paper, paragraph 5.3, p. 4 (in slightly different terms).

<sup>239</sup> IMI report on Compliance in the Facebook case.

<sup>240</sup> Views of the ES SA, 12 May 2023, p. 6.

<sup>241</sup> NL SA Mutual Assistance Request, p. 2.

<sup>242</sup> NL SA Mutual Assistance Request, p. 1, where a reference is made to the EDPB Guidelines 8/2020 on the targeting of social media users.

<sup>244</sup> CJEU Bundeskartellamt Judgment, paragraph 112.

<sup>244</sup> CJEU Bundeskartellamt Judgment, paragraph 112.

<sup>245</sup> CJEU Bundeskartellamt Judgment, paragraph 116.

*'In this regard, it is important to note that, despite the fact that the services of an online social network such as Facebook are free of charge, the user of that network cannot reasonably expect that the operator of the social network will process that user's personal data, without his or her consent, for the purposes of personalised advertising. In those circumstances, it must be held that the interests and fundamental rights of such a user override the interest of that operator in such personalised advertising by which it finances its activity, with the result that the processing by that operator for such purposes cannot fall within the scope of point (f) of the first subparagraph of Article 6(1) of the GDPR.'*<sup>246</sup> [emphasis added]

141. In the IE SA Provisional Position Paper issued before the CJEU Bundeskartellamt Judgment, the IE SA provisionally found that Meta IE had not demonstrated compliance with Article 6(1)(f) GDPR<sup>247</sup> as Meta IE had not demonstrated that it could rely on Article 6(1)(f) GDPR<sup>248</sup>. The IE SA then confirmed that Meta IE has not demonstrated compliance with Article 6(1)(f) GDPR following the analysis of the CJEU Bundeskartellamt Judgment as it states in its Final Position Paper that *'Prior to the date of [the Bundeskartellamt] judgment, the [IE SA] had analysed [Meta IE]'s reliance on Article 6(1)(f) [GDPR] and had come to the provisional conclusion that [Meta IE] had not demonstrated compliance with that provision' and that 'the CJEU indicated that there are significant barriers to [Meta IE] seeking to rely on Article 6(1)(f) [GDPR] for the behavioural advertising processing at issue in that judgment'*<sup>249</sup>.
142. The EDPB notes Meta IE's arguments regarding the alleged irrelevance of the CJEU Bundeskartellamt Judgment<sup>250</sup>. Meta considers that this judgment *'does not rule out Article 6(1)(f) [GDPR] "as a matter of principle" as a valid legal basis for [Meta IE]'s Behavioral Advertising Processing. The judgment assessed Article 6(1)(f) [GDPR] (and the element of "necessity") in the context of different processing than is at-issue here (i.e., data collected off-[Meta]<sup>251</sup>, and to a limited extent cross-product data processing, as opposed to data collected on-[Meta] products). (...) Further, the CJEU did not (and could not as a matter of law) issue a blanket finding that users' interests will always outweigh [Meta IE]'s and third parties' legitimate interests in the context of personalised advertising (...)*<sup>252</sup>.
143. As regards the scope of the CJEU Bundeskartellamt Judgment, the EDPB notes the references made to data collection from other services of the group to which an operator belongs<sup>253</sup>.

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<sup>246</sup> CJEU Bundeskartellamt Judgment, paragraph 117.

<sup>247</sup> IE SA Provisional Position Paper, paragraph 6.26, p. 11.

<sup>248</sup> IE SA Provisional Position Paper, paragraph 5.3, p. 4.

<sup>249</sup> IE SA Final Position Paper, paragraph 7.26, p. 12.

<sup>250</sup> Meta IE's Response to IE SA's Provisional Position Paper of 4 August 2023, section 1.5 (A). See also ENG Version of Meta IE Merits Complaint submitted to the Oslo District Court of 16 October 2023 (corrected), p. 38 and Meta IE's Submissions of 26 September 2023, p. 10-11.

<sup>251</sup> Data collected 'off'-Meta products refers data collected outside of Meta's products, such as on third-party websites, apps and certain offline interactions (e.g., purchases).

<sup>252</sup> Meta IE's Response to IE SA's Provisional Position Paper of 4 August 2023, section 1.5 (A) and section 2 for a more detailed analysis of the CJEU Bundeskartellamt Judgment.

<sup>253</sup> In that regard, paragraph 86 of the CJEU Bundeskartellamt Judgment states: *'By Questions 3 and 4, which it is appropriate to examine together, the referring court asks, in essence, whether and under what conditions points (b) and (f) of the first subparagraph of Article 6(1) of the GDPR must be interpreted as meaning that the processing of personal data by the operator of an online social network, which entails the collection of data of the users of such a network from other services of the group to which that operator belongs or from visits by those users to third-party websites or apps, the linking of those data with the social network account of those users and the use of such data, may be considered to be necessary for the performance of a contract to which the data subjects are party, within the meaning of point (b), or for the purposes of the legitimate interests pursued by the controller or*

144. The EDPB acknowledges that the behavioural advertising processing that Meta carries out in reliance of Article 6(1)(f) GDPR and that is examined for the purpose of this section 4.1.1.3<sup>254</sup> relates to personal data collected on Meta’s products while, according to Meta IE, the CJEU Bundeskartellamt Judgment mostly relates to personal data obtained from third party advertising partners outside of Meta’s products. However, the EDPB considers that this Judgment, addressed to Meta IE, Meta Platforms Inc. and Facebook Deutschland GmbH<sup>255</sup>, outlines the way the balancing exercise may be carried out for the purpose of behavioural advertising, which is also relevant for personal data collected on Meta’s products.
145. The EDPB recalls its previous guidelines where it highlighted that *‘it would be difficult for controllers to justify using legitimate interests as a lawful basis for intrusive profiling and tracking practices for marketing or advertising purposes, for example those that involve tracking individuals across multiple websites, locations, devices, services or data-brokering.’*<sup>256</sup>
146. The EDPB considers that this guidance is relevant for the processing at stake carried out by Meta IE, which, as provided in the EDPB Binding Decisions, is intrusive given its scale and the extensive amounts of data that is processed by Meta IE<sup>257</sup>. In those decisions, the EDPB outlined *‘the complexity, massive scale and intrusiveness of the behavioural advertising practice that Meta IE conducts through the Facebook [or Instagram] service’*<sup>258</sup>. In other words, *‘[b]ehavioural advertising, as briefly described in [paragraph 95 of the EDPB Binding Decision 3/2022 and paragraph 98 of the Binding Decision 4/2022<sup>259</sup>] is a set of processing operations of personal data of great technical complexity, which has a*

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*by a third party, within the meaning of point (f). That court asks, in particular, whether, to that end, certain interests which it explicitly lists constitute ‘legitimate interests’ within the meaning of the latter provision.’*

<sup>254</sup> Meta IE indicates to rely on Art. 6(1)(a) GDPR to process personal data obtained by Meta IE from third party advertising partners. Such data is about users’ activity off-Meta’s products. See footnotes 89 and 149 above in that regard.

<sup>255</sup> The request for a preliminary ruling in the CJEU Bundeskartellamt Judgment has been made in proceedings between Meta Platforms Inc., formerly Facebook Inc., Meta Platforms Ireland Ltd, formerly Facebook Ireland Ltd, and Facebook Deutschland GmbH, on the one hand, and the Bundeskartellamt. Meta IE operates the online social network Facebook in the EU. See CJEU Bundeskartellamt Judgment, paragraphs 2 and 26.

<sup>256</sup> Article 29 Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, adopted on 3 October 2017, as last Revised and Adopted on 6 February 2018, endorsed by the EDPB on 25 May 2018, p. 15. This was referred to by the NO SA in the NO SA Order, p. 9. This same statement was reiterated by the EDPB in the EDPB Guidelines on the targeting of social media users, Version 2.0, adopted on 13 April 2021, paragraph 56.

<sup>257</sup> EDPB Binding Decision 3/2022, paragraph 444 and EDPB Binding Decision 4/2022, paragraph 413.

<sup>258</sup> EDPB Binding Decision 3/2022, paragraph 96 and the EDPB Binding Decision 4/2022, paragraph 99.

<sup>259</sup> Paragraph 95 of EDPB Binding Decision 3/2022 states: *‘These requests for preliminary rulings mention that [Meta IE] collects data on its individual users and their activities on and off its Facebook social network service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social plug-ins, pixels and comparable technologies placed on the internet user’s computer or mobile device. According to the descriptions provided, [Meta IE] links these data with the user’s Facebook account to enable advertisers to tailor their advertising to Facebook’s individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user’s physical location to display content relevant to the user’s location. Meta IE offers its services to its users free of charge and generates revenue through this personalised advertising that targets them, in addition to static advertising that is displayed to every user in the same way.’*

Paragraph 98 of EDPB Binding Decision 4/2022 states: *‘These requests for preliminary rulings mention that Meta IE collects data on its individual users and their activities on and off its Facebook service via numerous means such as the service itself, other services of the Meta group including Instagram, WhatsApp and Oculus, third party websites and apps via integrated programming interfaces such as Facebook Business Tools or via cookies, social*

*particularly massive and intrusive nature*<sup>260</sup>. The IE SA reiterated this conclusion in the IE SA Decisions: *'It is therefore clear that the Board considers (...) the nature and scope of the processing to be extensive, complex, intrusive and on a massive scale'*<sup>261</sup>.

147. In light of the above and taking into account the legal analysis provided by the IE SA (see for example in paragraphs 135 and 138 above, as supported by the assessment performed by the of the CSAs), the EDPB considers that the interests and fundamental rights of data subjects override the legitimate interests put forward by Meta IE for the processing of personal data collected on Meta's products for the purposes of behavioural advertising, with the result that Meta IE did not fulfil the third condition of Article 6(1)(f) GDPR.
148. In light of the above analysis of the EDPB from paragraph 111 to 147, the EDPB considers that Meta IE inappropriately relies on Article 6(1)(f) GDPR to process personal data collected on its products for the purpose of behavioural advertising.

#### 4.1.1.3.4 Conclusion as to the infringement of Article 6(1) GDPR

149. The compliance approach adopted by Meta IE has been assessed in the IE SA Final Position Paper as follows:
- Meta IE seeks to still rely on Article 6(1)(b) GDPR to process some specific categories of personal data<sup>262</sup>, for advertising purposes<sup>263</sup>;
  - Meta IE seeks to rely on Article 6(1)(f) GDPR to process other personal data for the purposes of behavioural advertising<sup>264</sup> - solely for personal data collected on Meta's products<sup>265</sup>;
  - Meta IE relies on Article 6(1)(a) GDPR to process personal data provided to Meta IE by third party advertising partners<sup>266</sup>.
150. Meta IE [REDACTED] is willing to rely on Article 6(1)(a) GDPR as its legal basis [REDACTED] through the Meta IE's Consent Proposal<sup>267</sup>.
151. The EDPB highlights the need to assess the compliance of the processing activities within the scope of the IE SA Decisions with Article 6(1) GDPR at this point in time. [REDACTED]

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*plug-ins, pixels and comparable technologies placed on the internet user's computer or mobile device*<sup>164</sup>. According to the descriptions provided, Meta IE links these data with the user's Facebook account to enable advertisers to tailor their advertising to Facebook's individual users based on their consumer behaviour, interests, purchasing power and personal situation. This may also include the user's physical location to display content relevant to the user's location. Meta IE offers its services to its users free of charge and generates revenue through this personalised advertising that targets them, in addition to static advertising that is displayed to every user in the same way.'

<sup>260</sup> EDPB Binding Decision 3/2022, paragraph 123 and the EDPB Binding Decision 4/2022, paragraph 126.

<sup>261</sup> IE SA FB Decision, paragraph 9.23 and IE SA IG Decision, paragraph 243.

<sup>262</sup> See paragraph 91 above.

<sup>263</sup> IE Final Position Paper, paragraphs 6.2 and 7.1-7.22.

<sup>264</sup> IE Final Position Paper, paragraphs 6.3 and 7.23-7.67.

<sup>265</sup> IE Final Position Paper, paragraph 7.23, referring to Meta IE's Letter to the IE SA of 30 June 2023.

<sup>266</sup> IE SA Final Position Paper, paragraph 7.23, referring to Meta IE's Letter to the IE SA of 30 June 2023.

<sup>267</sup> Letter from Meta IE to IE SA regarding consent of 27 July 2023, p. 2.

██████████<sup>268</sup>. For the sake of clarity, the EDPB specifies that Meta IE’s Consent Proposal was not assessed in its merits for the purposes of this urgent binding decision. In this regard, the EDPB may only take note of the existence of an ongoing evaluation of the Meta IE’s Consent Proposal by the IE SA and the CSAs.

152. According to the EDPB, there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR for processing of personal data, including location data and advertisement interaction data collected, on Meta’s products for behavioural advertising purposes<sup>269</sup>.
153. In addition, the EDPB concludes that there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR for processing personal data collected on Meta’s products for behavioural advertising purposes<sup>270</sup>.

#### 4.1.2 On the infringement of the duty to comply with decisions by supervisory authorities

##### 4.1.2.1 Summary of the overall position of the NO SA

154. According to the NO SA, since the deadline for complying with the IE SA Decisions was 5 April 2023 but the infringement of Article 6(1) GDPR still persists more than six months later, Meta IE failed to ensure compliance with the IE SA Decisions, and hence infringed its duty to comply with the SAs’ decisions<sup>271</sup>. The NO states further that there is consensus on the European level between the IE SA and the CSAs that the processing continues to be unlawful<sup>272</sup>, and that *‘as acknowledged by the IE SA itself, Meta IE has failed to ensure compliance with [the IE SA Decisions]’*<sup>273</sup>. The NO SA stated that this non-compliance constitutes in itself an independent violation of the GDPR<sup>274</sup> for which Article 83(5)(e) GDPR envisages a fine which may be imposed in addition to the fines imposed by the IE SA Decisions<sup>275</sup>.

##### 4.1.2.2 Summary of the position of the controller

155. Meta IE stated that, prior to the IE SA Decisions, it relied on Article 6(1)(b) GDPR in a good faith manner and its *‘bona fide belief that it was lawful for it to do so’*<sup>276</sup>.
156. Following to the IE SA Decisions, Meta IE argued that it took substantial steps to bring its processing activities into *‘what it believes was compliance with [the IE SA] decisions’*<sup>277</sup>, including by changing its legal basis from Article 6(1)(b) GDPR to Article 6(1)(f) GDPR for the processing of personal data collected on its products for the purposes of behavioural advertising<sup>278</sup>.

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<sup>268</sup> ██████████

<sup>269</sup> See the analysis carried out above in Section 4.1.1.2.3 and paragraphs 98-99.

<sup>270</sup> See the analysis carried out above in Section 4.1.1.3.3 and paragraph 148.

<sup>271</sup> NO SA Request to the EDPB, p. 6.

<sup>272</sup> NO SA Request to the EDPB, p.12.

<sup>273</sup> NO SA Request to the EDPB, p. 6.

<sup>274</sup> NO SA Request to the EDPB, p. 6 and Letter from the NO SA to the IE SA dated 11 October 2023, p. 2.

<sup>275</sup> NO SA Request to the EDPB, p. 6.

<sup>276</sup> Letter from Meta IE to NO SA of 4 August 2023, in relation to right to be heard, paragraph 65.

<sup>277</sup> Letter from Meta IE to NO SA of 4 August 2023, in relation to the right to be heard, dated paragraph 65.

<sup>278</sup> Meta IE’s Compliance Report regarding the Facebook Service (IN-18-5-5) of 3 April 2023 (hereinafter, **‘Compliance Report on IE SA FB Decision’**), paragraph 2.1 and Meta IE’s Compliance Report regarding the Instagram Service (IN-18-5-7) of 3 April 2023 (hereinafter, **‘Compliance Report on IE SA IG Decision’**), paragraph 2.1 (together, the **‘Compliance Reports’**).

157. Meta IE takes the view that neither the EDPB Binding Decisions nor the IE SA Decisions ordered Meta IE to rely on a specific legal basis for the processing of personal data collected on its products for behavioural advertising purpose under Article 6(1) GDPR, such as Article 6(1)(a) GDPR<sup>279</sup>. As a result, Meta IE still currently seeks to rely on Article 6(1)(b) GDPR to process some specific categories of personal data that it does not consider to be behavioural data<sup>280</sup>, and on Article 6(1)(f) GDPR to process other personal data for the purposes of behavioural advertising<sup>281</sup> - solely for personal data collected on its products<sup>282</sup>.
158. After considering the IE SA Provisional Position Paper (including the IE SA's interpretation of the CJEU Bundeskartellamt Judgment), Meta IE stated that it was willing to implement the necessary measures to rely on Article 6(1)(a) GDPR as its legal basis for processing for the purpose of behavioural advertising through the Meta IE's Consent Proposal<sup>283</sup>.
159. After considering the IE SA's Final Position Paper, Meta IE stated that it considered itself as compliant with the IE SA Decisions

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#### 4.1.2.3 Analysis of the EDPB

160. The EDPB recalls that Article 60(10) GDPR provides for the duty for the controller to *'take the necessary measures to ensure compliance with the decision [taken in the context of the cooperation mechanism] as regards processing activities in the context of all its establishments in the Union'*<sup>286</sup>.
161. The EDPB also recalls that non-compliance with an order of an SA pursuant to Article 58(2) GDPR constitutes an infringement that may be sanctioned by way of an administrative fine pursuant to Article 83(5)(e) GDPR and Article 83(6) GDPR<sup>287</sup>.

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<sup>279</sup> Meta IE's Submissions of 26 September 2023, p. 10, and Meta IE's Submissions of 25 August 2023, p. 4 and 16.

<sup>280</sup> See paragraph 91 above and the IE SA Final Position Paper, paragraphs 6.2 and 7.1-7.22.

<sup>281</sup> IE SA Final Position Paper, paragraphs 6.3 and 7.23-7.67.

<sup>282</sup> See paragraph 104 above and the IE SA Final Position Paper, paragraph 7.23, referring to Meta IE's Letter to the IE SA of 30 June 2023.

<sup>283</sup> Letter from Meta IE to IE SA regarding consent of 27 July 2023, p. 2.

<sup>284</sup> Meta IE' Submissions of 25 August 2023, paragraph 61.

<sup>285</sup> Meta IE's Submissions of 25 August 2023, paragraph 64.

<sup>286</sup> Article 60 GDPR.

<sup>287</sup> According to Art. 83(5)(e) GDPR, *'non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 58(2) [GDPR] or failure to provide access in violation of Article 58(1) [GDPR]'* is an infringement that *'shall, in accordance with paragraph 2, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher'*. Art. 83(6) GDPR provides: *'Non-compliance with an order by the supervisory authority as referred to in Article 58(2) [GDPR] shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher'*.



162. The EDPB confirms, in line with the view of the NO SA<sup>288</sup>, that non-compliance with decisions of supervisory authorities is in itself an independent violation of the GDPR<sup>289</sup>.
163. As already noted above, the IE SA Decisions required Meta IE to, *inter alia*, take the necessary action to address the finding that Meta IE is not entitled to process personal data for behavioural advertising on the basis of Article 6(1)(b) GDPR and to bring its processing of personal data for behavioural advertising purposes into compliance with Article 6(1) GDPR.<sup>290</sup> Also, the IE SA made clear that the actions Meta IE should take to comply with the IE SA Decisions may include, but were not limited to, the identification of an appropriate alternative legal basis in Article 6(1) GDPR<sup>291</sup> and may include the implementation of any necessary measures required to satisfy the conditionality associated with that/those alternative legal basis/bases<sup>292</sup>. The deadline for compliance with the IE SA Decisions was 5 April 2023.

The EDPB notes that in the IE SA Final Position Paper, the IE SA found that Meta IE failed to demonstrate compliance with the IE SA Decisions, and states that Meta IE *'failed to demonstrate that it no longer relies on Article 6(1)(b) GDPR to process personal data for behavioural advertising'* and *'failed to demonstrate that it has a lawful basis to process Platform behavioural Data for behavioural advertising'*<sup>293</sup>.

164. The EDPB notes that the NL SA also stated that *'As Meta [IE] has publicly stated that it already makes use of Article 6(1)(f) [GDPR] as a legal basis, this conclusion means that - at the moment - personal data of millions of European data subjects are being processed without there being a valid legal basis. This moreover means that Meta [IE] does not comply with the [IE SA]'s order in the [IE SA Decisions] to bring these processing operations in line with Article 6 GDPR'*.<sup>294</sup>
165. The EDPB notes the view of the IE SA that neither the GDPR nor Irish national law prescribes the manner in which the assessment of the steps taken by the controller in purported compliance with the orders of an SA should be carried out<sup>295</sup>. In this respect, the EDPB notes that Meta IE does not contest that the IE SA's findings made subsequently to the IE SA Decisions are made *'to implement the existing [IE SA] decisions pursuant to Article 60(10) GDPR'*.<sup>296</sup>
166. In respect of Meta IE's argument that it fully complied with the IE SA Decisions by taking, first, substantial steps to bring its processing activities into compliance by 5 April 2023<sup>297</sup> and, secondly, steps in the direction of the Meta IE's Consent Proposal<sup>298</sup>, the EDPB highlights that these elements do

<sup>288</sup> Letter from the NO SA to the IE SA of 17 September 2023 in relation to the right to be heard, p. 7.

<sup>289</sup> *'Non-compliance with a corrective power previously ordered may be considered either as an aggravating factor, or as a different infringement in itself, pursuant to Art. 83(5)(e) and Art. 83(6) GDPR. Therefore, due note should be taken that the same non-compliant behaviour cannot lead to a situation where it is punished twice'*, EDPB Guidelines 04/2022 on the calculation of administrative fines under the GDPR, version 2.1, paragraph 103.

<sup>290</sup> See IE SA FB Decision, paragraph 10.44b; IE SA IG Decision, paragraph 212.

<sup>291</sup> IE SA FB Decision, paragraph 10.44b and IE SA IG Decision, paragraph 10.

<sup>292</sup> IE SA FB Decision, paragraph 8; and IE SA IG Decision, paragraph 212.

<sup>293</sup> IE SA Final Position Paper, section 8, p. 25. In relation to Meta IE's reliance on Article 6(1)(b) GDPR, also see paragraphs 96-99 above. In relation to Meta IE's reliance on Art. 6(1)(f) GDPR, also see paragraphs 121, 135, 138 above.

<sup>294</sup> NL SA Mutual Assistance Request, p. 2.

<sup>295</sup> Letter of the IE SA to Meta IE of 14 June 2023, p. 1-2.

<sup>296</sup> Meta IE's Submissions of 26 September 2023, p. 12 and 13.

<sup>297</sup> Meta IE's Submissions of 26 September 2023, p. 10 and Meta IE's Submissions of 16 October 2023, p. 5. See also Meta IE's Submissions of 25 August 2023, p. 33.

<sup>298</sup> Letter from Meta IE to IE SA regarding consent of 27 July 2023, p. 2.

not in themselves contradict the conclusion that at this point in time compliance with Article 6(1) GDPR for the processing activities within the scope of the IE SA Decisions has not yet been achieved while the deadline to implement the IE SA Decisions was 5 April 2023. [REDACTED]

#### 4.1.2.4 Conclusion as to the infringement of the duty to comply with decisions by supervisory authorities

167. In light of its findings that Meta IE still relies inappropriately on Article 6(1)(b) GDPR to process personal data, including location data and advertisement interaction data, collected on its products for the purpose of behavioural advertising<sup>300</sup> and on Article 6(1)(f) GDPR to process personal data collected on its products for the purpose of behavioural advertising<sup>301</sup> the EDPB finds, in line with the conclusions drawn by the IE SA<sup>302</sup> and with the views expressed in particular by the NO SA<sup>303</sup> [REDACTED]<sup>304</sup> in the course of the proceedings, that Meta IE did not achieve compliance with the IE SA Decisions within the deadline for compliance and is therefore currently in breach of its duty to comply with decisions by supervisory authorities.

## 4.2 On the existence of urgency to adopt final measures by way of derogation from the cooperation and consistency mechanisms

168. The second element to assess pursuant to Article 66(2) GDPR is the existence of an urgency situation justifying a derogation from the regular cooperation procedure.
169. The urgent intervention of the EDPB pursuant to Article 66(2) GDPR is exceptional, and derogates from the general rules applicable to the regular consistency and cooperation mechanisms.
170. Considering the fact that the urgency procedure under Article 66(2) GDPR is a derogation to the standard consistency and cooperation mechanisms, it must be interpreted restrictively. Therefore, the EDPB may request final measures under Article 66(2) GDPR only if the regular cooperation or consistency mechanisms cannot be applied in their usual manner, due to the urgency of the situation<sup>305</sup>.
171. In addition, Article 61(8) GDPR provides that, where an SA does not provide the information referred to in Article 61(5) GDPR within one month of receiving a mutual assistance request from another SA, the *'urgent need to act under Article 66(1) [GDPR] shall be presumed to be met and require an urgent binding decision from the Board pursuant to Article 66(2) [GDPR]'*. If such a presumption applies, the urgent nature of an Article 66(2) request for an urgent binding decision can be presumed and does not need to be demonstrated<sup>306</sup>.

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<sup>299</sup> Letter from NO SA to Meta IE and Facebook Norway of 17 September 2023 in relation to the right to be heard, p. 9.

<sup>300</sup> See paragraphs 98-99, and 152 above.

<sup>301</sup> See paragraphs 148 and 153 above.

<sup>302</sup> IE SA Final Position Paper, section 8, p. 25.

<sup>303</sup> NO SA Request to the EDPB, p. 6.

<sup>304</sup> [REDACTED]

<sup>305</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraph 167.

<sup>306</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraph 170.

172. In the present procedure, the NO SA requested the EDPB to adopt a decision pursuant to Article 66(2) GDPR, in order to urgently request the IE SA to impose final measures on Meta IE. The request has been made following to the adoption of provisional measures pursuant to Article 66(1) GDPR<sup>307</sup> which are only applicable in Norway, and are only valid for three months.
173. In the sections below, the EDPB analyses first whether the circumstances of the present case demonstrate the existence of urgency and the need to derogate from the cooperation and consistency mechanisms (section 4.2.1 below) before analysing whether the presumption described in Article 61(8) GDPR is applicable to the circumstances of the case (section 4.2.2).

#### 4.2.1 On the existence of urgency and the need to derogate from the cooperation and consistency mechanisms

##### 4.2.1.1 Summary of the position of the NO SA

174. The NO SA considers that ‘Regardless of the applicability of the Article 61(8) presumption, in the present case there is an urgent need for a binding decision from the EDPB in accordance with Article 66(2) GDPR, in order to protect the rights and freedoms of data subjects’<sup>308</sup>.
175. According to the NO SA, the processing in question is detrimental to individuals’ fundamental rights, and failing to put an end to this processing would thus expose these data subjects to a risk of serious and irreparable harm<sup>309</sup>. In more details, the NO SA takes the view that:
- The infringements have been occurring for a significant amount of time and are of an especially serious nature, as they have a considerable impact on the users of Meta’s products whose online activities are ‘*constantly, intrusively and opaquely monitored and profiled by Meta*’, which ‘*may give rise to the feeling that their private life is being continuously surveilled*’.<sup>310</sup>
  - The infringements affect over 250 million average monthly active users in the EU, including vulnerable data subjects in need of particular protection, such as minors, elderly people and people with cognitive disabilities<sup>311</sup>.
  - The filtering of the specific ads that are displayed on Facebook or Instagram has an adverse effect on data subjects’ freedom of information and on political participation<sup>312</sup> while creating ‘*a potential for reinforcement of existing stereotypes, and it can leave data subjects open to discrimination*’<sup>313</sup>.
  - Not taking urgent action to ensure compliance with the IE SA Decisions would deprive data subjects of the right to seek an effective remedy against a data controller from SAs under Article 77 GDPR<sup>314</sup>.

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<sup>307</sup> Art. 66(4) GDPR; as described in Section 2.1 above.

<sup>308</sup> NO SA Request to the EDPB, p. 10.

<sup>309</sup> NO SA Request to the EDPB, p. 10.

<sup>310</sup> NO SA Request to the EDPB, p. 10, referring to CJEU Bundeskartellamt Judgment, paragraph 118.

<sup>311</sup> NO SA Request to the EDPB, p. 10.

<sup>312</sup> NO SA Order, p. 22.

<sup>313</sup> NO SA Request to the EDPB, p. 10; NO SA Order, p. 22.

<sup>314</sup> NO SA Order, p. 28.

- The NO SA is of the view that there is no measure that could be applied retroactively to repair the violation of the rights and freedoms of data subjects<sup>315</sup>.
176. In addition, the NO SA states that there has been a *'continued refrainment from enforcement'* on the part of the IE SA<sup>316</sup>. The NO SA takes the view that despite the fact that infringements are taking place appears uncontroversial among supervisory authorities, *'the IE SA appears to be unwilling to demand that such infringements be ceased without any further delays'*<sup>317</sup>. In this respect, the NO SA states that the failure to firmly and expediently react to non-compliance with the IE SA Decisions not only deprives data subjects of the protection they are entitled to, but is also contrary to supervisory authorities' duty to ensure that the GDPR is respected in practice<sup>318</sup>.
177. More generally, in the view of the NO SA, not reacting to Meta IE's prolonged state of non-compliance would set a dangerous precedent<sup>319</sup> as it would *'invite dilatory strategies from non-compliant controllers'* and undermine the authority of the IE SA, the CSAs and the EDPB<sup>320</sup>. For the NO SA, a failure to adopt the requested urgent binding decision in the present circumstances would entail serious risks that the Article 66 GDPR mechanism would turn in to a *'paper tiger'*<sup>321</sup>.
178. The NO SA argues that an EDPB urgent binding decision would be a narrow and strictly limited exception to the primacy of the LSA in ensuring compliance with an Article 60 GDPR decision and would not set a precedent for derogating from the standard one-stop-shop cooperation procedure<sup>322</sup> as it would be issued after the completion of an Article 60 GDPR process, following the adoption by the IE SA of the IE SA Decisions<sup>323</sup> and given the fact that the IE SA does not envisage to start a new Article 60 GDPR procedure<sup>324</sup>.
179. Further, the NO SA argues that final measures would not interfere with [REDACTED] commitment to change the legal basis for behavioural advertising to consent<sup>325</sup>. According to the NO SA, *'if Meta [IE] would be ordered to stop all such processing activities based on Article 6(1)(b) [GDPR] and [Article 6(1)] (f) pending the identification of a valid legal basis, it would have an incentive to expeditiously identify adequate and lawful solutions to resume its processing activities as soon as possible'*<sup>326</sup>.
180. [REDACTED]

<sup>315</sup> NO SA Rejection of Meta IE and Facebook Norway's Request for Deferred Implementation of the Order dated 7 August 2023, p. 1.

<sup>316</sup> NO SA Order, p. 12.

<sup>317</sup> NO SA Request to the EDPB, p. 6.

<sup>318</sup> NO SA Request to the EDPB, p. 6.

<sup>319</sup> Letter of NO SA to IE SA of 11 October 2023, p. 11.

<sup>320</sup> NO SA Order, p. 28; NO SA Request NO SA Request to the EDPB, p. 12.

<sup>321</sup> NO SA Request to the EDPB, p. 12, referring to the opinion of Advocate General Bobek in Case C-645/19, Facebook Ireland and Others, paragraph 119 and paragraph 122.

<sup>322</sup> NO SA Request to the EDPB, p. 12.

<sup>323</sup> NO SA Request to the EDPB, p. 10-11, referring to IE SA Information on Procedure (response to SE SA) of 4 May 2023 where the IE SA had indicated via the IE SA IMI Informal Consultations that they would *'not be preparing any further decision in this matter'*.

<sup>324</sup> NO SA Request to the EDPB, p. 11.

<sup>325</sup> NO SA Request to the EDPB, p. 11-12.

<sup>326</sup> NO SA Request to the EDPB, p. 11-12.

181. The NO SA also recalls that in any event, the Meta IE's Consent Proposal does not eliminate the urgent need to adopt final measures<sup>329</sup>.

<sup>331</sup>. Therefore, in the NO SA's view, final measures constitute *'the only way'* to stop the harm to data subjects' fundamental rights<sup>332</sup>.

#### 4.2.1.2 Summary of the position of the controller

182. According to Meta IE, the circumstances of the case do not justify an urgent decision of the EDPB pursuant to Article 66(2) GDPR<sup>333</sup>. In particular, Meta IE recalls a prior decision of the EDPB stating that *'the urgency procedure under Article 66(2) GDPR is a derogation to the standard consistency and cooperation mechanisms, it must be interpreted restrictively. Therefore, the EDPB will request final measures under Article 66(2) [GDPR] only if the regular cooperation or consistency mechanisms cannot be applied in their usual manner due to the urgency of the situation'*<sup>334</sup>.
183. In this respect, Meta IE notes that the comments received by the IE SA from the CSAs show that the cooperation and consistency mechanism being led by the IE SA (which incorporates the views of numerous CSAs in addition to the views of the NO SA), is clearly functioning in accordance with Article 60 GDPR, and argues that there is no reason to derogate from that mechanism<sup>335</sup>. For this reason, in Meta IE's view, the NO SA's invocation of Article 66(1) GDPR and the NO SA Request to the EDPB are improper<sup>336</sup>.
184. According to Meta IE, the urgency procedure interferes with the regular cooperation mechanism that the IE SA has been following to implement the IE SA Decisions<sup>337</sup>. Meta IE's view is that the process of

<sup>327</sup> Letter of NO SA to IE SA of 11 October 2023, p. 2. See also NO SA Rejection of Meta IE's and Facebook Norway's Request for Deferred Implementation of the Coercive Fine of 7 August 2023, p. 1-2, where the NO SA gives several arguments related to the fact that Meta IE has *'not implemented any measures that would warrant lifting the Order or waiving the coercive fine, as [redacted] the personal data of data subjects in Norway continue to be unlawfully processed for behavioural advertising purposes [...]*,

<sup>328</sup> NO SA Request to the EDPB, p. 11.

<sup>329</sup> NO SA Request to the EDPB, p. 11.

<sup>330</sup> NO SA Request to the EDPB, p. 8.

<sup>331</sup> NO SA Request to the EDPB, p. 8.

<sup>332</sup> NO SA Request to the EDPB, p. 12.

<sup>333</sup> Letter from Meta IE to IE SA of 31 May 2023, p.5; Letter from Meta IE to IE SA regarding potential urgent proceedings of 21 June 2023, p. 4.

<sup>334</sup> Letter from Meta IE to IE SA dated 31 May 2023, p. 5, referring to EDPB Urgent Binding Decision 01/2021, paragraphs 195-196.

<sup>335</sup> Meta IE's Submissions of 16 October 2023, p. 4.

<sup>336</sup> Meta IE's Submissions of 16 October 2023, p. 4.

<sup>337</sup> Meta IE's Submissions of 26 September 2023, p. 12-13.

engagement between Meta IE and the IE SA pursuant to Articles 56(6) GDPR and Article 60(10) GDPR remains ongoing, and that there are no exceptional circumstances that would allow the NO SA to bypass such process<sup>338</sup>.

185. In addition, according to Meta IE, *'the NO SA's action directly conflicts with and undermines (i) the authority of the LSA, (ii) the role of other supervisory authorities across the EU/EEA who are appropriately engaging via the LSA-led process and (iii) the GDPR's one-stop-shop mechanism'*<sup>339</sup>.
186. Meta IE also states that the existence of a disagreement between a LSA and a CSA does not, in itself, create a situation of urgency as such<sup>340</sup>. In this respect, it states that *'the fact that the [NO SA] appears to disagree with [REDACTED] the [IE SA] cannot justify it resorting to the use of Article 66(2) [GDPR]'*<sup>341</sup>. Meta IE also states that there is no precedent for a SA using Article 66(2) GDPR to seek to *'overrule and dictate the process that a LSA has put in place to assess compliance with the LSA's own orders'*<sup>342</sup>.
187. Regarding the nature of the infringements, Meta IE is of the view that the NO SA does not provide evidence of their alleged seriousness, and states that behavioural advertising is a common practice, widespread beyond Meta's services<sup>343</sup>.
188. Meta IE also argues that the fact that the behavioural advertising processing has been ongoing for many years does not justify any urgency but, rather, proves that there is no new element of urgency<sup>344</sup>. Meta IE highlights that the processing at stake in this case is the same processing as the one that has been *'the subject of detailed consideration by the [IE SA] (...) for over 4 years and by the EDPB, with the awareness of SAs throughout'*<sup>345</sup>. In this respect, Meta IE also recalls that in the EDPB Urgent Binding Decision 01/2021, the EDPB has established that *'the mere continuation of processing, cannot, on its own, justify an urgent need to act'*<sup>346</sup>.
189. Meta IE considers that the EDPB Binding Decisions did not mandate it to rely on Article 6(1)(a) GDPR for behavioural advertising processing and did not conclude either that Article 6(1)(f) GDPR was not an

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<sup>338</sup> Letter from Meta IE to IE SA of 31 May 2023, p. 5; Letter from Meta IE to IE SA regarding potential urgent proceedings of 21 June 2023, p. 4. [REDACTED]

<sup>339</sup> Letter from Meta IE to the IE SA [REDACTED] of 10 August 2023, p. 2.

<sup>340</sup> Meta IE's Submissions of 26 September 2023, p. 1-2, 8. See also Meta IE's Submissions of 16 October 2023, p. 5.

<sup>341</sup> Meta IE's Submissions of 26 September 2023, p. 12.

<sup>342</sup> Meta IE's Submissions of 26 September 2023, p. 2.

<sup>343</sup> Meta IE's Submissions of 26 September 2023, p. 9. More specifically, Meta IE highlights that the minimum age for using Facebook and Instagram is 13 and for users aged between 13 and 17 only the age and location are used to display ads.

<sup>344</sup> Meta IE's Submissions of 26 September 2023, p. 8-9. Meta IE also reiterated that the *'alleged "urgency" claimed by the [NO SA] cannot be premised on the relevant processing (i.e. [Meta IE]'s use of on-platform data for behavioural advertising purposes), given this processing has been ongoing for years with the full knowledge of regulators, and the only recent development is that [Meta IE] has increased the level of data subjects' control over this processing'*, see Meta IE's Submissions of 16 October 2023, p. 5.

<sup>345</sup> See also Letter from Meta IE to IE SA of 31 May 2023, p. 5. Also see Letter from Meta IE to IE SA regarding potential urgent proceedings of 21 June 2023, p. 3.

<sup>346</sup> Letter from Meta IE to IE SA of 31 May 2023, p. 5, referring to the EDPB Urgent Binding Decision 01/2021, paragraphs 195-196.

appropriate legal basis for the processing of personal data collected on Meta's products for the purpose of behavioural advertising<sup>347</sup>. Meta IE argues that it was only with the IE SA Final Position Paper that it became clear to it that its reliance on Article 6(1)(f) GDPR for such processing did not comply with the IE SA Decisions<sup>348</sup>.

190. Meta IE also argues that the IE SA is not refraining from enforcing the GDPR against it, given that the IE SA shared a timeline with the CSAs and issued the IE SA Provisional Position Paper and then the IE SA Final Position Paper<sup>349</sup>.

<sup>350</sup>.

191. Meta IE states further that any urgent binding decision would be counterproductive, and ultimately harm the interests of data subjects while generating administrative work for the EDPB, the IE SA, the CSAs and Meta IE<sup>351</sup>. In this respect, it also highlights that the measures requested by the NO SA through the urgency proceedings had already been considered as objections during the previous Article 65 GDPR process, and rejected by the EDPB in the EDPB Binding Decisions<sup>352</sup>.

<sup>353</sup>.

#### 4.2.1.3 Analysis of the EDPB

192. Article 66(2) GDPR requires the SA requesting an urgent binding decision to provide reasons for requesting such opinion. This includes the need for the requesting SA to demonstrate an urgent need to act.
193. Therefore, the EDPB analyses, whether, on the basis of the views of the NO SA and of the controller, as well as on the basis of the elements in the file, the condition of urgency is met.
194. In this respect, the EDPB considered in a past decision that the nature, gravity and duration of an infringement, as well as the number of data subjects affected and the level of damage suffered by them, may play an important part when deciding whether or not there is an urgent need to act in a particular case<sup>354</sup>.
195. **In relation to the nature and gravity of the infringements**, the EDPB notes that its findings that Meta IE still relies inappropriately on Article 6(1)(b) GDPR to process personal data, including location data and advertisement interaction data collected on its products for the purpose of behavioural advertising<sup>355</sup> and on Article 6(1)(f) GDPR to process personal data collected on its products for the

<sup>347</sup> Meta IE's Submissions of 26 September 2023, p. 10.

<sup>348</sup> Meta IE's Submissions of 26 September 2023, p. 10 (Meta IE refers to national courts in the EU holding, prior to the IE SA Decisions, that Art. 6 (1) (b) GDPR is an appropriate legal basis, and to the fact that previous decisions from the IE SA initially confirmed the possibility to rely on Art. 6 (1) (b) GDPR). See also Meta IE's Submissions of 16 October 2023, p. 5.

<sup>349</sup> Meta IE's Submissions of 26 September 2023, p. 7 and 9.

<sup>350</sup> Meta IE's Submissions of 26 September 2023, p. 11.

<sup>351</sup> Meta IE's Submissions of 26 September 2023, p. 3; see also Meta IE's Submissions of 25 August 2023, paragraphs 46-48.

<sup>352</sup> Meta IE's Submissions of 26 September 2023, p. 7-8.

<sup>353</sup> Meta IE's Submissions of 26 September 2023, p. 9.

<sup>354</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraph 169.

<sup>355</sup> See paragraphs 98-995 and 152 above.

purpose of behavioural advertising<sup>356</sup> relate to the same processing activities as those referred to in the IE SA Decisions adopted on the basis of EDPB Binding Decisions.

196. In this respect, the EDPB recalls its finding from the EDPB Binding Decisions, i.e. that the nature and gravity of the infringement of Article 6(1) GDPR are such that a risk of damage caused to data subjects is consubstantial with the finding of the infringement itself<sup>357</sup>. In relation to Meta IE's infringements of Article 6(1) GDPR with respect to behavioural advertisement practices, the EDPB found that they constituted a very serious situation of non-compliance with the GDPR, in relation to processing of extensive amounts of data<sup>358</sup>, which is essential to the controller's business model, and harming the rights and freedoms of millions of data subjects in the EEA<sup>359</sup>.
197. The EDPB also already highlighted in its EDPB Binding Decisions the '*complexity, massive scale and intrusiveness of the behavioural advertising practice that [Meta IE] conducts*'<sup>360</sup>. This view is still currently shared by the NO SA, which finds that Meta IE's users' online activities are '*constantly, intrusively and opaquely monitored and profiled*' by Meta IE, which '*may give rise to the feeling that their private life is being continuously surveilled*'<sup>361</sup>. This view is also still shared by the NL SA, which expressed great concerns with respect to the processing activities at stake in light of '*the large amount of personal data being processed, the number of data subjects involved as well as the nature of the data that is being processed – including video, audio and mouse movement*'<sup>362</sup>.
198. The EDPB also clarified that at the time of the adoption of the EDPB Binding Decisions, bringing the processing into compliance with the GDPR would allow to minimise the potential harm to data subjects created by the violations of the GDPR<sup>363</sup>. In the EDPB Binding Decisions, the elements of the '*nature and gravity of the infringement*'<sup>364</sup> and the '*number of data subjects affected*' - which were and still are significant<sup>365</sup> - led the EDPB to conclude that '*it is particularly important that appropriate corrective measures be imposed [...] in order to ensure that [Meta IE] complies with this provision of the GDPR*'<sup>366</sup>.
199. When determining the transition period for bringing Meta IE's processing into compliance with the GDPR, the EDPB requested that the IE SA gives '*due regard to the harm caused to the data subjects by the continuation of [Meta IE]'s infringement of Article 6(1) GDPR during this period*'<sup>367</sup>.
200. The need for urgent action was fully acknowledged and clearly indicated in the IE SA Decisions<sup>368</sup>.

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<sup>356</sup> See paragraphs 148 and 153 above.

<sup>357</sup> EDPB Binding Decision 3/2022, paragraph 446 and EDPB Binding Decision 4/2022, paragraph 415.

<sup>358</sup> EDPB Binding Decision 3/2022, paragraph 444 and EDPB Binding Decision 4/2022, paragraph 413.

<sup>359</sup> EDPB Binding Decision 3/2022, paragraph 282 and EDPB Binding Decision 4/2022, paragraph 284.

<sup>360</sup> EDPB Binding Decision 3/2022, paragraph 96 and EDPB Binding Decision 4/2022, paragraph 99.

<sup>361</sup> NO SA Request to the EDPB, p. 10, referring to CJEU Bundeskartellamt Judgment, paragraph 118.

<sup>362</sup> NL SA Mutual Assistance Request, p. 2.

<sup>363</sup> EDPB Binding Decision 3/2022, paragraph 282 and EDPB Binding Decision 4/2022, paragraph 284.

<sup>364</sup> EDPB Binding Decision 3/2022, paragraph 279 and EDPB Binding Decision 4/2022, paragraph 281.

<sup>365</sup> EDPB Binding Decision 3/2022, paragraph 445 and EDPB Binding Decision 4/2022, paragraph 414.

<sup>366</sup> EDPB Binding Decision 3/2022, paragraph 279 and EDPB Binding Decision 4/2022, paragraph 281.

<sup>367</sup> EDPB Binding Decision 3/2022, paragraph 286 and Binding Decision 4/2022, paragraph 288.

<sup>368</sup> IE SA FB Decision, paragraph 8.10 ('[...] I do not agree with Facebook's submission that the [IE SA] has discretion to delay the activation of the timeline for compliance [...]. It is clear, from paragraph 286 of the Article 65 [GDPR] Decision, that the EDPB considered it necessary for Facebook to take the remedial action required to address the relevant infringements "within three months". While Facebook has correctly identified that the EDPB has not expressly identified the starting point of this compliance period, the [IE SA]'s view is that it goes without saying that the starting point has to be the adoption and notification of the [IE SA]'s final decision, given that this is the earliest time from which the applicable timeline for compliance can start to run. Any contrary suggestion would



201. In relation to the **duration of the infringement** and considering the above findings that Meta IE still relies inappropriately on Article 6(1)(b) GDPR and Article 6(1)(f) GDPR to process personal data collected on its products for the purpose of behavioural advertising<sup>369</sup> despite the fact that the deadline for complying with the IE SA Decisions was 5 April 2023, the EDPB finds that data subjects are still faced with data processing activities that are unlawful<sup>370</sup>. In relation to Meta's argument that it is only on 18 August 2023 that the IE SA concluded that Meta IE's reliance on Article 6(1)(f) GDPR for behavioural advertising purpose was insufficient to comply with the IE SA Decisions<sup>371</sup>, the EDPB shares the view of the NL SA expressed already on 30 May 2023 that *'the controller could not have been unaware of already established guidance from the EDPB, nor of the position of several CSAs on the matter, but chose to explore the path of Article 6(1)(f) [GDPR] regardless'*<sup>372</sup>.
202. In this respect, the EDPB can only note that every additional day during which the processing activity at stake takes place without reliance on an appropriate legal basis causes supplementary harm to the data subjects and allows Meta to continue to collect significant amounts of personal data of millions of European individuals on a daily basis and to generate significant revenue from the unlawful processing of the personal data of millions of data subject in the EEA<sup>373</sup>. It also observes, in line with the position of the NO SA, that there are no measures that could be applied retroactively to repair the violation of the rights and freedoms of data subjects<sup>374</sup>.
203. Therefore, while in some cases the fact that an infringement has been continuing for a long time may serve to demonstrate that an urgent need to act does not arise<sup>375</sup>, as recalled by Meta IE<sup>376</sup>, the EDPB considers in this case that the situation is different. To the contrary, in this case, the fact that the processing activities are still performed without reliance on an appropriate legal basis represents an element in favour of concluding that there is an urgent need for final measures to be adopted, since despite the orders given in the IE SA Decisions and the different discussions regarding their implementations, Meta IE still processes unlawfully personal data and still does not comply with the IE SA decisions<sup>377</sup>. This is not dispelled by Meta IE's arguments on the fact that more transparency and an opt-out mechanism were implemented<sup>378</sup>, as these elements do not solve the underlying issue of the lawfulness of the processing<sup>379</sup> and the related harm caused on data subjects.

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*be inconsistent with the need for urgent action that was clearly indicated to be required in paragraphs 286, 288 and 290 of the Article 65 Decision. It would further render meaningless the EDPB's consideration of the compliance period in terms of a fixed number of months (in this case, three)'. An analogous wording is present in paragraph 214 of the IE SA IG Decision.*

<sup>369</sup> See paragraphs 152 and 153 above.

<sup>370</sup> EDPB Binding Decision 3/2022, paragraph 446 and EDPB Binding Decision 4/2022, paragraph 415.

<sup>371</sup> Meta IE's Submissions of 26 September 2023, p. 11 and Meta IE's Submissions of 16 October 2023, p.5.

<sup>372</sup> NL SA Mutual Assistance Request, p. 2.

<sup>373</sup> In this respect, Meta IE states that *'any suspension of behavioural advertising in Norway for nearly a three month period would irreparably damage [Meta IE] as it would suffer (i) many millions of Euros in lost advertising revenue during this period'*, see Meta IE's Letter to the NO SA of 14 August 2023, p.9.

<sup>374</sup> NO SA Rejection of Meta IE's and Facebook Norway's Request for Deferred Implementation of the Order dated 7 August 2023, p. 1.

<sup>375</sup> See, for instance, EDPB Urgent Binding Decision 01/2021, paragraphs 195-196.

<sup>376</sup> Letter from Meta IE to IE SA of 31 May 2023, p. 5, referring to the EDPB Urgent Binding Decision 01/2021, paragraphs 195-196.

<sup>377</sup> See sections 4.1.1.4 and 4.1.2.4 above.

<sup>378</sup> Meta IE's Submissions of 26 September 2023, p. 9.

<sup>379</sup> See paragraphs 152 and 153 above.

204. The EDPB recalls in this respect the NO SA's argument that the failure to firmly and expediently react to non-compliance with the IE SA Decisions deprives data subjects of the protection that they are entitled to<sup>380</sup>.
205. The EDPB finds, in light of the above and in line with the view of the NO SA, that **failing to put an end to the processing activities at stake and to enforce the IE SA Decisions exposes data subjects to a risk of serious and irreparable harm**<sup>381</sup>. The NO SA, alongside other CSAs, have also expressed the view that further measures are urgently needed in this case not only to address the situation of non-compliance with the GDPR but also put an end to the harm to data subjects.
206. The SE SA expressed the need for further action after the circulation of Meta IE Compliance Reports and asked '*the [IE] SA what procedure [the SE SA] can expect going forward*'<sup>382</sup>.
207. The NL SA [REDACTED]<sup>383</sup>, echoing its previous call to the IE SA "*to swiftly undertake adequate actions in order to cease the continuous illegality of the invasive processing of personal data of millions of users*"<sup>384</sup>. It is also important to recall the NL SA Mutual Assistance Request<sup>385</sup>, according to which '*appropriate and expedient action is required to protect the fundamental rights of millions of data subjects in the Netherlands as well as throughout the European Economic Area*'<sup>386</sup> and that SAs should be '*acting together*' on this '*as cooperating European supervisory authorities under the lead of the [IE SA]*'<sup>387</sup>.
208. Similarly, already after the circulation of the IE SA Provisional Position Paper to the CSAs, the DE Hamburg SA requested the IE SA '*to swiftly reach a consolidated position that [Meta IE] has not demonstrated the legal basis and suspend the processing, which is based on Article 6 (1) [(b) GDPR] and Article 6 (1) (f) GDPR for behavioural advertising*'<sup>388</sup>.
209. In the EDPB Binding Decisions, the EDPB made clear that urgent action was already required in December 2022 and decided that, at that time, the order for compliance to be imposed on Meta IE should require Meta IE to restore compliance within a short period of time<sup>389</sup>. In doing so, the EDPB

<sup>380</sup> NO SA Request to the EDPB, p. 6.

<sup>381</sup> See paragraph 175 above, and NO SA Request to the EDPB, p. 10.

<sup>382</sup> SE SA comment in IE SA IMI Informal Consultations of 4 May 2023.

<sup>383</sup> [REDACTED].

<sup>384</sup> Views of the NL SA on the Compliance Reports of 4 May 2023, in IMI informal consultation on FB case and in IMI informal consultation on IG case, paragraph 4.

<sup>385</sup> The NL SA made the NO SA Mutual Assistance Request on 30 May 2023 and requested the IE SA to inform them by 30 June 2023:

(i) '*Of its conclusion as to whether [Meta IE] can or cannot invoke Article 6(1)(f) GDPR for the processing of the personal data of its users for the purposes of behavioural advertising, more specifically for a large part of the processing operations for which [Meta IE] previously relied on Article 6(1)(b) [GDPR];*' and

(ii) '*Of its conclusion as to whether [Meta IE] does or does not comply with the [IE SA]'s final decision of 31 December 2022, ordering [Meta IE] to bring these processing operations in line with Article 6 GDPR;*' and

(iii) '*Of a timeframe in which appropriate and expedient action will be taken to ensure that [Meta IE] acts in compliance with Article 6 GDPR, to protect the fundamental rights of millions of data subjects affected by this processing operation, in the Netherlands as well as throughout the European Economic Area (EEA). In this respect, the [NL SA] attaches significant weight to the connection between the controller's non-compliance with Article 6 GDPR and its failure to comply with the [IE SA]'s order. In our view, this warrants prompt intervention*'

<sup>386</sup> NL SA Mutual Assistance Request, p. 1.

<sup>387</sup> NL SA Mutual Assistance Request, p. 2.

<sup>388</sup> Views of the DE Hamburg SA on IE SA Provisional Position Paper of 21 July 2023, p. 2.

<sup>389</sup> Binding Decision 3/2022, paragraph 286 and Binding Decision 4/2022, paragraph 288.

recalled the IE SA's reasoning on the three-month deadline already provided by the IE SA its draft decision<sup>390</sup> for compliance for the transparency infringements, which it considered to be necessary and proportionate in light of: (1) the potential for harms to the data subjects' rights that such a measure entails, considering that the interim period for compliance *'will involve a serious ongoing deprivation of their rights'*, (2) the significant financial, technological, and human resources and (3) the clear instructions provided to Meta IE to comply with GDPR<sup>391</sup>. The EDPB therefore instructed the IE SA to include in its final decision an order for Meta IE to bring its processing of personal data for the purpose of behavioural advertising in the context of the Facebook service into compliance with Article 6(1) GDPR **within three months**<sup>392</sup>.

210. Importantly, the understanding that the timeframe to be left to Meta IE to achieve compliance with the GDPR needed to be a fixed one was also shared by the IE SA in the IE SA Decisions, where the IE SA referred to the EDPB Binding Decisions and explained that clearly *'the EDPB considered it necessary for [Meta IE] to take the remedial action required to address the relevant infringements 'within three months' and indicated a 'need for urgent action', and with 'a fixed number of months'*<sup>393</sup>.
211. The EDPB previously established that urgency procedures under Article 66 GDPR are derogations from the standard consistency and cooperation mechanism and that the requirements of Article 66 GDPR must be interpreted restrictively<sup>394</sup>. Therefore, the EDPB considers that it may request final measures under Article 66(2) GDPR only if the regular cooperation or consistency mechanisms cannot be applied in their usual manner due to the urgency of the situation<sup>395</sup>. Therefore, the EDPB assesses in this section whether there is **a need to derogate from the regular cooperation and consistency mechanisms in this case**.
212. In this particular case, the IE SA already adopted the IE SA Final Decisions under the one-stop-shop procedure on the basis of the EDPB Binding Decisions, containing an order for compliance with Article 6(1) GDPR. Pursuant to Article 60(10) GDPR, the controller shall notify the measures taken for complying with a decision taken in the cooperation mechanism with the LSA, which shall inform the CSAs.
213. The EDPB Guidelines on the application of Article 60 GDPR highlight that the *'obligation [of the controller to notify to the LSA the measures taken to comply with the decision] ensures the effectiveness of the enforcement. It is also the basis of possible necessary follow-up actions to be commenced by the LSA, also in cooperation with the other CSAs'*<sup>396</sup>.
214. These guidelines further point out that if the LSA concludes that the measures taken are insufficient, the LSA should, as part of its legal duty to inform the CSAs, consider providing the other CSAs with its assessment of the measures adopted by the controller, in particular in order to decide whether further

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<sup>390</sup> IE SA draft decision relating to Facebook, paragraph 8.4, IE SA draft decision relating to Instagram, paragraph 202.

<sup>391</sup> Binding Decision 3/2022, paragraph 286 and Binding Decision 4/2022, paragraph 288.

<sup>392</sup> Binding Decision 3/2022, paragraph 288 and Binding Decision 4/2022, paragraph 290.

<sup>393</sup> IE SA FB Decision, paragraph 8.10; IE SA IG Decision, paragraph 214.

<sup>394</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraphs 165-167.

<sup>395</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraph 167. Also see paragraph 169 above.

<sup>396</sup> EDPB Guidelines 02/2022 on the application of Article 60 GDPR, adopted on 14 March 2022, paragraph 248.

actions are necessary<sup>397</sup>. This indicates that where the measures adopted by the controller are considered to be insufficient, there may be a need for the LSA to take further actions.

215. In the case at hand, the IE SA concluded in the IE SA Final Position Paper, also relying upon the comments shared and views expressed by the CSAs, that Meta IE failed to demonstrate compliance with the IE SA Decisions<sup>398</sup>. However, it also considered that it was 'fair' and 'reasonable' to provide Meta IE with an opportunity to demonstrate that it can rely on consent as a lawful basis rather than engaging in enforcement measures<sup>399</sup>.

216. The IE SA has also reiterated its position, as LSA, that no further urgent actions are necessary in this case, as the course of action already being taken, consisting in 'an enforcement procedure [...] in which a defined set of proposals, by which [Meta IE] proposes to achieve compliance with its obligations under Article 6 GDPR (and the terms of the [IE SA] Decisions), is the subject of ongoing assessment by the [IE SA] and the CSAs', is adequately addressing the situation<sup>400</sup>.

217. In this respect, the EDPB acknowledges the need to evaluate the proposal being made by the controller, and that this entails the 'examination of a number of particularly complex (and novel) issues'<sup>401</sup>. The EDPB also fully acknowledges that a 'regulatory process' is 'being conducted under the GDPR's cooperation and consistency framework', led by the IE SA, [REDACTED]

[REDACTED]

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[REDACTED]

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he EDPB therefore finds that the existence of the Meta IE's Consent Proposal does not undermine the need to take actions to ensure that the unlawful processing comes to an end.

219. In this context, the EDPB notes that the IE SA acknowledged in its Final Position Paper - more than four months after the deadline for compliance - that Meta IE still infringes the GDPR<sup>405</sup>. The EDPB finds that the fact that the IE SA did not take supervisory measures to put an end to Meta IE's inappropriate reliance on 6(1)(b) and 6(1)(f) GDPR and to enforce the IE SA Decisions, despite the risk of serious and

<sup>397</sup> EDPB Guidelines 02/2022 on the application of Article 60 GDPR, adopted on 14 March 2022, paragraph 249.

<sup>398</sup> IE SA Final Position Paper, paragraph 9.2.

<sup>399</sup> IE SA Final Position Paper, paragraph 9.2.

<sup>400</sup> Letter of IE SA to NO SA of 13 October 2023, p. 4.

<sup>401</sup> Letter of IE SA to NO SA of 13 October 2023, p. 4-5.

<sup>402</sup> Letter of IE SA to NO SA of 13 October 2023, p. 6.

<sup>403</sup> Letter of IE SA to NO SA of 13 October 2023, p. 4-5.

<sup>404</sup> IE SA's Response to Meta IE of 11 August 2023 p. 2. The [REDACTED]

<sup>405</sup> IE SA Final Position Paper, paragraph 8.1.

irreparable harm caused to data subjects<sup>406</sup>, shows that the regular cooperation and consistency mechanism is not providing satisfactory results, and that there is a need to request the IE SA to urgently order final measures due to the urgency of the situation. In this respect, the EDPB notes that while now six months after the deadline for compliance have passed, there is still no clear indication that compliance will be reached soon nor is there a clear indication that the IE SA - as LSA - intends to adopt corrective measures in order to end the ongoing infringements<sup>407</sup>.

220. In conclusion, the EDPB finds, in light of the circumstances described above, **that the regular cooperation or consistency mechanisms cannot be applied in their usual manner, and that due to the risk of serious and irreparable harm without urgent final measures**, there is a need to derogate from the regular cooperation and consistency mechanisms to order final measures due to the urgency of the situation.
221. Lastly, the EDPB considers it relevant to recall the SAs' duty to monitor the application of the GDPR in order to protect the fundamental rights and freedoms of natural persons in relation to processing and to facilitate the free flow of personal data within the EU<sup>408</sup>. In particular, the EDPB has stated that when a violation of the GDPR has been established, competent supervisory authorities are required to react appropriately to remedy this infringement<sup>409</sup>. The powers afforded to SAs by Article 58 GDPR are aimed to fulfilling this goal. Similarly, the Court of Justice of the European Union held that '(...) [a]lthough the supervisory authority must determine which action is appropriate and necessary (...), the supervisory authority is nevertheless required to execute its responsibility for ensuring that the GDPR is fully enforced with all due diligence'<sup>410</sup>.

#### 4.2.2 On the application of a legal presumption of urgency justifying the need to derogate from the cooperation and consistency mechanisms

222. In the precedent section, the EDPB found that there is a need to derogate from the regular cooperation and consistency mechanisms to order final measures due to the urgency of the situation<sup>411</sup>. In this section, the EDPB assesses whether such urgency and need to derogate from the regular cooperation and consistency mechanisms may also be presumed on the basis of Article 61(8) GDPR.
223. Considering the facts of the case<sup>412</sup>, the EDPB will assess whether this case falls within the description provided by Article 61(8) GDPR, which refers to the situation where an SA does not provide the information referred to in Article 61(5) GDPR within one month of receiving a mutual assistance request from another SA. Article 61(8) GDPR provides that the '*urgent need to act under Article 66(1) [GDPR] shall be presumed to be met and require an urgent binding decision from the Board pursuant to Article 66(2) [GDPR]*'. If such a presumption applies, the urgent nature of an Article 66(2) request for an urgent binding decision can be presumed and does not need to be demonstrated<sup>413</sup>.

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<sup>406</sup> See paragraph 205 above.

<sup>407</sup> See paragraphs 215-216 above

<sup>408</sup> Article 51(1) GDPR and Recital 123 GDPR.

<sup>409</sup> EDPB Binding Decision 3/2022, paragraph 278 and EDPB Binding Decision 4/2022, paragraph 280 (referring to CJEU Judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559, paragraph 111).

<sup>410</sup> Judgment of 16 July 2020, *Facebook Ireland and Schrems*, C-311/18, ECLI:EU:C:2020:559, paragraph 112.

<sup>411</sup> See EDPB analysis under 4.2.1.3

<sup>412</sup> See Section 1 of this urgent binding decision.

<sup>413</sup> EDPB Urgent Binding Decision 01/2021, adopted on 12 July 2021, paragraph 170.

224. As mentioned, the NO SA Mutual Assistance Request was made on 5 May 2023 - see paragraphs 10, 13, and 15 above describing the NO SA Mutual Assistance Request and the response provided by the IE SA.

#### 4.2.2.1 Summary of the position of the NO SA

225. The NO SA considers that Article 61(8) GDPR is applicable in this case<sup>414</sup> because the IE SA replied ‘No, I cannot comply with the request’ to the NO SA Mutual Assistance Request *‘without providing any specific justification other than referring to another letter it sent to all of the CSAs on 31 May 2023’*<sup>415</sup>. The NO SA also argues that the *‘IE SA did not provide a reasoned refusal’* as per Article 61(4) GDPR, *‘nor did it inform [the NO SA] of results or progress of any measures taken in order to respond to [their] request to ban the unlawful processing of personal data and to enforce compliance with Article 6(1) [GDPR]’*<sup>416</sup>. According to the NO SA, the content of the letter of 31 May 2023 was a simple announcement of when the IE SA would finalise its review of the Meta IE Compliance Reports, but it *‘did not provide any information on the specific enforcement plan [they] requested, nor did it announce any specific or envisaged enforcement action with respect to Meta IE, despite [their] request to that effect’*<sup>417</sup>.
226. In view of the NO SA there *‘were no measures taken in order to respond to the request’*, and within a month from the NO SA Mutual Assistance request, *‘the IE SA had complied with neither of [their] demands’*<sup>418</sup>. The NO SA also indicates that their demands remain unfulfilled due to the fact that the IE SA considers it fair and reasonable not to engage in enforcement measures despite its conclusion that Meta IE is currently failing to rely on a valid lawful basis for behavioural advertising<sup>419</sup>.
227. To support the view that Article 61(8) GDPR is applicable to the present case, the NO SA refers to an opinion of Advocate General Bobek stating that where a LSA fails to address a CSA mutual assistance request, the latter may adopt provisional measures in circumstances in which *‘the urgent need to act is presumed and need not be proven’*<sup>420</sup>. The NO SA also mentions the existence of precedent decisions applying the Article 61(8) GDPR presumption, in particular a decision from the IT SA related to Meta IE where the SA similarly considered that a failure from the LSA to address their request legitimately allowed for a derogation to the cooperation mechanism and the triggering of an Article 66 GDPR urgency procedure<sup>421</sup>.
228. The NO SA underlines that - contrary to the factual circumstances that led the EDPB to conclude that Article 61(8) was not applicable in a previous case<sup>422</sup> - *‘the communications regarding the present matter between the NO SA and the IE SA were made using the procedure for MA [Mutual Assistance]*

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<sup>414</sup> NO SA Request to the EDPB, p. 7-8.

<sup>415</sup> NO SA Request to the EDPB, p. 8.

<sup>416</sup> NO SA Request to the EDPB, p. 8.

<sup>417</sup> NO SA Request to the EDPB, p. 8.

<sup>418</sup> NO SA Request to the EDPB, p. 8;

<sup>419</sup> NO SA Request to the EDPB, p. 8, referring to the IE SA Final Position Paper. It may be useful to also note that the NO SA, in its Letter to the IE SA of 21 September 2023 (p.1), states they understand the IE SA has chosen not to follow the NO SA Mutual Assistance Request because in spite of preliminarily concluding that Meta IE is still not operating in compliance with Art. 6(1) GDPR they did not indicate any corresponding enforcement measures.

<sup>420</sup> NO SA Request to the EDPB, p. 9, referring to Opinion of Advocate General Bobek in Case C-645/19, Facebook Ireland and Others, paragraph 119 and paragraph 135.

<sup>421</sup> NO SA Request to the EDPB, p. 9, referring to Italian SA’s decision of 21 December 2022 [9853406], available at <https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9853406#english>.

<sup>422</sup> NO SA Request to the EDPB, p.9 referring to EDPB Urgent Binding Decision 01/2021, paragraphs. 171-181.

requests pursuant to Article 61(1) GDPR, and not the procedure for Voluntary Mutual Assistance (“VM[A]”) requests’<sup>423</sup>.

#### 4.2.2.2 Summary of the position of the controller

229. Meta IE argues that, in this case, no ‘presumption of urgency arises under Article 61(8) GDPR’<sup>424</sup>. Meta IE indicates that in order to rely on Article 61(8) GDPR presumption of urgency, the NO SA ‘must show that the [IE SA] failed to respond to the [NO SA’s Mutual Assistance Request]’ but considers that the NO SA ‘cannot show this’<sup>425</sup>. Meta IE states that the NO SA’s ‘attempt to rely on the presumption of urgency in Article 61(8) GDPR is misconceived as a matter of law and contradicts the factual record of communications’ between the IE SA and the NO SA<sup>426</sup>. According to Meta IE, the IE SA ‘adequately addressed the [NO SA Mutual Assistance Request] by providing the information the [NO SA] requested’ and the NO SA ‘distort[s] and mischaracterize[s] the substance and nature of the correspondence’ with the IE SA<sup>427</sup>.
230. In Meta IE’s view, the NO SA Mutual Assistance Request did not ‘request the [IE SA] to detail a “specific enforcement plan” or “specific or envisaged enforcement action” that it would “impose on [Meta IE] in the event of non-compliance”, as this is not what is entailed by the request of the NO SA to the IE SA to share “a timeline specifying how it will ensure in an expedient manner that Meta [IE] complies with Article 6(1) GDPR”’<sup>428</sup>. Rather, according to Meta IE, this wording referred to a request to share a timeline, which the IE SA provided ‘on numerous occasions’<sup>429</sup> and this demonstrates that there was ‘no inaction or failure to communicate by the [IE SA] which the [NO SA] can now rely on to invoke Article 61(8) [GDPR]’<sup>430</sup>.
231. According to Meta IE, ‘the [IE SA]’s decision not to immediately implement the [NO SA]’s own preferred enforcement measures did not amount to a failure to adequately respond to the [NO SA Mutual Assistance Request]. Nothing in Article 61(1) GDPR requires such blind obedience by an LSA to whatever actions a CSA might request it to take. [...] The [IE SA] adequately addressed the [NO SA Mutual Assistance Request] by providing the information the [NO SA] requested’<sup>431</sup>. It also states that ‘Article 61(5) GDPR [...] does not require an LSA to commit in advance to impose any specific corrective measures within any specific timeframe’<sup>432</sup>. Meta IE further elaborates that while ‘Article 61 GDPR cannot be used by a single SA to demand that an LSA adopt corrective measures with respect to processing that is subject to an ongoing LSA-led compliance proceeding’, the IE SA later provided reasons ‘for declining to issue an immediate ban on processing’<sup>433</sup>. In this regard, Meta IE is of the opinion that corrective measures cannot be requested ‘with respect to processing that is subject to an ongoing LSA-led compliance proceeding’ as this could ‘undermine the one-stop shop mechanism and

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<sup>423</sup> NO SA Request to the EDPB, p.9-10.

<sup>424</sup> Meta IE’s Submissions of 25 August 2023, p. 18-21; Meta IE’s Submissions of 16 October 2023, p. 5-8; Annexure 1 to Meta IE’s 16 October 2023 Letter, p.17; Annexure 12 to Meta IE’s 16 October 2023 Letter, p.49-53.

<sup>425</sup> Meta IE’s Submissions of 25 August 2023, p. 19; Meta IE’s Submissions of 16 October 2023, p. 5.

<sup>426</sup> Meta IE’s Submissions of 26 September 2023, p. 5.

<sup>427</sup> Meta IE’s Submissions of 16 October 2023, p. 5.

<sup>428</sup> Meta IE’s Submissions of 26 September 2023, p. 5, referring to the NO SA Mutual Assistance Request.

<sup>429</sup> Meta IE’s Submissions of 25 August 2023, p. 19.

<sup>430</sup> Meta IE’s Submissions of 26 September 2023, p. 7.

<sup>431</sup> Meta IE’s Submissions of 26 September 2023, p. 2; Meta IE’s Submissions of 16 October 2023, p. 5.

<sup>432</sup> Meta IE’s Submissions of 16 October 2023, p. 5.

<sup>433</sup> Meta IE’s Submissions of 16 October 2023, p. 6, referring to (i) Meta IE’s Merit Complaint submitted to the Oslo District Court annexed to Meta IE’s Submissions of 16 October 2023, and to (ii) the IE SA Final Position Paper.

*the LSA's duty to consider all CSAs views in connection with that mechanism*<sup>434</sup>. In addition, Meta IE argues that the request ban on processing had already been *'considered and rejected by the EDPB in a prior Article 65 GDPR binding decision'*<sup>435</sup>.

232. In Meta IE's view, the IE SA addressed the NO SA's Mutual Assistance Request via the IE SA Update to CSAs of 31 May 2023 as it contained *'relevant information'* and allowed to inform the NO SA of *'the progress of the measures taken in order to'* address the request<sup>436</sup>. Considering that the IE SA did address the request on 31 May 2023, it therefore did not refuse to do so when it provided its negative response on IMI on 2 June 2023 because this response was accompanied with a reference to the IE SA Update to CSAs of 31 May 2023<sup>437</sup>. Meta IE further details that the IE SA had explained that the negative response on IMI was the result of a *'mistake'* and that the NO SA's message to the IE SA shows that the NO SA *'did not believe [...] that the [IE SA] had failed to respond'* to the request<sup>438</sup>. In support of this, Meta IE mentions a message from the NO SA to the IE SA stating: *'Thank you for your message of 2 June 2023. We understand that you will revert towards the end of June'* and *'we will await your response towards the end of June'*<sup>439</sup>.
233. Meta IE considers that the NO SA did not object to the IE SA Provisional Position Paper and did not mention any alleged failure by the IE SA to respond to the NO SA Mutual Assistance Request, *'despite invoking Article 61(8) GDPR in the [NO SA] Order to attempt to argue that urgency may be presumed due to an alleged failure to respond by the [IE SA]'*<sup>440</sup>. Furthermore, Meta IE argues that the NO SA *'did not raise any complaints about the [IE SA]'s proposed timetable prior to issuing the Order, even though that is what it would have been expected to do first if it had genuine concerns about urgency'*<sup>441</sup>.
234. Concerning the NO SA's reference to the opinion of Advocate General Bobek in Case C-645/19, Meta IE indicates that *'considering the lengthy procedural history, which includes the [IE SA] imposing the NOYB Decisions and properly conducting an ongoing compliance procedure, the NO SA cannot reasonably argue that the [IE SA] has failed to act. The [IE SA] is acting, and also fully cooperating with, the other SAs'*<sup>442</sup>.

#### 4.2.2.3 Analysis of the EDPB

235. The cooperation mechanism in the GDPR provides for different tools for the SAs to exchange among themselves and perform their tasks. One of such tools is mutual assistance pursuant to Article 61 GDPR. Under this provision, SAs *'shall provide each other with relevant information and mutual assistance in order to implement and apply [the GDPR] in a consistent manner, and shall put in place*

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<sup>434</sup> Meta IE's Merits Complaint submitted to the Oslo District Court annexed to Meta IE's Submissions of 16 October 2023, p. 52.

<sup>435</sup> Meta IE's Merits Complaint submitted to the Oslo District Court annexed to Meta IE's Submissions of 16 October 2023, p. 52, referring to (i) EDPB Binding Decision 3/2022, paragraph 285 and to (ii) EDPB Binding Decision 4/2022, paragraph 287.

<sup>436</sup> Meta IE's Submissions of 16 October 2023, p. 5, referring to the IE SA Update to CSAs of 31 May 2023.

<sup>437</sup> Meta IE's Submissions of 16 October 2023, p. 6.

<sup>438</sup> Meta IE's Submissions of 16 October 2023, p. 6.

<sup>439</sup> Meta IE's Submissions of 16 October 2023, p. 6, referring to the message sent by the NO SA to the IE SA via the IMI flow relating to the NO SA Mutual Assistance Request on 9 June 2023.

<sup>440</sup> Meta IE's Submissions of 25 August 2023, p.9, referring to an email dated 14 July 2023 from the NO SA to the IE SA informing of the Provisional Measures being taken.

<sup>441</sup> Meta IE's Submissions of 26 September 2023, under footnote 41 p. 12.

<sup>442</sup> Meta IE's Complaint to the NO SA regarding the NO SA Order, 1 August 2023, p. 17; Meta IE's Submissions of 25 August 2023, p.21.



measures for effective cooperation with one another'<sup>443</sup>. The same provision also explains that mutual assistance 'shall cover, in particular, information requests and supervisory measures, such as requests to carry out prior authorisations and consultations, inspections and investigations'<sup>444</sup>.

236. The EDPB recalls that Article 61 GDPR on mutual assistance belongs to Section 1 of Chapter VII of the GDPR related to cooperation. In this regard, the EDPB considers Article 61 GDPR to be one of the mechanisms for supervisory authorities to ensure proper and efficient cooperation. Consequently, the concept of mutual assistance rooted in the GDPR entails '*sincere and effective cooperation*'<sup>445</sup> and requires concrete actions from a supervisory authority receiving a mutual assistance request (hereinafter, '**Requested SA**'). More specifically, the obligations of a Requested SA can be listed in a logical sequence as follows:

- Article 61(2) GDPR: '*each SA shall take all appropriate measures required to reply to a request of another SA*';
- Article 61(2) GDPR: the Requested SA shall reply within a specific timeframe ('*without undue delay and no later than one month after receiving the request*');
- Article 61(4) GDPR: the Requested SA must '*comply with the request*' in all cases except for the situations mentioned in Article 61(4) (a) and (b);
- Article 61(5) GDPR, first sentence: '*the requested SA shall inform the requesting SA of the result or, as the case may be, of the progress of the measures taken in order to respond to the request*';
- Article 61(5) GDPR, second sentence: '*the requested SA shall provide reasons for any refusal to comply with a request pursuant to paragraph 4*';
- Article 61(6) GDPR: the Requested SA shall, as a rule, supply the information by electronic means, using a standardised format.

237. Article 61(9) GDPR provides the possibility for the European Commission (hereinafter the '**EC**') to specify, by means of implementing acts, the format and procedures for mutual assistance and the arrangements for the exchange of information by electronic means between SAs. On 16 May 2018, the EC adopted an implementing act relating to the use of the EC Internal Market Information system for GDPR consistency and cooperation procedures, including for Article 61 GDPR mutual assistance requests (IMI) (hereinafter, the '**IMI Implementing Act**')<sup>446</sup>.

238. The IMI procedure dedicated to Article 61 GDPR mutual assistance requests is a one-to-one workflow. This entails that the request can only be addressed to, and received by, the Requested SA. Similarly, the reply will only be addressed to, and received by, the SA that made the mutual assistance request (hereinafter, the '**Requesting SA**'). Pursuant to Article 3(3) of the IMI Implementing Act, this dedicated workflow is to be used for the different exchanges between authorities in the framework of an Article

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<sup>443</sup> Article 61(1) GDPR.

<sup>444</sup> Article 61(1) GDPR.

<sup>445</sup> On how a '*lead supervisory authority cannot, in the exercise of its competences, [...] eschew essential dialogue with and sincere and effective cooperation with the other supervisory authorities concerned*', see Judgment of the Court of Justice (Grand Chamber) of 15 June 2021, in case Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit, C-645/19, ECLI:EU:C: 2021:483, paragraph 63.

<sup>446</sup> EC Implementing Decision (EU) 2018/743 of 16 May 2018 on a pilot project to implement the administrative cooperation provisions set out in Regulation (EU) 2016/679 of the European Parliament and of the Council by means of the Internal Market Information System C/2018/2814, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L.2018.123.01.0115.01.ENG&toc=OJ%3AL%3A2018%3A123%3ATOC>.

61 GDPR mutual assistance request. This includes, in particular, ‘requesting mutual assistance from another supervisory authority in the form of information and/or supervisory measures’, ‘responding to a mutual assistance request including acceptance or in exceptional cases refusals to comply with the request’, and ‘communication of the progress and the result of measures taken in order to respond to the request’<sup>447</sup>. The use of this dedicated IMI workflow also allows for the automatic monitoring of the one-month deadline to reply to a request pursuant to Article 61(2) GDPR.

239. Being a one-to-one workflow in the IMI, an Article 61 GDPR mutual assistance procedure is a type of bilateral communication to be distinguished from other bilateral or multilateral communication channels that are made available in IMI for other types of GDPR cooperation mechanisms. While a mutual assistance request can be connected to developments occurring within multilateral communication channels, the initiation of a mutual assistance request by a supervisory authority opens a dedicated workflow for exchanges between the Requesting and Requested SAs only.
240. Pursuant to Article 61 GDPR, a Requested SA is under a legal obligation to address a mutual assistance request. The only possibility for a Requested SA to refuse to address a request is where it provides reasons for refusing to comply, in line with the two limited exceptions of Article 61(4) GDPR<sup>448</sup> and as provided in the last sentence of Article 61(5) GDPR<sup>449</sup>. While the possibility to provide information on the results or progress of the measures taken within the one-month timeframe gives some discretion to the Requested SA, the duty to cooperate also implies that the Requested SA must always take certain concrete steps to address the given request, or duly justify why it does not do so. In an exceptional situation where a Requested SA does not provide appropriate information on the measures taken, the progress made, or on the duly reasoned grounds why it cannot satisfy the request, within one month of receiving the request, the Requesting SA may consider that the conditions of Article 61(8) GDPR are met.
241. In light of the above developments, the EDPB considers that the obligation for the Requested SA to address a mutual assistance request implies the need to fulfil **procedural** and **substantive criteria**.
242. The need to fulfil the procedural criteria mainly derives from Article 61, paragraphs 6 and 9 GDPR, together with Article 3(3) of the IMI Implementing Act. The procedural criteria relate to the procedural formalities that need to be respected to address a mutual assistance request.
243. For what concerns, on the other hand, the obligation to fulfil substantive criteria, the EDPB considers that this arises from the provisions mentioned above, namely (i) the wording of Article 61(4) GDPR and Article 61 (5) GDPR, providing for a possibility to refuse to comply with mutual assistance requests only based on the limited grounds listed in the GDPR, and providing reasons for any refusal, and (ii) the qualification of mutual assistance as a tool for cooperation. This imposes the need to examine the content of the reply and the actions taken by a Requested SA to evaluate whether or not a given request has been addressed.
244. The list provided by Article 61(1) GDPR is not exhaustive (‘in particular’). As such, it does not list or exclude specifically the imposition of corrective measures. However, the EDPB considers that this does

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<sup>447</sup> EC Implementing Decision (EU) 2018/743 of 16 May 2018, Article 3(3).

<sup>448</sup> Art. 61(4) GDPR states ‘The requested supervisory authority shall not refuse to comply with the request unless: (a) it is not competent for the subject-matter of the request or for the measures it is requested to execute; or (b) compliance with the request would infringe this Regulation or Union or Member State law to which the supervisory authority receiving the request is subject.’

<sup>449</sup> ‘The requested supervisory authority shall provide reasons for any refusal to comply with a request pursuant to paragraph 4’.

not, in any event, remove the duty of the Requested SA, pursuant to Article 61 (4) and 61 (5) GDPR and the general duty of cooperation, to provide reasons for any refusal to comply with a request.

245. Moving on to the case at hand, the EDPB notes that on 5 May 2023 a formal Article 61 GDPR mutual assistance request was initiated by the NO SA via the creation of a dedicated IMI workflow. The NO SA Mutual Assistance Request contained two different requests:

(i) *'that the IE SA issues a temporary ban on Meta IE's processing of personal data for behavioural advertising purposes on Facebook and Instagram based on Article 6(1)(f) GDPR, in accordance with Article 58(2)(f) GDPR'*<sup>450</sup>;

(ii) *'that the IE SA shares a timeline specifying how it will ensure in an expedient manner that [Meta IE] complies with Article 6(1) GDPR'*.

246. In the NO SA Mutual Assistance Request, the NO SA also specified that they would *'be grateful if the IE SA, by 5 June 2023, would share the timeline and confirm that a temporary ban will be issued'* and that *'If the IE SA is not in a position to comply with our request regarding [Meta IE], we may need to consider our options in relation to the adoption of provisional measures in Norway pursuant to Article 66 of the GDPR. We hope that this will not be necessary and look forward to cooperating further with the IE SA within the framework of the cooperation mechanisms set out in Chapter VII of the GDPR'*.

247. The NO SA Mutual Assistance Request was also uploaded by the NO SA as a comment on the Meta IE Compliance Reports, shared with the LSA and all CSAs within the IE SA IMI Informal Consultations. Other CSAs shared their feedback on the Compliance Reports in the same period, as described above in paragraph 10, and some of them also addressed concerns on actions taken by the IE SA<sup>451</sup>. In this context, on 30 May 2023, the NL SA also made a mutual assistance request, as described above in paragraph 12. Analysing, first of all, **whether the procedural criteria were met** by the IE SA's response to the NO SA Mutual Assistance Request, the EDPB notes that it is on 2 June 2023 that the first

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<sup>450</sup> The wording of the NO SA Mutual Assistance Request then goes on as follows: *'The ban should last until the lead and concerned supervisory authorities are satisfied that [Meta IE] has provided adequate and sufficient commitments to ensure compliance with Articles 6(1) and 21 GDPR, in line with Article 31 GDPR. This will give us the opportunity to further engage with Meta and make sure that it commits to fully respect its obligations under the GDPR, while preventing any further risks for data subjects stemming from [Meta IE]'s non-compliant behavioural advertising practices. Please note that in our view, behavioural advertising includes any activities where advertising is targeted on the basis of a data subject's behaviour or movements, including advertising based on perceived location'*.

<sup>451</sup> Several CSAs expressed concerns about:

(i) The IE SA not sharing its own legal assessment (e.g. FR SA on 25 April 2023; DE Hamburg SA on 4 May 2023). In response, the IE SA invited the CSAs to *'carry out their own assessments of the compliance material'* and outlined that *'the finding of infringement of Article 6(1) [GDPR] and the requirement for a corresponding order to be imposed, were determined by the EDPB' which 'overturned the views originally expressed by the IE SA in its draft decision'* (IE SA request for CSAs views circulated via the IMI on 26 April 2023);

(ii) The measures suggested by the controller to comply with the IE SA decisions - in particular the reliance on Article 6(1)(b) GDPR and Article 6 (1)(f) GDPR for behavioural advertising - which raised concerns and criticisms for which several CSAs requested immediate actions from the IE SA (e.g. views of DE Hamburg SA on 4 May 2023; views of NL SA on 4 May 2023; comment of the SE SA on 4 May 2023).

Similarly, the NO SA had previously contacted the IE SA via email on 5 April to express their *'strong doubts'* about Meta using Article 6(1)(f) in the context of behavioural advertising, as well as their fear of a *'real risk to data subject's rights'*, and asking the IE SA for their assessment and intentions for regulatory action. On 4 May 2023, the IE SA had indicated via the IE SA IMI Informal Consultations that they would *'not be preparing any further decision in this matter'* and that they would rely on their assessment of compliance, carried out jointly together with all CSAs, IE SA Information on Procedure (response to SE SA), dated 4 May 2023.

procedural development from the IE SA occurred within the Art. 61 IMI workflow initiated by the NO SA. This is when the IE SA specified they *'cannot comply with the request'* (by way of checking a pre-filled text box on IMI), and indicated in a comment they had further detailed their response under previous communications located in the IMI Informal Consultations<sup>452</sup>. The IE SA made reference to the IE SA Update to CSAs of 31 May 2023 (see above paragraph 13). Therefore, the EDPB considers that the IE SA addressed the NO SA Mutual Assistance Request from a procedural standpoint.

248. The EDPB also analyses the **substance of the reply provided by the IE SA** to assess whether the NO SA Mutual Assistance Request was addressed within the one-month deadline set by the legislator. It is in particular relevant to assess whether the IE SA, refusing to comply with the NO SA Mutual Assistance Request, provided the reasons for such refusal in accordance with Article 61(5) GDPR. While specifying they *'cannot comply with the request'*, the IE SA indicated in a comment they had further detailed their response under previous communications located in the IE SA IMI Informal Consultations<sup>453</sup>. The IE SA made reference to the IE SA Update to CSAs of 31 May 2023 (see above paragraph 13)<sup>454</sup>.
249. According to the IE SA, the IE SA Update to CSAs of 31 May 2023 which its reply of 2 June 2023 referred to was *'directed to the subject matter of the NO SA [Mutual Assistance Request]'* and was *'clearly engaging with the substance of the NO SA [Mutual Assistance Request] [...] directly, and in a fulsome manner'*<sup>455</sup>. Consequently, the IE SA considers it did not refuse to engage with the NO SA's request for mutual assistance by means of its communication of 2 June 2023<sup>456</sup>.
250. The content of the IE SA Update to CSAs of 31 May 2023 relates to the information about the continuation of the assessment of the Meta IE Compliance Reports pursuant to Article 60(10) GDPR<sup>457</sup>. In fact, it was a mere confirmation of the approach already suggested to all CSAs prior to the NO SA Mutual Assistance Request<sup>458</sup>.

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<sup>452</sup> NO SA mutual assistance request IMI dedicated flow.<sup>453</sup> More specifically the message from the IE SA stated: 'Dear Colleagues, Please see detailed response uploaded by the [IE SA] under [the IMI Informal Consultations] for further information. Best regards, IE SA'.

<sup>453</sup> More specifically the message from the IE SA stated: 'Dear Colleagues, Please see detailed response uploaded by the [IE SA] under [the IMI Informal Consultations] for further information. Best regards, IE SA'. Such response was the IE SA Update to CSAs of 31 May 2023 (see paragraph 13 above). The LSA referred to two different communications issued to all CSAs via the IMI Informal Consultations.

<sup>454</sup> The IE SA indicated that they had *'received all of the assessments from CSAs'* and *'forwarded them to [Meta IE] for it to consider the views expressed and to detail any changes that it proposes to implement on foot of the CSA assessments'*. Furthermore, the IE SA stated that it will *'complete its own assessment of [Meta IE]'s compliance reports' 'once the IE SA receives [Meta IE]'s response'*. The IE SA also stated *'it will be in a position to complete its own assessment of [Meta IE]'s [Compliance Reports] and to share its assessment with the Norwegian and Dutch supervisory authorities (both of which have lodged Article 61 requests for mutual assistance) and with all other CSAs by the end of June 2023'*.

<sup>455</sup> Views of IE SA on NO SA Order, p.2.

<sup>456</sup> Views of IE SA on NO SA Order, p.2, referring to IE SA's Response to the NO SA Mutual Assistance Request.

<sup>457</sup> The LSA indicated that they had *'received all of the assessments from CSAs'* and *'forwarded them to [Meta IE] for it to consider the views expressed and to detail any changes that it proposes to implement on foot of the CSA assessments'*. Furthermore, the LSA stated that it will *'complete its own assessment of Meta [IE]'s [C]ompliance [R]eports' 'once the IE SA receives Meta IE's response'*. The LSA also stated *'it will be in a position to complete its own assessment of Meta's compliance reports and to share its assessment with the Norwegian and Dutch supervisory authorities (both of which have lodged Article 61 requests for mutual assistance) and with all other CSAs by the end of June 2023'*.

<sup>458</sup> IE SA Information on Procedure (response to SE SA), dated 4 May 2023 (prior to the NO SA Mutual Assistance Request). In this communication, the LSA indicated to all CSAs - via the IMI Informal Consultations - that the *'IE SA will not be preparing any further decision in this matter'* and that they would rely on their assessment of compliance, carried out jointly together with all CSAs.

251. The EDPB notes that the IE SA Update to CSAs of 31 May 2023 makes reference to the NO SA Mutual Assistance Request, by saying: ‘The IE SA anticipates that it will be in a position to complete its own assessment of Meta IE Compliance Reports and to share its assessment with the [NO SA] and [NL SA] (both of which have lodged Article 61 requests for mutual assistance) and with all other CSAs by the end of June 2023’.
252. However, the EDPB considers that:
- the second request in the NO SA Mutual Assistance Request was a request for ‘*a timeline specifying how [the IE SA] will ensure in an expedient manner that [Meta IE] complies with Article 6(1) GDPR*’. The IE SA Update to CSAs of 31 May 2023 does provide a timeline of the next steps in the process envisaged by the IE SA for the assessment of the Meta IE Compliance Reports (with the last step being the completion of the IE SA’s own assessment and its sharing with the CSAs by the end of June 2023). However, there are no details as to how the IE SA considered that the completion of the assessment of the Compliance Reports would ‘*ensure in an expedient manner that [Meta IE] complies with Article 6(1) GDPR*’. While there is an implicit (and, in any event, only partial) connection, further motivation in this regard would have been necessary.
  - the first request in the NO SA Mutual Assistance Request was a request for the imposition of a “temporary ban on Meta’s processing of personal data for behavioural advertising purposes on Facebook and Instagram based on Article 6(1)(f) GDPR, in accordance with Article 58(2)(f) GDPR’. The IE SA Update to CSAs of 31 May 2023 does not include any reasoning as to the IE SA’s acknowledgement or consideration of this request.
253. The EDPB notes that while the IE SA explained after the expiry of the one-month deadline that the negative answer to the NO SA Mutual Assistance Request was the result of a mistake (a text box ‘incorrectly (and inadvertently) checked’)<sup>459</sup>, the IE SA does not state it tried to amend its answer - for instance to provide the reasons for any refusal to comply with the request - or sought assistance to do so within the one-month deadline.
254. The EDPB also takes note of the IE SA’s view shared on 27 September 2023 that the part of the NO SA Mutual Assistance Request pertaining to a ban was not ‘*validly made by reference to the provisions of Article 61 GDPR*’ and that it was not ‘*open to the [NO SA] to demand, by way of mutual assistance request, that the [IE SA] impose a temporary ban on the Processing Operations*’ at stake<sup>460</sup>.
255. However, Article 61(4), letter (b) GDPR envisages the possibility for the Requested SA to refuse to comply with a mutual assistance request in a situation where it considers that compliance with it would infringe the GDPR or EU or Member State law to which the Requested SA is subject. Nevertheless, in this circumstance, as already underlined under paragraph 240, the Requested SA that wishes to invoke this ground for refusal needs to motivate its response pursuant to Article 61(5) GDPR. The IE SA Update to CSAs of 31 May 2023 or the message in the MA Request workflow of 2 June 2023 do not provide any justification for not addressing the request under the limited exceptions of Article 61(4) GDPR. In addition, the views shared on 27 September 2023 were way beyond the expiration of the one month

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<sup>459</sup> Communication of IE SA to all CSAs dated 20 July 2023, p. 2.

<sup>460</sup> Letter from the IE SA to the NO SA dated 27 September 2023, p. 3. In this regard the IE SA further argued that the EDPB Binding Decisions ‘*explicitly declined to impose a temporary ban*’ (p. 3) and that ‘*Putting in place an immediate ban on processing which is isolated and divorced from any underlying legal procedure would inevitably expose the [IE SA] to significant legal risk and lead to litigation*’ (p. 4).

deadline. Therefore, the EDPB considers that, within one month of receiving the request, the LSA did not provide the reasons for refusal to comply with the request pursuant to Article 61(5) GDPR.

256. In light of the above, the EDPB considers that the IE SA failed to provide a substantive reply the NO SA Mutual Assistance Request.
257. Considering the fact that Article 61(8) GDPR provides explicitly that the presumption of urgency applies in case the [Requested SA] does not provide the information in [Article 61(5)] within the one month of receiving the request, **the EDPB therefore considers that the presumption set by Article 61(8) GDPR is applicable in this specific case. Consequently, the EDPB finds that urgency may be presumed on the basis of Article 61(8) GDPR, which further corroborates the need to derogate from the regular cooperation and consistency mechanisms** <sup>461</sup>.

#### 4.2.3 Conclusion as to the existence of urgency

258. The EDPB considers that the elements analysed above justify the urgency for the EDPB to request the IE SA to order final measures under Article 66(2) GDPR. The EDPB considers that the urgent need to order final measures is clear in light of the risks that the infringements represent for the rights and freedoms of the data subjects without the adoption of final measures<sup>462</sup>. Furthermore, the EDPB considers that such urgency may be presumed pursuant to Article 61(8) GDPR<sup>463</sup>. **The EDPB therefore considers that there is urgency for the IE SA to order final measures in this case.**

## 5 ON THE APPROPRIATE FINAL MEASURES

259. On the basis of the analysis above (see sections 4.1 and 4.2), the conditions relating to the existence of infringements and to an urgent need to act in this case are met. The EDPB therefore proceeds with the analysis of which final measures, if any, it should order in this specific case. A request from a SA under Article 66(2) GDPR is aimed to address a situation where such SA, after adopting provisional measures under Article 66(1) GDPR, ‘considers that final measures need urgently be adopted’.

### 5.1 Content of the final measures

#### 5.1.1 Summary of the position of the NO SA

260. In the NO SA Request to the EDPB, the NO SA requests that ‘*final measures, in line with the provisional measures [the NO SA] imposed in Norway, be imminently adopted*’<sup>464</sup>. In the NO SA Order, the NO SA prohibited for three months Meta IE and Facebook Norway from processing personal data of data subjects residing in Norway for behavioural advertising on the basis of Article 6(1)(b) GDPR or Article 6(1)(f) GDPR from 4 August 2023 to 3 November 2023<sup>465</sup>. The NO SA provides that the NO SA Order will be lifted before that date if remedial measures are implemented so that adequate and sufficient commitments to ensure compliance with Article 6(1) GDPR and Article 21 GDPR can be provided<sup>466</sup>. In case the order is not complied with, the NO SA announces, in the NO SA Order itself, that it may decide to impose a coercive fine of up to NOK 1 000 000 per day of non-compliance on Meta IE and/or

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<sup>461</sup> Also see the EDPB Urgent Binding Decision 01/2021, paragraph 181.

<sup>462</sup> As demonstrated in section 4.2.2.3 above.

<sup>463</sup> As demonstrated in section 4.2.1.3 above.

<sup>464</sup> NO SA Request to the EDPB, p. 12.

<sup>465</sup> NO SA Order, p. 3.

<sup>466</sup> NO SA Order, p. 3.

Facebook Norway, individually or collectively<sup>467</sup>. As Meta IE and Facebook Norway did not comply with the NO SA Order, the NO SA imposed a daily coercive fine, which started to accrue on 14 August 2023<sup>468</sup>.

261. The NO SA also points out that, with respect to the objective that the final measures should seek to achieve, *'it is necessary to ensure that "[p]ersonal data shall not be processed for Behavioural Advertising based on Article 6(1)(b) [GDPR] or [Article] 6(1)(f) GDPR in the context of the Services"'*<sup>469</sup>. The NO SA requests that any final measure should demand *"swift compliance"* without further delay<sup>470</sup>.
262. With respect to the geographical scope of the final measures requested, the NO SA asked that *'the measures should be applied EEA-wide, to avoid derogating from the harmonisation and consistency that the GDPR aims to ensure'*<sup>471</sup>.
263. The NO SA considers that Meta IE has a *'readily available procedure to terminate this processing rapidly'*, as it already implemented an objection mechanism in the EEA in relation to its processing for behavioural advertising in reliance of Article 6(1)(f) GDPR. In other words, the NO SA argues that suspending this processing activity could be achieved through the use of a process similar to the one used by Meta IE in the context of the objection mechanism, and that nothing - from a technical perspective - prevents Meta IE from suspending the behavioural advertising processing in the EEA<sup>472</sup>.
264. To support this request, the NO SA points out that (1) final measures should urgently be adopted because the processing of personal data violates the rights and freedoms of data subjects in all EEA states, (2) the IE SA Decisions are applicable for users in all EEA states, and (3) there is consensus at European level between the IE SA and the CSAs that the processing continues to be unlawful<sup>473</sup>.

### 5.1.2 Summary of the position of Meta IE and Facebook Norway

265. Meta IE points out that in its view *'it is not clear which final measures the [NO SA] is seeking to request from the EDPB'*<sup>474</sup>. According to Meta IE, the NO SA Order *'comprises three core elements: (i) the imposition of a temporary ban [...]; (ii) the imposition of daily administrative fines [...]; and (iii) the lifting of that ban subject to receiving adequate commitments from [Meta IE]'*<sup>475</sup>. Meta IE alleges it is not clear whether the NO SA intends to pursue each of these elements, or others, as part of its request<sup>476</sup>.
266. Meta IE considers that the NO SA Request to the EDPB constitutes partly *'an attempt to re-litigate objections that the [NO SA] has already raised in the NOYB Inquiries at the Article 65 GDPR stage and which have already been rejected by the EDPB'*<sup>477</sup>. According to Meta IE, the NO SA's actions *'appear to be motivated by (unwarranted) dissatisfaction with the [IE SA]'s handling of the enforcement of the*

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<sup>467</sup> NO SA Order, p. 4.

<sup>468</sup> NO SA's Decision to impose a coercive fine on Meta IE and Facebook Norway of 7 August 2023, p. 3.

<sup>469</sup> NO SA Request to the EDPB, p. 12.

<sup>470</sup> NO SA Request to the EDPB, p. 12.

<sup>471</sup> NO SA Request to the EDPB, p. 12.

<sup>472</sup> NO SA Request to the EDPB, p. 12-13.

<sup>473</sup> NO SA Request to the EDPB, p. 12.

<sup>474</sup> Meta IE's Submissions of 26 September 2023, p. 13.

<sup>475</sup> Meta IE's Submissions of 26 September 2023, p. 13.

<sup>476</sup> Meta IE's Submissions of 26 September 2023, p. 13.

<sup>477</sup> Meta IE's Submissions of 26 September 2023, p. 3, 13. See also Meta IE's Submissions of 16 October 2023, p. 8.

*NOYB Decisions*'. The controller states then that it *'cannot be sanctioned based on factors that are outside its sphere of influence'*<sup>478</sup>.

267. In addition, Meta IE provided arguments in respect of the possible content of the final measures to be ordered by the EDPB, setting out elements for each possible measure identified. Meta IE also argues that, in general, only the provisional measures adopted by the requesting SA can be adopted as final measures under the Article 66(2) GDPR procedure<sup>479</sup>. In Meta IE's view, it is unclear whether the EDPB is competent to order final measures on an EEA-wide basis, or whether it is limited to only ordering measures with respect to the country of the requesting CSA, and it is unclear whether the EDPB is competent to adopt final measures permanently<sup>480</sup>. On this matter, Meta IE also made reference to the fact that the EDPB has itself requested the EU legislator to clarify this<sup>481</sup>.

268. Regarding a possible deletion order for data already unlawfully collected [REDACTED] while the NO SA has not explicitly requested such final measure, Meta IE clarified its view that such request would be unlawful and unnecessary<sup>482</sup>. More specifically, Meta IE argues that the NO SA Order did not issue a deletion order as part of its Provisional Measures adopted under Article 66(1) GDPR<sup>483</sup>. Further, Meta IE highlights that the EDPB Binding Decisions rejected objections from the NO SA that aimed to impose a deletion order on Meta IE<sup>484</sup>.

[REDACTED]

[REDACTED] <sup>485</sup>.

[REDACTED] <sup>486</sup>.

[REDACTED] <sup>487</sup>. In any event, Meta IE notes that the personal data previously collected for behavioural advertising is also processed for other purposes that are not related to advertising, such as security, fraud and safety<sup>488</sup>. Meta IE considers that *'a controller cannot be compelled to delete personal data where it is validly collected and processed for different purposes pursuant to valid legal bases, even in cases where its legal basis for one distinct set of processing is subsequently held to be invalid'*<sup>489</sup>.

<sup>478</sup> Meta IE's Submissions of 26 September 2023, p. 17.

<sup>479</sup> Meta IE's Submissions of 26 September 2023, p. 13-14.

<sup>480</sup> Meta IE's Submissions of 26 September 2023, p. 13, footnote 44.

<sup>481</sup> Meta IE's Submissions of 26 September 2023, p. 13, footnote 44, referring to section 6.2 of EDPB-EDPS Joint Opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, at paragraphs 113-116 and 121. In this Joint Opinion, the EDPB and the EDPS provided their views on the proposed regulation made by the European Commission which, according to the EDPB and the EDPS, unduly restricts the application of the urgency procedure under Article 66(2) GDPR.

<sup>482</sup> Meta IE's Submissions of 26 September 2023, p. 14-15.

<sup>483</sup> Meta IE's Submissions of 26 September 2023, p. 14.

<sup>484</sup> Meta IE's Submissions of 26 September 2023, p. 14. This argument relates to the objections made by the NO SA to the draft decisions of the IE SA in the Facebook and Instagram cases, requesting an order to delete personal data processed under Art. 6(1)(b) GDPR, which the EDPB considered not to meet the threshold of Art. 4(24) GDPR (in EDPB Binding Decision 3/2022, paragraph 483 and EDPB Binding Decision 4/2022, paragraph 450).

<sup>485</sup> Meta IE's Submissions of 26 September 2023, p. 14.

<sup>486</sup> Meta IE's Submissions of 26 September 2023, p. 14.

<sup>487</sup> Meta IE's Submissions of 26 September 2023, p. 14.

<sup>488</sup> Meta IE's Submissions of 26 September 2023, p. 14-15.

<sup>489</sup> Meta IE's Submissions of 26 September 2023, p. 15.



269. Regarding a possible suspension order or ban applicable to all EEA users, Meta IE considers that the NO SA's request for a short implementation deadline is allegedly '*flawed and not feasible*'<sup>490</sup>. According to Meta IE, building the supporting infrastructure and rolling out the objection mechanism entailed '*hundreds of thousands of hours of work*' on Meta IE's side by multi-disciplinary teams including product, machine learning and infrastructure engineers, user experience designers, operations, policy, marketing and legal to design, build and implement the systems, processes and user experience required to enable Meta IE to meet the different requirements of Article 6(1)(f) GDPR<sup>491</sup>. In Meta IE's view, the NO SA's assertion that implementing a process similar to the objection mechanism could form some '*sort of instant compliance solution*' is '*flawed*'<sup>492</sup>. [REDACTED]  
[REDACTED]<sup>493</sup>. In other words, Meta IE argues that a change of legal basis for its behavioural advertising processing before [REDACTED] would simply not be feasible.
270. Meta IE also quotes the arguments put forward by the IE SA in that regard: '*Putting in place an immediate ban on processing which is isolated and divorced from any underlying legal procedure (...), would inevitably expose the [IE SA] to significant legal risk and lead to litigation. In the context of such litigation, the [IE SA] would be called on to justify its decision to depart from the course of action rooted in [IE SA Decisions] (uncontested by the EDPB and/or the CSAs), in favour of an alternative, summary procedure involving the immediate imposition of a ban on processing*'<sup>494</sup>.
271. Regarding fines specifically, Meta IE argues that the NO SA is not entitled to ask for a fine as a final measure<sup>495</sup>, since the NO SA Order did not include fines as a provisional measure under Article 66(1) GDPR. More generally, Meta IE also claims that fines are not an appropriate form of final measures under Article 66(2) GDPR<sup>496</sup>, and that the EDPB is not competent to adopt such a decision under Article 66(2) GDPR<sup>497</sup>. As the Article 66(2) GDPR procedure constitutes a derogation to the standard cooperation procedure, Meta IE, highlighting the need for a restrictive interpretation of Article 66 GDPR, is of the opinion that any final measures '*can only be those that are urgently needed to bring the infringement to an end*'<sup>498</sup>. According to Meta IE, all the final measures that do not achieve this objective must be adopted within the framework of the one-stop-shop and the consistency mechanism<sup>499</sup>. Lastly, in Meta IE's view, fines are not appropriate to ensure the immediate protection of data subjects<sup>500</sup>. Meta IE also argues that fines would be inappropriate in the circumstances of this case, where high fines have already been imposed by the IE SA in the IE SA Decisions and where Meta IE [REDACTED] engaged in good faith with the IE SA<sup>501</sup>.

<sup>490</sup> Meta IE's Submissions of 26 September 2023, p. 15.

<sup>491</sup> Meta IE's Submissions of 26 September 2023, p. 15.

<sup>492</sup> Meta IE's Submissions of 26 September 2023, p. 15.

<sup>493</sup> Meta IE's Submissions of 25 August 2023, p. 23-24.

<sup>494</sup> Meta IE's Merits Complaint submitted to the Oslo District Court, p. 26, referring to the Letter of the IE SA to the NO SA of 27 September 2023.

<sup>495</sup> Meta IE's Submissions of 26 September 2023, p. 3.

<sup>496</sup> Meta IE's Submissions of 26 September 2023, p. 16.

<sup>497</sup> Meta IE's Submissions of 26 September 2023, p. 16.

<sup>498</sup> Meta IE's Submissions of 26 September 2023, p. 16.

<sup>499</sup> Meta IE's Submissions of 26 September 2023, p. 16.

<sup>500</sup> Meta IE's Submissions of 26 September 2023, p. 16.

<sup>501</sup> Meta IE's Submissions of 26 September 2023, p. 16.

According to Meta IE, the NO SA Request to the EDPB *'already has, and will continue to, generate a huge amount of administrative work for the EDPB, the CSAs, the LSA and Meta [IE],*

<sup>502</sup>. Meta IE considers that, in light of the fact that a potential urgent binding decision may extend beyond Norway, *'any attempt to perpetuate the provisions of the [NO SA] Order by way of such a decision only serves to exacerbate this misuse of the urgency procedure and the violation of [Meta IE]'s rights'*<sup>503</sup>.

272. Facebook Norway highlights that it is not, and has never been, a party to the inquiries leading to the adoption of the IE SA Decisions<sup>504</sup>. It also highlights that the IE SA Decisions are only addressed to Meta IE, in its capacity of sole data controller for the purpose of behavioural advertising on Facebook and Instagram. Facebook Norway points out that it is a separate and independent legal entity that does not offer Facebook or Instagram either in Norway or elsewhere, and is not the data controller for the concerned behavioural advertising processing<sup>505</sup>. Furthermore, Facebook Norway maintains that it should not have been the addressee of the NO SA Order<sup>506</sup>.
273. Meta IE and Facebook Norway have also expressed the view that the IE SA has already exercised corrective powers against Meta IE in the IE SA Decisions, and that anyways the enforcement of corrective orders is a matter for the LSA and governed by the applicable national law<sup>507</sup>.

### 5.1.3 Analysis of the EDPB

274. In addition to the elements enshrined in the NO SA Request to the EDPB, the EDPB takes into consideration the elements and arguments put forward by the IE SA. The IE SA considers that the NO SA Request to the EDPB seeks to obtain an urgent binding decision from the EDPB, *'the net effect of which would be to compel the [IE SA], as LSA, to impose an EEA-wide ban'*<sup>508</sup>. However, according to the IE SA, it is already leading an ongoing *'enforcement procedure'*, whereby it is, along with the CSAs, assessing *'a defined set of proposals, by which [Meta IE] proposes to achieve compliance'* with Article 6(1) GDPR and the IE SA Decisions<sup>509</sup>. This process is happening by involving the CSAs in accordance with the GDPR's cooperation and consistency framework<sup>510</sup>. More specifically, the IE SA highlights that it *'is currently engaged in a cooperative process to give effect to these orders in a manner that permits all CSAs to make observations on [Meta IE]'s proposed course of action'*<sup>511</sup>.

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<sup>502</sup> Meta IE's Submissions of 16 October 2023, p. 9.

<sup>503</sup> Meta IE's Submissions of 25 August 2023, p. 28.

<sup>504</sup> Facebook Norway's Submissions of 25 August 2023, p. 13. See also Facebook Norway's Submissions of 16 October 2023, p. 4.

<sup>505</sup> Facebook Norway's Submissions of 25 August 2023, p. 13; Facebook Norway's Submissions of 16 October 2023, p. 4; see also Letter from Facebook Norway to Ministry of Local Government and Regional Development of 8 August 2023, p. 2.

<sup>506</sup> Facebook Norway's Submissions of 26 September 2023, p. 1. See also Facebook Norway's Submissions of 16 October 2023, p. 4.

<sup>507</sup> Meta IE's and Facebook Norway's Submissions of 19 October 2023, p. 1-2.

<sup>508</sup> Letter from the IE SA to the NO SA of 13 October 2023, p. 3.

<sup>509</sup> Letter from the IE SA to the NO SA of 13 October 2023, p. 4.

<sup>510</sup> Communication of IE SA to CSAs of 20 July 2023, p. 1. See also Letter from the IE SA to the NO SA of 13 October 2023, p. 4-6.

<sup>511</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 3

275. According to the IE SA, no final measures ordered by the EDPB would be appropriate, as it would divert resources from the IE SA-led process under the GDPR's cooperation and consistency framework<sup>512</sup>. In addition, according to the IE SA, the NO SA's legal justifications to suggest immediate enforcement action by the LSA are '*rooted in hypothetical arguments*'<sup>513</sup>.
276. In this regard, the EDPB acknowledges that, since the moment the IE SA shared with the CSAs the Compliance Reports on 5 April 2023, there has been an ongoing process consisting in the assessment of the compliance efforts by Meta IE represented by the switch on 3 April 2023 to Article 6(1)(f) GDPR as legal basis for most of the personal data collected on Meta's products for behavioural advertising purposes and later on, by the Meta IE's Consent Proposal, and that this process was led by the IE SA in its role as LSA in cooperation with the CSAs, which were invited to submit their views on multiple occasions.
277. However, in light of the elements described above, namely the existence of ongoing infringements of Article 6(1) GDPR - that the EDPB has already labelled as a 'very serious situation of non-compliance'<sup>514</sup>, and of the duty to comply with decisions of SAs, and the existence of an urgent need to act despite the ongoing process led by the IE SA, as motivated above in Section 4.2 of this urgent binding decision, the EDPB considers that, at this point of time, there is a **need to order final measures as further enforcement measures are necessary**.
278. With respect to the **possible content of the specific final measures**, the EDPB considers that it can order final measures other than the provisional measures adopted under Article 66(1) GDPR or than those referred to in the request made pursuant to Article 66(2) GDPR. The GDPR does not indeed provide such limitations on the final measures, and the EDPB, while taking into consideration the request made pursuant to Article 66(2) GDPR as well the other elements of the file, is entrusted to ensure the correct and consistent application of GDPR when performing activities under the consistency mechanism<sup>515</sup>. Therefore, the EDPB is competent under Article 66(2) GDPR to order the final measures that are appropriate on the basis of the circumstances of the case.
279. **In the case at hand, the EDPB considers it appropriate to analyse whether a ban on processing should be imposed**, bearing in mind that the NO SA Request to the EDPB asks that '*final measures, in line with the provisional measures [the NO SA] imposed in Norway, be imminently adopted*'<sup>516</sup>, and that the NO SA Order included a prohibition from processing personal data of data subjects residing in Norway for behavioural advertising on the basis of Article 6(1)(b) GDPR or Article 6(1)(f) GDPR.
280. In respect of the possible imposition of a ban on processing, the IE SA considers that 'the form of order sought by the [NO SA] is not one that could lawfully be delivered by the [IE SA] in the manner now demanded'<sup>517</sup>. This is, first, because the EDPB declined to instruct the IE SA to impose a temporary ban

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<sup>512</sup> Letter from the IE SA to the NO SA of 13 October 2023, p. 5.

<sup>513</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 4.

<sup>514</sup> EDPB Binding Decision 3/2022, paragraph 282 and EDPB Binding Decision 4/2022, paragraph 284.

<sup>515</sup> Art. 63 GDPR, Art. 65 GDPR, Art. 70(1) GDPR, Art. 70(1)(a) GDPR, and Art. 70(1)(t) GDPR.

<sup>516</sup> NO SA Request to the EDPB, p. 12.

<sup>517</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 3.

in the EDPB Binding Decisions<sup>518</sup>, and secondly because the IE SA Decisions ‘made provision for enforcement measures, namely, the orders for compliance, under which [Meta IE]’s proposals for the adoption of one or more alternative legal bases for the Processing Operations would be assessed, and ruled on, on their respective merits’<sup>519</sup>. The IE SA concludes that *‘the EDPB recognised, explicitly, that a process would need to be put in place in which the Controller would identify the means by which it proposed to achieve compliance with its obligations, and, further, that, acting together in the context of the co-operation and consistency mechanism provided for at Chapter VII of the GDPR, the [IE SA] and the CSAs would in turn be required to test those proposals and assess whether or not they are sufficient to achieve compliance with the requirements of Article 6(1) [GDPR] and the [IE SA] Decisions’*<sup>520</sup>.

281. According to the IE SA, the imposition of a ban on processing ‘which is isolated and divorced from any underlying legal procedure would inevitably expose the [IE SA] to significant legal risk and lead to litigation’, where the IE SA ‘would be called on to justify its decision to depart from the course of action rooted in [the IE SA Decisions] (uncontested by the EDPB and/or the CSAs), in favour of an alternative, summary procedure involving the immediate imposition of a ban on processing’<sup>521</sup>. In this regard the IE SA also argues that ‘it is inaccurate to suggest that the [IE SA] could impose an immediate ban on processing, whilst continuing to progress its assessment of [Meta IE]’s proposed consent model, in conjunction with its CSA colleagues’<sup>522</sup>.
282. In this respect, the EDPB highlights that the fact that it chose not to instruct the IE SA to impose a temporary ban in the EDPB Binding Decisions, considering at that time that the imposition of an order to bring processing into compliance within a short time frame would be appropriate, does not in itself rule out the possibility that a ban would be needed today. Likewise, the fact that the IE SA Decisions, adopted on the basis of the EDPB Binding Decisions, do not provide for a ban on processing does not prevent the EDPB from ordering final measures in the form of a ban on processing in the context of this urgent procedure, taking into account the facts that occurred following the adoption of the IE SA Decisions. In this regard, the EDPB also recalls that the IE SA acknowledged in the IE SA Final Position Paper that ‘enforcement measures may [...] have been necessary at this juncture’<sup>523</sup>.
283. In the next paragraphs, the EDPB will assess the appropriateness, necessity and proportionality of a ban on processing. Article 58(2)(f) GDPR provides supervisory authorities with the power to impose a temporary or definitive limitation including a ban on processing.
284. Recital 129 GDPR provides elements to assess whether a specific measure is appropriate. More specifically, consideration should be given to ensuring that the measure chosen does not create ‘superfluous costs’ and ‘excessive inconveniences’ for the persons concerned in light of the objective pursued. When choosing the appropriate corrective measure, there is a need to assess whether the chosen measure is necessary to enforce the GDPR and achieve protection of the data subjects with regard to the processing of their personal data, which is the objective being pursued. Compliance with

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<sup>518</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 3. See also Letter from the IE SA to the NO SA of 13 October 2023, p. 3-4 (where the IE SA also states the EDPB did not instruct the IE SA to adopt an automatic ban or a ban to be imposed should Meta IE fail to achieve compliance within a defined date).

<sup>519</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 3.

<sup>520</sup> Letter from the IE SA to the NO SA of 13 October 2023, p. 4.

<sup>521</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 4.

<sup>522</sup> Letter from the IE SA to the NO SA of 27 September 2023, p. 4.

<sup>523</sup> IE SA Final Position Paper, paragraph 9.2.

the principle of proportionality requires ensuring that the chosen measure does not create disproportionate disadvantages in relation to the aim pursued<sup>524</sup>.

285. As a first element, the EDPB would like to recall its reasoning in the EDPB Binding Decisions. In such decisions, as pointed out by the IE SA and by Meta IE, the EDPB analysed at that point of time whether a ban constituted an appropriate corrective measure to be imposed in the IE SA Decisions, due to the presence of some relevant and reasoned objections putting forward this request<sup>525</sup>. Several of the elements that the EDPB considered at the time are helpful to be considered in this urgent binding decision, too.
286. **The EDPB highlighted in the EDPB Binding Decisions** that the infringement of Article 6(1) GDPR found in the case at hand constituted a very serious situation of non-compliance with the GDPR, in relation to processing of extensive amounts of data, which is essential to the controller's business model, thus harming the rights and freedoms of millions of data subjects in the EEA; therefore, the corrective measure chosen in the circumstances of this case should aim to bring the processing into compliance with the GDPR thus minimising the potential harm to data subjects created by the violations of the GDPR<sup>526</sup>.
287. Therefore, according to the EDPB Binding Decisions, considering the nature and gravity of the infringement of Article 6(1)(b) GDPR, as well as the number of data subjects affected, it was particularly **important that appropriate corrective measures be imposed**, in addition to a fine, in order to ensure that Meta IE complies with this provision of the GDPR<sup>527</sup>.
288. It is also important to note that the EDPB considered that it is **not necessary to establish an urgent necessity for imposing a temporary ban** because nothing in the GDPR limits the application of Article 58(2)(f) GDPR to exceptional circumstances<sup>528</sup>.
289. While in the EDPB Binding Decisions the EDPB took note of the elements raised by the objections to justify the need for imposing a temporary ban, consisting in essence in the need to halt the processing activities that are being undertaken in violation of the GDPR until compliance is ensured in order to avoid further prejudicing data subject rights, it considered that the objective of ensuring compliance and bringing the harm to the data subjects to an end could be adequately met also by amending the order to bring processing into compliance envisaged in the IE SA draft decisions to reflect Meta IE's

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<sup>524</sup> EDPB Binding Decision 3/2022, paragraph 284 and EDPB Binding Decision 4/2022, paragraph 286.

<sup>525</sup> More specifically, in the dispute leading to the adoption of EDPB Binding Decision 3/2022, certain objections requested the imposition of a ban or limitation on processing or an order to abstain from the processing activities in the absence of a valid legal basis (in particular, the objections of the AT, NL, DE and NO SAs). The EDPB analysed the merits of the objections of the AT and NL SAs (found to be relevant and reasoned in paragraph 266 of EDPB Binding Decision 3/22) and did not take any position on the merits of the other objections on this matter that were found to be not relevant and reasoned, namely the objections of the DE and NO SAs (see paragraph 268 of Binding Decision 3/2022).

Concerning, instead, the dispute leading to the adoption of EDPB Binding Decision 4/2022, certain objections requested the imposition of a ban or limitation on processing or an order to abstain from the processing activities in the absence of a valid legal basis (in particular, the objections of the AT, NL, DE and NO SAs). The EDPB analysed the merits of the objections of the AT and NL SAs (found to be relevant and reasoned in paragraph 269 of EDPB Binding Decision 4/2022) and did not take any position on the merits of the other objections on this matter that were found to be not relevant and reasoned, namely the objections of the DE and NO SAs (see paragraph 271 of Binding Decision 4/2022).

<sup>526</sup> EDPB Binding Decision 3/2022, paragraph 282 and EDPB Binding Decision 4/2022, paragraph 284.

<sup>527</sup> EDPB Binding Decision 3/2022, paragraph 279 and EDPB Binding Decision 4/2022, paragraph 281.

<sup>528</sup> EDPB Binding Decision 3/2022, paragraph 283 and EDPB Binding Decision 4/2022, paragraph 285.

infringement of Article 6(1) GDPR<sup>529</sup>. The EDPB noted in this regard that this measure would require Meta IE to put in place the necessary technical and operational measures to **achieve compliance within a set timeframe**<sup>530</sup>. **Such timeframe was established to be necessarily a ‘short period of time’**<sup>531</sup>. The EDPB Binding Decisions comprised, eventually, instructions to the IE SA to include in the IE SA Decisions orders for Meta IE to bring its processing of personal data for the purpose of behavioural advertising in the context of the Facebook service into compliance with Article 6(1) GDPR within three months<sup>532</sup>. In this respect, the EDPB considered this deadline for compliance to be necessary and proportionate, considering that **the interim period for compliance ‘will involve a serious ongoing deprivation of their rights’ and the significant financial, technological, and human resources available to Meta IE**<sup>533</sup>.

290. The fact that the **three-month timeframe has expired several months ago** is an important element to be considered, that marks a significant difference compared to the situation that the EDPB analysed in the EDPB Binding Decisions. Already the three-month interim period for compliance was considered by the EDPB to involve *‘a serious ongoing deprivation’* of data subjects’ rights: the need to ensure that this deprivation comes to an end is therefore even clearer now that three times the time initially envisaged has passed.
291. As a consequence, the reasoning of the EDPB in the EDPB Binding Decisions on whether a ban needed to be imposed in the IE SA Decisions provides **arguments in favour of considering that the imposition of a ban would be appropriate, necessary and proportionate today, rather than against this.**
292. The EDPB also takes note of the NO SA’s argument that Meta IE has a *‘readily available procedure to terminate this processing rapidly’*, as it already implemented an objection mechanism in the EEA in relation to its processing for behavioural advertising in reliance of Article 6(1)(f) GDPR, which allows the suspension of the processing<sup>534</sup>.
293. The EDPB also notes Meta IE’s argument that a short implementation deadline would not be feasible<sup>535</sup>, considering the need for a complex process for the implementation of a ban involving several teams and many hours of work<sup>536</sup>. More specifically, Meta contests that it can comply ‘(i) through blanket application of the [objection mechanism] to all users across the EEA, and then “as a next step” (ii) “expanding the [objection mechanism] to include categories of data processing covered by the [NO SA Order]”, since already the NO SA acknowledges for step (ii) that this “would require redesigning the [objection mechanism]”’<sup>537</sup>.

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<sup>529</sup> EDPB Binding Decision 3/2022, paragraph 285 and EDPB Binding Decision 4/2022, paragraph 287. In reaching this conclusion, the EDPB highlighted that compliance with the principle of proportionality requires ensuring that the chosen measure does not create disproportionate disadvantages in relation to the aim pursued, and Recital 129 GDPR provides that consideration should be given to ensuring that the measure chosen does not create ‘superfluous costs’ and ‘excessive inconveniences’ for the persons concerned in light of the objective pursued. EDPB Binding Decision 3/2022, paragraph 284 and EDPB Binding Decision 4/2022, paragraph 286.

<sup>530</sup> EDPB Binding Decision 3/2022, paragraph 285 and EDPB Binding Decision 4/2022, paragraph 287.

<sup>531</sup> EDPB Binding Decision 3/2022, paragraph 286 and EDPB Binding Decision 4/2022, paragraph 288.

<sup>532</sup> EDPB Binding Decision 3/2022, paragraph 288 and EDPB Binding Decision 4/2022, paragraph 290.

<sup>533</sup> EDPB Binding Decision 3/2022, paragraph 286 and EDPB Binding Decision 4/2022, paragraph 288.

<sup>534</sup> NO SA Request to the EDPB, p. 12-13.

<sup>535</sup> Meta IE’s Submissions of 26 September 2023, p. 15.

<sup>536</sup> Meta IE’s Submissions of 26 September 2023, p. 15.

<sup>537</sup> Meta IE’s Submissions of 26 September 2023, p. 15 (‘Ignoring [Meta IE]’s arguments, the [NO SA] claims that [Meta IE] can comply (i) through blanket application of the [objection mechanism] to all users across the EEA, and then “as a next step” (ii) expanding the [objection mechanism] to include categories of data processing

294. According to the EDPB, the NO SA's argument on the existence of the objection mechanism is reasonable at least for what concerns the processing currently carried out on the basis of Article 6(1)(f) GDPR (i.e. the majority of the processing of personal data collected on Meta's products currently carried out for the purposes of behavioural advertising)<sup>538</sup>, also considering that Meta IE did not explain why for the processing based on Article 6(1)(f) GDPR a 'redesigning' of the mechanism would be necessary; also, Meta IE confirms that 'all relevant objections' are honoured leading to the 'the user [being] "opted out" of this processing'<sup>539</sup>.
295. Additionally, while certainly the imposition of a ban causes significant disadvantages to the controller<sup>540</sup>, the EDPB considers that such disadvantages are not at this point in time, *per se*, disproportionate compared to the harm caused to data subjects by the unlawful processing and continued non-compliance. In this regard, moreover, the EDPB notes that the controller was granted the opportunity to take remedies without facing these disadvantages. As highlighted above<sup>541</sup>, several months have passed since the adoption of the IE SA Decisions and the expiry of the deadline for the orders to bring processing into compliance contained therein. At this stage, the controller has undertaken efforts to comply with the GDPR but compliance has not yet been achieved, as indicated in the IE SA Final Position Paper, and there is still no clear indication that compliance will be reached soon<sup>542</sup>. The imposition of an order to bring processing into compliance within a short deadline did not succeed in reaching the objective it pursued, consisting in '*ensuring compliance and bringing the harm to the data subjects to an end*'<sup>543</sup>.

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covered by the [NO SA Order]. As the [NO SA]'s argument itself acknowledges in step (ii), compliance with the [NO SA Order] (or an urgent binding EDPB decision based on the [NO SA Order]) would require redesigning the [objection mechanism]. As a reminder, building the supporting infrastructure and rolling out the [objection mechanism] entailed hundreds of thousands of hours of work by multi-disciplinary teams including product, machine learning and infrastructure engineers, user experience designers, operations, policy, marketing and legal to design, build and implement the systems, processes and user experience required to enable [Meta IE] to meet the different requirements of Article 6(1)(f) GDPR. The [NO SA]'s speculative assertion that this could form some sort of instant compliance solution is fundamentally flawed'.

<sup>538</sup> See Meta IE Compliance Report on IE SA FB Decision, paragraphs 3.1.3 and 5.8.2, and Meta IE Compliance Report on IE SA IG Decision, paragraphs 3.1.3 and 5.8.2. See also paragraphs 103-106 above.

<sup>539</sup> Meta IE's Merits Complaint submitted to the Oslo District Court on 16 October 2023, p. 14-15 ('since the launch of the Objection Mechanism, Meta [IE] has honoured all relevant objections without qualification and without undertaking a balancing assessment to determine whether it has compelling legitimate grounds to override the user's objection. All that is checked is that the objection (i) relates to behavioural advertising processing that Meta [IE] presently undertakes under Article 6(1)(f) GDPR, and (ii) is submitted by a genuine user based in the EU/EEA (to confirm Meta [IE] is the controller and the GDPR applies). As soon as Meta [IE]'s operations team have confirmed (i) and (ii) based on the limited information that the user is asked to provide, the user is "opted-out" of this processing').

This is without prejudice to the conclusion of the IE SA in the IE SA Final Position Paper whereby the compliance with the GDPR of the objection mechanism set up by Meta IE has not been demonstrated (paragraphs 7.60-7.66).

<sup>540</sup> In Meta IE's Letter to the NO SA of 14 August 2023, Meta IE lists challenges possibly arising from 'stopping' processing of personal data of Norwegian users for behavioural advertising purposes, involving the need to make changes to Meta IE's code and related infrastructure, inform users, provide advertisers with appropriate advance notice, waiting for users to update their apps. Meta IE also highlights the possible damage arising from a suspension of behavioural advertising in Norway, connected to lost revenue, reputational harm, and future revenue losses (p. 8-10).

<sup>541</sup> See paragraph 290 above. See also Meta Ireland's Submissions of 25 August 2023, p. 23-24; Letter from Meta Ireland to NO SA of 14 August 2023, p. 8-9.

<sup>542</sup> See also Meta IE's Submissions of 25 August 2023, p. 23-24; Letter from Meta IE to NO SA of 14 August 2023, p. 8-9.

<sup>543</sup> EDPB Binding Decision 3/2022, paragraph 285 and EDPB Binding Decision 4/2022, paragraph 287.

296. In light of the elements above, the EDPB considers it **appropriate, necessary and proportionate to order final measures consisting in a ban on processing**, to be adopted on the basis of Article 58(2)(f) GDPR.
297. The EDPB considers that, in this particular case, it would be proportionate that **a period of implementation be provided to enable Meta IE to implement it**.
298. The EDPB seizes the occasion to specify that also the NO SA Order was issued on 14 July 2023 but envisaged that it would only become applicable as of 4 August 2023<sup>544</sup>.
299. At the same time, the period of implementation should be a short one, in light of the urgency of the situation as described extensively in the sections above of this urgent binding decision and in particular of the urgent need to put an end to the unlawful processing being carried out to the detriment of data subjects.
300. According to the EDPB, in light of the elements in the file, the implementation of a ban in a short period of time should be technically and practically feasible for Meta IE. This is in particular the case considering that Meta IE already envisages the implementation of a consent mechanism [REDACTED]. Additionally, Meta IE has been aware of the need to bring the unlawful processing to an end since the notification of the IE SA Decisions adopted in December 2022.
301. Therefore, the EDPB considers that, in this particular case, **it is proportionate for the ban on processing to be effective one week after the notification of the final measures to the controller**.
302. Additionally, the EDPB clarifies that the ban should refer to **Meta IE's processing of personal data collected on Meta's products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR**. The processing activities to which the ban refers are: (i) the processing of personal data, including location data and advertisement interaction data, collected on Meta's products for behavioural advertising purposes, having established in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR; (ii) processing of personal data collected on Meta's products for behavioural advertising purposes, having ascertained in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR<sup>545</sup>.
303. The EDPB considers that, in general, the **geographical scope** of the final measures ordered pursuant to Article 66(2) GDPR should be broader than the territory of the requesting SA. While it is provided by Article 66(1) GDPR that the urgent provisional measures adopted by a requesting SA only apply to the territory of that SA, the intervention of the EDPB aims to ensure a consistent application of the GDPR, in light of Articles 63 and 70 GDPR. The final measures should therefore have a broader geographical scope to ensure the protection of the rights and freedoms of all the data subjects affected; this scope can, depending on the matter, cover several Member States<sup>546</sup>. The NO SA requested that final measures, if any, 'should be applied EEA-wide, to avoid derogating from the harmonisation and consistency that the GDPR aims to ensure'<sup>547</sup>. Since in this case the unlawful processing takes place and affect the rights and freedom of data subjects in the entire EEA, the EDPB agrees that the appropriate territorial scope is for the final measures to be applicable throughout the entire EEA, and

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<sup>544</sup> NO SA Order, p. 3-4.

<sup>545</sup> A more thorough analysis can be found above in paragraphs 97-99, 103-104, 147-148 and 152-153.

<sup>546</sup> EDPB-EDPS Joint Opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, paragraph 114.

<sup>547</sup> NO SA Request to the EDPB, p. 12.



concur with the NO SA on the need to avoid fragmentation in the protection afforded to data subjects. Limiting the scope of the final measures to the Norwegian territory would indeed lead to fragmentation in the protection as it would require each CSAs to adopt provisional measures on its own territory under Article 66(1) GDPR and to request an EDPB urgent binding decision under Article 66(2) GDPR leading to the need to adopt final measures limited to their own territory. Such situation could also result in a patchwork of final measures and a fragmentation in countries where the SA has not acted<sup>548</sup>.

304. The EDPB considers that the addressee of the final measures consisting of a ban on processing should be Meta IE, which shall take the necessary measures to ensure compliance with the decision as regards processing activities in the context of all its establishments in the EEA. In line with this, and since Facebook Norway was subject to the NO SA Order alongside Meta IE and considering its submissions, Facebook Norway – which is the Norwegian establishment of Meta IE – should be informed of the outcome and receive a copy of the final measures and of the EDPB urgent binding decision.

#### 5.1.4 Conclusion

305. In light of all the elements above, the EDPB considers it necessary to order final measures, consisting in a ban on processing pursuant to Article 58(2)(f) GDPR.
306. This ban on processing should be addressed to Meta IE, and become effective one week after the notification of the final measures to them.
307. The EDPB considers that the ban should refer to Meta IE's processing of personal data for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR across the entire EEA, as described above in paragraphs 303-304.

#### 5.2 Adoption of the final measures and notification to the controller

308. The GDPR does not specify the procedural steps to be taken following the adoption of an urgent binding decision by the EDPB pursuant to Article 66(2) GDPR. It is however important to note that the two-week deadline for adoption is specified 'by derogation from [...] Article 65(2) [GDPR]' (Article 66(4) GDPR). Consequently, the EDPB considers that, in addition to Article 65(2) GDPR, the procedure set by Article 65(5) GDPR and Article 65(6) GDPR represents a point of reference.
309. The EDPB's urgent binding decision shall be addressed to the LSA and to all the CSAs and be binding on them<sup>549</sup>. The Chair of the Board shall notify, without undue delay, the urgent binding decision to the supervisory authorities concerned, and inform the European Commission thereof<sup>550</sup>.
310. Taking into consideration that the final measures will have to be applicable throughout the entire EEA (as provided in the above sections 5.1.3 and 5.1.4), the EDPB considers that the IE SA, in its role of LSA, will have to adopt a national decision imposing the measures that the EDPB has considered necessary

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<sup>548</sup> EDPB-EDPS Joint Opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, paragraph 115.

<sup>549</sup> Art. 65(2) GDPR. According to Art. 66(4) GDPR, this provision is derogated in respect of the deadline for adoption; therefore, the last sentence of Art. 65(2) GDPR fully applies.

<sup>550</sup> See Art. 65(5) GDPR. Considering the fact that the NO SA was the SA making the request pursuant to Article 66(2), the EDPB will also inform the EFTA Surveillance Authority, in light of Article 1, second paragraph, letter m of Decision of the EEA Joint Committee No. 154/2018.

to order as final measures pursuant to Article 66(2) GDPR<sup>551</sup>. This was already envisaged by the IE SA itself<sup>552</sup>.

311. While the procedure set by Article 65(5) GDPR and Article 65(6) GDPR represents a point of reference, as mentioned above, the EDPB considers that the deadline set in Article 65(6) for the SA to adopt its national decision (one month in Article 65 proceedings) may need to be shortened, on a case by case basis, in Article 66 proceedings. The urgency of the procedure is highlighted by the shortening of the deadline for the Board to adopt its urgent binding decision or opinion under Article 66(4) GDPR. It would therefore be counterintuitive, and against the legislator's will, to imagine that the deadline for the SA to adopt its national decision should remain unchanged in Article 66 proceedings. While the EDPB acknowledges the need for time allowing the SA to draft a national decision and possibly hear the company, in this particular case it is necessary to bear in mind the date of expiry of the Provisional Measures (3 November 2023) as well as the prolonged situation of non-compliance leading to the urgency of the situation as described above.
312. In this case, the EDPB considers that the national decision needs to be adopted by the IE SA without undue delay and at the **latest by two weeks after the EDPB has notified its urgent binding decision to the IE SA and to all the CSAs**. The EDPB highlights, in this regard, that adopting the national decision prior to the expiry of the Provisional Measures on 3 November 2023 would be desirable as it would allow avoiding a gap in the legal situation for what concerns the Norwegian territory. Additionally, the IE SA will have to notify the national decision to Meta IE, attaching the urgent binding decision<sup>553</sup>.
313. The EDPB also requests the NO SA to inform Facebook Norway about the outcome of these proceedings, by sharing a copy of the national decision of the IE SA and of the urgent binding decision, following the notification by the IE SA of its national decision to Meta IE.

## 6 URGENT BINDING DECISION

314. In light of the above and in accordance with the tasks of the EDPB under Article 70(1)(t) GDPR to issue urgent binding decisions pursuant to Article 66 GDPR, the Board issues the following binding decision in accordance with Article 66(2) GDPR.
315. As regards the existence of infringements, based on the evidence provided, the EDPB concludes that there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR for processing of personal data, including location data and advertisement interaction data, collected on Meta's products for behavioural advertising purposes.
316. The EDPB also concludes that there is an ongoing infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR for processing personal data collected on Meta's products for behavioural advertising purposes.
317. In addition, the EDPB concludes that Meta IE is currently in breach of its duty to comply with decisions by supervisory authorities.

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<sup>551</sup> See Art. 65(6) GDPR.

<sup>552</sup> The IE SA considers the NO SA Request to the EDPB seeks to obtain an urgent binding decision from the EDPB, 'the net effect of which would be to compel the [IE SA], as LSA, to impose an EEA-wide ban (...) (In that regard, it is of course the case that it is not open to the EDPB to exercise corrective powers directly as against any controller or processor)'. Letter from the IE SA to the NO SA of 13 October 2023, p. 3.

<sup>553</sup> As described in Art. 65(6) GDPR and paragraph 308 above.

318. On the existence of urgency, the EDPB considers that, the urgent need to order final measures is clear in light of the risks that the infringements represent for the rights and freedoms of the data subjects without the adoption of final measures<sup>554</sup>. Because of such risks, the EDPB also finds that there is a need to derogate from the regular cooperation and consistency mechanisms to order final measures due to the urgency of the situation<sup>555</sup>.
319. The EDPB also considers that the IE SA, by not providing the information referred in Article 61(5) GDPR within the one-month deadline, failed to address the NO SA Mutual Assistance Request and that the presumption of urgency set by Article 61(8) GDPR is therefore applicable in this specific case, which further corroborates the need to derogate from the regular cooperation and consistency mechanisms<sup>556</sup>.
320. Considering the existence of the aforementioned ongoing infringements of the GDPR and the existence of an urgent need to act despite the ongoing process led by the IE SA, the EDPB considers that, at this point of time, further enforcement measures are necessary.
321. Therefore, in light of the analysis carried out above<sup>557</sup> the EDPB considers it appropriate, proportionate and necessary to order final measures, consisting in a ban on processing pursuant to Article 58(2)(f) GDPR.
322. This ban on processing should be addressed to Meta IE, and become effective one week after the notification of the final measures to them.
323. The EDPB considers that the ban should refer to Meta IE's processing of personal data collected on Meta's products for behavioural advertising purposes on the basis of Article 6(1)(b) GDPR and Article 6(1)(f) GDPR across the entire EEA. The processing activities to which the ban refers are: (i) the processing of personal data, including location data and advertisement interaction data, collected on Meta's products for behavioural advertising purposes, having established in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(b) GDPR; (ii) processing of personal data collected on Meta's products for behavioural advertising purposes, having ascertained in this respect the infringement of Article 6(1) GDPR arising from inappropriate reliance on Article 6(1)(f) GDPR.
324. The EDPB instructs the IE SA to adopt a national decision containing the final measures ordered by the EDPB without undue delay and at the latest by two weeks after the EDPB has notified its urgent binding decision to the IE SA and to all the CSAs. The IE SA shall notify the national decision, attaching the urgent binding decision of the EDPB, to Meta IE without undue delay.
325. The EDPB instructs the NO SA to inform Facebook Norway about the outcome of these proceedings.

## 7 FINAL REMARKS

326. This urgent binding decision is addressed to the IE SA, the NO SA and all the other CSAs.
327. The EDPB considers that its current decision is without any prejudice to any assessments the EDPB may be called upon to make in other cases, including with the same parties.

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<sup>554</sup> See section 4.2.1.3 above.

<sup>555</sup> See paragraph 220 above.

<sup>556</sup> See section 4.2.2.3 above, including paragraph 257.

<sup>557</sup> See Sections 5.1.3 and 5.1.4 above.

328. The IE SA shall adopt its national decision no later than two weeks after notification of the EDPB urgent binding decision.
329. The IE SA shall notify its national decision and this urgent binding decision to Meta IE without undue delay. The IE SA shall inform the EDPB of the date when the national decision is notified to the controller.
330. The NO SA shall inform Facebook Norway of the outcome of these proceedings without undue delay after the notification of the national decision to Meta IE.
331. The IE SA will communicate its final decision to the EDPB. Pursuant to Article 70(1)(y) GDPR, the IE SA's final decision communicated to the EDPB will be included in the register of decisions that have been subject to the consistency mechanism.

For the European Data Protection Board

The Chair

(Anu Talus)