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Pay or consent to have your data used – the complex intersection between the DMA and data protection rules

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ABSTRACT
One of the objectives of the Digital Markets Act (DMA) is to prevent gatekeeper platforms from employing their data advantage to create barriers to new entrants. To achieve that, the DMA uses the concept of GDPR consent in Article 5(2) DMA. While this can be seen as a recognition of the synergy between the GDPR and the regulation of digital markets, it exposes an unavoidable challenge for the DMA enforcer: DMA deals with market power and contestability and the GDPR deals with fundamental rights of individuals concerning their personal data. Therefore, data protection and market regulators depart from different assumptions about freedom of choice and consumers' preferences. These differences are prone to creating conflicts when enforcing the DMA provisions. The purpose of this article is twofold. It critically examines the conflict between the GDPR and DMA regarding consent. It also reflects on how these conflicts have been dealt with in the DMA investigation on Meta's 'Pay or Consent' model. The article contends that the DMA enforcer has not considered the specific objectives of the DMA when addressing consent in Meta's model, relying instead only on data protection assumptions to conceptualise it. This outcome led to avoidable DMA overregulation and inefficient remedies.

KEYWORDS
Digital markets; DMA; GDPR

1. Introduction

The objectives of the General Data Protection Regulation (GDPR) (Regulation (EU) 2016/679)[1] and the Digital Market Act (DMA) (Regulation (EU) 2022/1925)[2] differ. Moreover, the assumptions these frameworks make about the functioning and monetisation of data-driven platform models differ from those concerning consumers' expectations. These differences have the potential to create challenges for collaboration between data protection authorities and market regulators in enforcing the DMA's data-related provisions. These challenges – illustrated by the regulatory and judicial treatment of Meta's ad-funded model – are the focus of this paper.

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The monetisation of online platform data-driven models, where users receive free access to services in exchange for the processing of their data for personalised advertising, has become a key concern for European Union regulators, especially after the Case C-252/21 *Bundeskartellamt v Meta Platforms* [2021] ECLI:EU:C:2023:537 and the enactment of the DMA, the *ex ante* regulation for digital markets. On the one hand, the outcomes of the *Meta Platforms*, when addressing the ad-funded business model of online platforms, made clear that these platforms cannot exclude users from accessing their services even if they do not consent to having their data processed and aggregated across different platforms or third-party services for personalised advertising purposes. According to the European Court of Justice (ECJ), these firms should provide users with a less personalised way to access their services, even if this alternative entails the payment of an appropriate fee (*Meta Platforms*, para. 150). On the other hand, Article 5(2) DMA[3] prohibits designated gatekeepers from aggregating end-users' data across different platforms or third-party services, except when these users are offered a specific choice and consent to this processing in accordance with the consent requirements established in Articles 4(11) and 7 GDPR.

To readjust its business model to the reasoning brought by these two important milestones, Meta launched in November 2023 its 'Pay or Consent' business model for the European Union region. According to its terms (Facebook 2024a; Facebook 2024b), Facebook and Instagram platform users are presented with two options to access the platforms' services: they can either pay a subscription fee to access the platform services without having their data harvested and aggregated across different Meta services or third-party services for personal advertising purposes, or they are entitled to have free access to the platform if they consent to the collection and cross-use of their data for these purposes. Therefore, in the model's terms, users are offered an alternative way to access the platforms if they do not wish to consent to the cross-aggregation of their data for personalised ads purposes. Despite this, the European Commission, in the decision of the Case DMA 100055 – Meta – Article 5(2) (European Commission 2025, para 7), considered that the model's binary choice is not compliant with the DMA since it: (i) does not provide end users with a specific choice; (ii) does not allow users to exercise a lawful consent, according to the GDPR requirements.

This outcome not only brought an unexpected interpretation of Art 5(2) DMA by the European Commission but also raised several salient questions concerning the extent to which data protection assumptions affected the analysis of 'Pay or Consent' offers in the investigation, creating, as a result, an outcome that is not connected to the pursuit of DMA objectives of contestability and fairness. Moreover, this decision has revealed how the assumptions employed in the European Commission's decision-making process disregarded the functioning and monetisation of data-driven businesses and followed data protection statements about users' freedom of choice and detriment. As a result, these assumptions are prone to generate adjustments to the gatekeeper business model that, although the European Commission claims to secure more options for end users and ensure that their consent is lawfully obtained, introduce uncertainty when they exercise their choices. Not only that, this outcome further entrenches the gatekeeper data advantage by granting an additional level of potentially valuable strategic and structured information about their users, through the preferences they reveal when exercising their choices to access the platforms.

The complex interplay between competition rules and the data protection regulation in digital markets, especially considering the ad-funded business model of digital platforms, has been extensively scrutinised by the scholarship for at least a decade (Costa-Cabral and Lynskey 2017; Kerber 2022). The *Meta Platforms* case has shed some light on several issues regarding the extent to which these two legal areas can intertwine in assessing potential anti-competitive conduct by dominant undertakings, and how these different authorities can collaborate to achieve a coherent analysis (Gorecka 2024). However, commentators have explicitly highlighted that even in this collaborative environment, the different assumptions of these two diverse areas of European Union law must be taken into account to avoid conflicts and enable a coherent outcome (D'Amico 2024). As pointed out by commentators (Graef 2023; Wierzbicka 2024), the conflicts arising from the incorporation of data protection assumptions in competition assessments, despite the clarifications brought by *Meta Platforms*, can be more complex in the enforcement of the DMA especially considering that the assessment of a lawful GDPR consent is a precondition to evaluate the gatekeeper's compliance with the DMA data-related provisions established in Article 5 (2). In addition to that, the DMA's *ex ante* nature and the limited possibility of gatekeepers' defence can exacerbate the possibility of an overreaching effect of the DMA and the design of ineffective remedies. As such, the understanding of how these conflicts can arise in specific situations, what their root causes are, and their potential detrimental effects on achieving the DMA objectives is essential to enable a coherent DMA enforcement. They bring several policy implications to the current discussion of a collaborative agenda between data protection authorities and competition regulators.

Considering the facts above, this article evaluates the soundness of the assumptions employed by the European Commission to challenge the adoption of the 'Pay or Consent' model by a DMA gatekeeper. It explores not only how the *Meta Platforms* case and GDPR consent requirements were addressed in the analysis of the model's offers, but also analyses whether the new model interferes with users' freedom of choice and detriment. Finally, it investigates how the strict incorporation of data protection assumptions in the DMA context created an overreaching and undesirable effect of the regulation, challenging and outlawing, *prima facie,* a business model that provides a real choice for end users while complying with GDPR requirements for lawful consent.

The article is organised as follows: Section 2 details the different objectives of the GDPR and the DMA, analysing their distinct perspective concerning consent requirements. Section 3 evaluates Meta's former ad-funding model and addresses the changes introduced by the adoption of the 'Pay or Consent', as a reaction to the clarifications introduced by the *Meta Platforms* case and the enactment of the DMA. Section 4 analyses the concerns raised by data protection regulators and the European Commission regarding the adoption of the 'Pay or Consent' model by a DMA gatekeeper, specifically examining the validity of the endorsed data protection assumptions related to the model's offers, as well as the proposed remedy. Concluding remarks will follow.

2. The different objectives of the GDPR and the DMA under the European legal framework

2.1. The General Data Protection Regulation (GDPR)

The protection of individuals' data rights is one of the fundamental values protected by the Charter of the Fundamental Rights of the European Union, as established in its Article 8. To address this core value, the GDPR pursues two main objectives (GDPR, Art. 1(1)): (i) the protection of natural persons concerning the processing of their personal data and (ii) establishing rules relating to the free movement of personal data The first objective aims to protect the fundamental rights of individuals regarding the processing of personal data (GDPR, Recital 1). This protection aims to empower individuals to control their data, respecting their autonomy and self-determination (Solove 2013). The second one seeks to facilitate the free flow of personal data within the European Union and its transfer to third countries and organisations, while providing a high level of protection to individuals in this regard (GDPR, Recital 5). Therefore, in view of these two objectives, GDPR provisions are mainly focused on protecting individuals, considering their data rights within the European Union legal framework.

To achieve the purposes mentioned above, the GDPR provides a governing framework concerning the legal basis for the collection and processing of personal data within the European Union (GDPR, Art. 6(1)). Among them, the data subject's consent is particularly salient to this paper, as it is considered the appropriate legal basis for processing personal data for personalised advertising purposes, following the *Meta Platforms* case.

According to Articles 4(11) and 7 GDPR, data processors must ensure that data subjects' consent is freely given, specific, informed, and unambiguous. Additionally, the data processor must be able to demonstrate that data subjects were offered a genuine choice and their consent can be withdrawn without detriment. When conceptualising these consent requirements data protection regulators (EDPB 2020) have taken into consideration the specific relationship between the data subject and data processor, formulating assumptions related to situations in which information asymmetry, behavioural limitations, and imbalance of power are presumed to affect the individual's control over their data, affecting, as a result, the legitimacy of consent and leading to data protection breaches (Kerber 2025). Data protection assumptions consider that users can be led to bad decision-making in data transactions with large data processors, such as online platforms. These assumptions, therefore, aim to prevent steering or undue influence over individuals' data management decisions and to provide them with tools to preserve their autonomy.

In the GDPR context, factors such as the market structure in which the data processor is operating (D'Amico 2024), the features of the data processor's business model or the data subject preferences and valuations concerning their privacy rights or the purposes for which their data is processed, are not assessed by data protection regulators to investigate how they can interfere with the assumptions made about the concept requirements or influence consent legitimacy. However, these factors are crucial to assess the user's consent in a market regulation like the DMA, as the next sub-section will detail.

2.2. The Digital Markets Act (DMA)

The DMA is an asymmetrical market regulation which aims to bring contestability and fairness to digital markets. This legal framework aims to advance a more effective procedure for the investigation of anticompetitive practices in the digital markets (Witt 2022). In this context, a self-enforcing *ex ante* regulation is presented as a better framework to address the dynamic and fast-changing environment of digital markets, foreseeing specific and self-enforcing commands directly aimed at dominant platforms that occupy a market position that enables them to foreclose entry (gatekeepers) (DMA, Art. 3(1)). In digital markets, online platforms rely on users' personal data to increase the efficiency of their services and products. User data is collected and aggregated across different platform services or third-party services to build comprehensive profiles serving different uses by these firms. It enables the offering of personalised products and services to their users, both end and business users, differentiating them from those offered by other incumbents. It also allows accurate predictions about users' behaviour and preferences, and, in the case of advertising-funded platforms like Google or Facebook, these comprehensive user profiles are employed to sell advertising space to the business side of the platform (Bergemann and Bonatti 2024) to monetise the services offered for free on the demand side. Therefore, the collection and aggregation of personal data across different services provide a competitive advantage for gatekeeper platforms, acting as one of the key drivers of the consolidation of their market power, foreclosing the market to new entrants.

Taking into consideration these issues and their detrimental effects on the contestability of European Union digital markets, the DMA has addressed the data-advantage of gatekeepers, prohibiting them from engaging in certain data-driven practices involving the combination and aggregation of users' data across different services, as listed in Article 5(2) DMA. Despite this prohibition, gatekeepers are allowed to employ the prohibited data aggregation practices across different services in their core services if users are presented with the specific choice and consent with the meaning of Articles 4(11) and 7 GDPR. As such, the GDPR provides a necessary normative contribution (Vandendriessche and Butts 2025) to the enforcement of Art 5(2) DMA to investigate gatekeepers' compliance or circumvention of the two cumulative conditions foreseen by this DMA provision.

Nevertheless, to correct digital market failures and comply with the DMA objectives of contestability and fairness, the data protection assumptions to conceptualise choice and the requirements of a lawful consent (EDPB 2020) are not enough. In the DMA context, personal data is considered not only in its dimension as a fundamental individual right but also in its economic dimension, as a critical input for efficient platform services and their monetisation framework. Therefore, market assumptions about freedom of choice and detriment, users' preferences and values, as well as the firm's incentives within the digital market structure, are necessary to contextualise the data protection concepts in a market regulation. The lack of this contextualisation risks jeopardising the efficacy of DMA's data-related provisions.

As a result, the tension created by the interplay between data protection and market assumptions concerning consent generates complex challenges to the European Commission for the effective enforcement of DMA data-related provisions and the design of adequate remedies to address the DMA objectives. Moreover, it poses several questions concerning the extent of conflicts that inescapably arise in the collaborations between data protection and market regulators and how they interfere with the DMA objectives.

3. Meta's monetisation models for Facebook and Instagram in the European Union: from ad-funded to 'Pay or Consent'

The European Union's fundamental values acknowledge different perspectives on personal data, especially its human rights and economic dimensions (Monti and Alexandre 2025). This recognition is established in the European Union legal framework and policy documents, such as the European Strategy for Data (European Commission 2020). In this context, lawmakers and regulators face a complex challenge to achieve the right balance between these dimensions in the regulation of activities and markets that deal with personal data.

The development of digital markets and the increase in transactions involving personal data have motivated a different set of European Union regulations which consider personal data under its different perspectives. These regulations, despite pursuing different objectives, are increasingly overlapping. The data-related provisions of the DMA and the GDPR are one example of that. Against this background, the sincere collaboration between these two different regulators, as established in Article 4(3) Treaty on European Union and especially after the *Meta Platforms* case, is unavoidable and desirable to ensure the fulfilment of the core values of the European Union legal framework. However, due to the distinct objectives these two regulations pursue, they depart from different assumptions, test different hypotheses and design different remedies when considering the ad-funded model of digital platforms. As such, conflicts might arise, posing risks to efficient DMA enforcement.

3.1. Meta's ad-funded business model

Since the first decade of the 2000s, Meta Platforms has adopted an ad-funded business model for its social networking platform, Facebook (Frenkel and Kang 2021, 54). Launching its business tools, Facebook Ads and Facebook Analytics, made it possible to implement personalised marketing and advertising messages between end users and advertisers. These tools utilise algorithmic predictions based on Facebook users' behaviour and preferences observed and inferred during their interactions within the platform, as well as in third-party apps and websites connected to the Facebook platform through plug-in mechanisms such as 'like' or 'share' buttons. This data-driven business model has drastically changed the effectiveness of online advertising campaigns and has granted Facebook, through its data advantage and robust investment in R&D, a huge revenue from selling online advertising space. The inventiveness of this model in connection with the network effects of the multi-sided platform markets has positioned the Facebook platform in a dominant position in its core market (social network services) and have enabled advances in adjacent ones.

In the Facebook ad-funded model, to open a user account within the platform and gain free access to its services and content, users were required to consent to the collection and aggregation of their data generated by the interactions within the Facebook platform, with data generated by their interaction with other Facebook services, such as

Instagram, or third-party apps and websites. Facebook claimed that this data processing and combination were necessary to provide its social network services and content (Bundeskartellamt 2019, 3). As such, the only way to open a user account to access Facebook services was to consent to the collection and aggregation of personal data across different services by this platform. Consequently, if users consent, they can access Facebook for free. Free access is often used as an incentive on the demand side to foster direct and indirect network effects in multi-sided platform businesses and enable the monetisation of services by the platform's supply side. End-users are free not to join the platform in the first place. Nevertheless, if they wanted to join in and did not consent, no alternative was offered to allow them to access the platform.

The ad-funded model was the revenue framework used by Meta to monetise its Facebook services. In this model, the user's data on the demand side serves as an input to enable the monetisation of platform services through the supply side (business users and advertisers). This ad-funded business model became a reference for the monetisation of platform services in digital markets. Google Search is another example of its use.

In 2016, the German Competition Authority launched an investigation (Bundeskartellamt 2019) to assess whether Facebook had abused its dominant position by infringing the GDPR. According to the decision of the German Competition Authority (Bundeskartellamt 2019), Facebook abused its dominant position by imposing unfair conditions that required users to consent to the aggregation of their data across different services for personalised advertising to access the platform. This investigation condemned Facebook's practice, ordering the platform to adapt its Terms and Conditions to stop making access to the Facebook platform dependent on the collection and processing of the user's data for personalised advertising purposes.

Meta appealed this decision, initiating a contentious debate in German courts, culminating with the referral to the ECJ of several questions about the interplay between the data protection regulation and competition rules. The ECJ's response to these questions in the *Meta Platforms* case established, among several clarifications, that: (i) contrary to Meta's allegation, the collection and combination of users' data for personalised advertisement was not necessary for rendering the services of the Facebook platform (*Meta Platforms*, para. 104). The applicable lawful basis for the data collection and processing related to this purpose, according to the GDPR, is the user's consent. (ii) Meta cannot exclude users who do not consent to data processing for personalised advertising purposes from accessing Facebook's services. Users must be free to refuse consent and should be offered '*if necessary for an appropriate fee, an equivalent alternative not accompanied by such data processing operations' (Meta Platforms,* para. 150*).* Therefore, the abuse identified by the Court in the case consisted of the users' choice being a 'take-it-or-leave-it' offer in which they either accept these terms or do not use the services. As a result of this single alternative, the consent granted by users could not be considered as freely given under Article 4(11) GDPR since users had no real or free choice when consenting to access the platform (GDPR, Recital 43).

Despite all these clarifications, it is important to stress that the ECJ recognised the fact that the monetisation of the Facebook business model was based on online personalised advertising revenue (*Meta Platforms*, para 50). In this model, free access to the platform on the demand side is only made possible through the monetisation of users' data on the business side of the platform. When users do not authorise this through their consent, the platform might not be able to recover its costs from the supply side of the two-sided market and hence would have to find other avenues for revenue generation, for example, by charging for access.

Although Meta is prohibited from restricting users' choice by offering a single alternative for them to access its platforms, the ECJ ruling did not compel Meta to render free services to its users. The judgment clearly stated that the payment of an appropriate fee could accompany the offer of an equivalent alternative not accompanied by such data processing operations (less personalised choice). There was no statement in the ruling imposing that the less personalised offer should be provided to grant users free access to the platform services and content. These important clarifications will be crucial for adjusting Meta's platform business model to the new European Union *ex ante* regulation for digital markets, the DMA.

3.2. Meta's 'Pay or Consent' model and the DMA

The 'Pay or Consent' model is neither new nor a Meta creation. Online news media have been using it since the GDPR came into force in 2018 to contain the decline in the revenue of newspapers' online advertising, caused by the rise of other online media channels. It is a well-known revenue model framework today in the European Union. In a nutshell, if readers are not subscribers, they still can access the news media online version (or part of it) for free if they consent to the collection and aggregation of their data across different services for personalised ads.

To adhere to the ruling concerning the *Meta Platforms* case and to comply with the DMA obligations, Meta, a designated gatekeeper, launched its version of the 'Pay or Consent' model for its platform businesses in the European Union in November 2023. According to the terms of this model in the Meta platforms webpages, end-users are presented with two alternatives to access Meta's platforms: (i) free subscription with ads, in which end-users consent to the collection and aggregation of their data generated in Meta products, their connections, app, browser and device for personalised advertising to access the platforms freely (Facebook 2024a) or (ii) subscription for no-ads, in which consumers pay a monthly fee to access the platform without having their data collected and employed for personalised advertising (Facebook 2024b). These options, at first glance, address the lack of choices highlighted by the *Meta Platforms* case. As such, end-users who do not consent to the collection and aggregation of their data across different services by Meta for personalised advertising purposes are no longer excluded from access to Meta's platforms. They can now join Facebook and Instagram by paying a subscription fee since, as mentioned above, the ECJ has expressly recognised its legal admissibility (*Meta Platforms*, para 150).

Meta's version followed the basic framework of the 'Pay or Consent' model popularised by online media outlets, as pointed out above. Here, it is important to note that the use of this model by online media outlets has not raised concerns from regulators until Meta adopted it to monetise its Facebook and Instagram services in the European Union (IAB Europe 2024a). However, the employment of this model by a gatekeeper online platform has prompted data protection regulators and the DMA enforcer to question whether the model fulfilled the GDPR consent requirements, especially considering how the position of large online platforms in their core service markets (as well as the network effects and users' lock-in features of their business model) can affect the users' freely given consent. These factors are not usually found when the model is employed by news outlets. As such, a key issue is to inquire into what reasons and evidence support their concerns regarding the new model.

The collection and aggregation of personal data generated by user interactions with multi-sided digital platforms across different services are recognised as a salient element for the data advantage of digital platforms. The data advantage of dominant companies, in turn, can be a critical factor in consolidating their market power and foreclosing digital markets (DMA, Recital 36). As such, the DMA, aiming to bring contestability and fairness to digital markets, has prohibited some dominant undertakings, designated as gatekeepers (DMA, Art. 3(1)), from engaging in certain data-driven practices involving the combination and aggregation of users' data across different services, as listed in Article 5(2) DMA. Nevertheless, the implementation of these prohibitions can be overridden by the offer of a specific choice and the end-user consent as long as this consent is valid under the GDPR requirements of being freely given, specific, informed and unambiguous (GDPR Articles 4(11) and 7).

Thus, the compliance or circumvention of the prohibitions established in Article 5(2) DMA inescapably relies on examining whether and under which conditions the end-user consent was obtained. The user's consent is deemed as one of the more challenged legal bases for personal data processing under the GDPR (Solove 2013), especially in the context of data-driven business models. Several criticisms were directed at DMA concerning this provision due to the weak control end-users have over their data in online platform transactions (Graef 2021). In digital platform markets, in which data-driven business models are a common feature, reports from regulators (ICO, CMA 2023) pointed out that firms have incentives to circumvent the GDPR's requirements for the validity of data-subject consent (GDPR, Recitals 32 and 33 and Articles 4(11) and 7). According to them, these firms have incentives to take advantage of end users' cognitive biases and behavioural patterns to obtain their consent and enlarge their data processing in order to keep their data advantage and entrench their market power in their core market or adjacent ones (Condorelli and Padilla 2020). It is important, though, to exercise some caution in relation to this evidence since it neglects the fact that this personal data looping is also necessary for rendering valuable services and products for end-users. One example of this is the recommender systems that enable users to discover new products aligned with their preferences and interests.

Another important issue to consider in the DMA provisions is that when assessing the GDPR consent requirements, the content of Art 5(2) DMA brings an inescapable connection between the offer of a specific choice and the analysis of GDPR consent requirements, especially the one related to users' freedom of choice. According to Recital 42 GDPR, consent cannot be considered freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment. As such, the assessment related to offering a specific choice and the consequent obtention of a freely given consent brings several complex and nuanced aspects for DMA enforcement, especially given that the data controller (GDPR, Art. 4(7)) is a designated gatekeeper. As defined by the DMA, these firms enjoy a position of significant impact on the internal market, being key intermediaries between users and businesses, and providing online platform services characterised by strong network effects (Evans and Richard 2008). These attributes are able to interfere with the relationship between them and their users, signalling an imbalance of power in the transaction between both parties (GDPR, Recital 43). Therefore, assessing how it affects gatekeeper practices is crucial in determining whether the specific offer is valid and consent is freely given for DMA purposes. As ruled in the *Meta Platforms* case, although the imbalance referred above cannot be presumed present in all transactions conducted between dominant companies (the same reasoning applies to gatekeepers) and users (*Meta Platforms*, paras. 147–149), the gatekeeper must be able to prove that the end-user consent was obtained in compliance with the GDPR requirements. Otherwise, the consent cannot be understood as valid to support the data aggregation practices across different services prohibited by the DMA.

All these elements in the assessment of Article 5(2) DMA raise several questions about the employment of the 'Pay or Consent' by a gatekeeper and the extent to which it affects the lawfulness of users' consent, especially considering that data protection and market regulation are not supposed to employ the same assumptions in the model analysis. These regulations consider personal data under different perspectives and inevitably will reach different conclusions about what a specific choice and a freely given consent are under the model's offer. The DMA, as a complementary competition tool, cannot assess the offer of a specific choice and lawful consent, disregarding the model's functioning and its monetisation framework.

4. The contentious objections and remedy to meta's 'Pay or Consent' model in DMA enforcement

It is worth stressing that the *Meta Platforms* case was focused on the lack of alternatives for users to join Meta's Facebook platform when they do not consent to the processing of their data for personalised advertising. Despite the obligation to provide another alternative/choice to users to access the platform without consenting to the collection and aggregation of their data across different services for personalised advertising, the ruling does not require Meta to offer a less personalised alternative for free. That would be questionable under a market and free competition economy, protected not only by the principles established in Article 3(3)Treaty on the European Union but also by the freedom to conduct a business, as established in Article 16 Charter of Fundamental Rights of the European Union. Also, the ruling has not expressly declared or implied that having two alternatives to access the platform (one of them being a paid offer), in addition to the decision of not joining the platforms, could *prima facie* bring detriment to users' free choice and consequently invalidate their consent.

Despite that, the European Commission has challenged Meta's 'Pay or Consent' model *prima facie* in one of the first investigations related to the DMA's enforcement, concluding in its final decision (European Commission 2025) that the model was not compliant with Article 5(2) DMA, not only because it failed to meet the GDPR consent requirements but also because the specific offer was not in accordance with the DMA. In this context, the lack of a less personalised offer for free, in addition to the model's binary offers, invalidates the specific offer in the model. As a consequence, the users' consent cannot be deemed compliant with the GDPR since no real offer was presented to them. The European Commission employed the same data protection assumptions to assess the model and its users' expectations to assess both cumulative conditions of Article 5(2) DMA. This outcome ultimately led to a disputed interpretation of Article 5(2) DMA by the DMA enforcer. It exposed the complex collaboration between the European Commission and data protection regulators in the enforcement of the DMA, as the next subsection demonstrates.

4.1. The data protection assumptions concerning the 'Pay or Consent' implemented by large online platforms

The European Commission initiated an investigation into this model in March 2024 (European Commission 2025), challenging the model's compliance with the two cumulative conditions established by the DMA to validate personal data aggregation practices. As already stressed above, without offering a specific choice and fulfilling all GDPR consent requirements, the gatekeeper cannot justify to the DMA enforcer the data-aggregation practices prohibited by Article 5(2) DMA.

One month after the European Commission opened the investigation, the European Data Protection Board (EDPB) released its Opinion on Valid Consent in the Context of Consent or Pay Models by Large Online Platforms (EDPB 2024). This opinion states that, in most cases, it will not be possible for large online platforms to comply with the requirements of valid consent according to the GDPR if they only offer a binary choice between consenting to the processing of personal data for personalised advertisement and paying a fee (EDPB 2024, para. 179). The EDPB considered that a binary choice, either to consent to data processing for personalised advertisements or pay a fee for no ads, interferes with the users' autonomy to decide, making it more difficult for them to refuse or withdraw their consent (EDPB 2024, paras. 67-70). In this scenario, according to the EDPB, when confronted with these two options, if the users withdraw their consent, it would automatically lead them to the paid offer (EDPB 2024, para. 172). It also considers that by imposing a fee on non-consenting users, large platforms would exclude them from access to the platforms if they do not agree to pay, thereby preventing them from using a service that plays a significant role and is essential in their social lives. This could characterise a detriment, especially in the presence of lock-in or network effects (EDPB 2024, 3). Therefore, these large online platforms should offer users an equivalent alternative that does not entail the payment of a fee, without behavioural advertising, comprising a form of advertising that involves less (or no) personal data (EDPB 2024, paras. 180 and 181). Although the opinion does not address any specific 'Pay or Consent' model, it highlights key assumptions that support opposition to the employment of the model by a large online platform.

Nonetheless, it is crucial to note that, according to Recitals 135 and 136 and Article 64 GDPR, one of the primary purposes of the EDPB Opinions is to serve as a consistency mechanism, ensuring uniformity in the interpretation of relevant and contentious topics related to personal data processing. Consequently, the EDPB does not investigate or generate comments or correction measures in specific cases or individual contexts, as these activities are the responsibility of the national data protection supervisory authorities, as established in the GDPR in Recital 122 and Articles 55-59. As such, the EDPB Opinion does not officially bring any verdict on Meta's model as addressed by the European General Court of Justice in the Case T-319/24 *Meta Platforms Ireland Ltd v European Data Protection Board* ECLI:EU:T:2025:435. Moreover, although EDPB opinions are intended to reflect a common understanding of contentious issues and serve as a uniformity mechanism, they are not binding on national data protection authorities. Even less so on other regulators such as the European Commission.

Taking these factors into account, the EDPB opinion on ‘Pay or Consent’ models adopted by large online platforms approaches personal data primarily as a fundamental right, as would be expected from a data-protection authority. These assumptions overlook other dimensions of personal data, particularly its role as an input for business models in attention markets and as a driver of innovative products valued by consumers. They do not recognise that users’ personal data on the demand side of the platform is a key input to the monetisation of Facebook and Instagram by business users and advertisers on the supply side of these multi-sided platforms. They do not consider that the revenue framework for data-driven models is often mistakenly understood by platform users as ‘free’, since they have not disbursed any monetary payment to access ad-funded platform services (Akman 2021, 248) before the launch of a ‘Pay or Consent’ model. Despite all these critical factors, the EDPB’s key reasoning was fully confirmed and adopted by the European Commission without any counter-analysis or consideration of these lacking issues during the assessment of Meta’s ‘Pay or Consent’.

The reasoning brought by the EDPB to challenge the model implemented by large online platforms must be considered with caution in the context of the DMA. As already mentioned, Article 5(2) DMA seeks to address the data advantage of gatekeepers in a market structure to restore contestability and fairness. This objective must guide the DMA enforcer in analysing the extent to which the EDPB assumptions can be taken into consideration without acknowledging other features of platform markets and their data-driven models. The fundamental right of companies to conduct their business in a market structure, comprising their right to promote changes in their contract terms that are not prohibited by the legal framework, as well as the consumer’s autonomous decision-making in evaluating the new offers, must be considered as important counterbalance factors to test the soundness of data protection assumptions related to the model. Considering this, the next subsection critically addresses these topics, examining whether and to what extent this counterbalance was considered to support the European Commission’s restrictions on the model under the DMA provisions.

4.2. Assessing the DMA assumptions about Meta’s ‘Pay or consent’ model

Despite the European Commission’s strong statements reaffirming its autonomy and independence from the EDPB understandings in Article 5(2) DMA investigations (European Commission 2025, paras. 53 and 292), it is not possible to ignore the influence of the EDPB’s opinion on the Commission’s decision-making concerning Meta’s ‘Pay or Consent’ model. This influence resonates especially in relation to the lack of a less personalised offer for free, as the key factor in challenging and condemning the model (EDPB 2024, paras. 72–82). This absence underlies most of the European Commission’s assumptions in the model’s assessment, ranging from the nature of the services provided by these social networks and consumers’ preferences towards them to considerations about the model’s negative impact on users’ freedom of choice and the detriment. The European Commission’s final decision renders the model inadequate to meet the two cumulative conditions established in Article 5(2) DMA to legitimise the continuation of the gatekeepers' data-related practices banned by this DMA provision. Thus, understanding the robustness of these statements in a market regulation is crucial to assessing the efficiency of this DMA *ex ante* intervention in online platform markets and the effects they can generate. The following paragraphs detail how this absence has influenced the assessment of the model under the DMA provisions, leading, as a result, to controversial arguments justifying its use by a gatekeeper.

4.2.1 The nature of social networking services

Following data protection assumptions about the essentiality of social networking services and consumers' attitudes towards them (EDPB 2024, paras. 87–89), the European Commission considered that social networking services have a critical and essential role in users' daily lives (European Commission 2025, paras. 198–200). These services are provided by a gatekeeper which has an entrenched and incontestable position in this market. Thus, even if a user decides to leave Meta's platforms and port their data to another platform providing this core service, some obstacles, such as interoperability requirements and the lack of potential competitors, still need to be overcome. In Additionally, according to the European Commission, Meta has offered platform services for years without monetary payment (European Commission 2025, para. 93). In this context, if users are forced to choose between consenting to personalised ad purposes or paying a subscription fee for no ads, they would be compelled to continue to consent to keep access to a service that 'has an essential role' in their lives. The European Commission, pointing out some of the scholarship on the topic (Muller-Tribbensee, Miller, and Bernd 2024), considered that consumers are unwilling to pay for a less data-invasive transaction. As a result, considering the combination of these factors, a less personalised offer for free was deemed crucial to avoid detriment to the platform's users. However, caution must be exercised in taking into consideration these statements to investigate the compliance of market regulation provisions.

Firstly, social networking is not deemed an essential service in the European Union legal framework. Assuming that would subject this type of service to a strong set of different regulations, principles (universal access, for example) and controls by regulators (Majone 1994). Thus, a necessary distinction must be made between access to digital communications (through the use of the Internet) and the use of social media networks. The concept of essential services has a clear meaning in competition regulation, as discussed in Case C-7/77 *Oscar Bronner GmbH & Co v Mediaprint Zeitungs and others* ECLI: EU: C:1998:569 and addressed by salient policy papers (OECD 1996). Currently, it hardly comprises social networking, even considering the huge number of its users and their relevance to the digital economy. The fact that these services are highly valued by end-users does not directly make them essential.

Secondly, Meta's platform services have not entailed monetary payment from end-users for several years, as the European Commission argues (European Commission 2025, para. 93), but they were monetised through users' data by the supply side of the platform. In this context, the aggregation of users' personal data across different services acted as critical input to enable service monetisation by business users and advertisers, who seek efficient targeting for products and services. Despite not being free, platform services were not monetised by the demand side of the platform (end-users). Personal data of users is not the equivalent of a monetary price to be paid by them to access the platform's services. In fact, it is a critical input in the platform revenue framework to enable the service monetisation by the supply side. This mechanism is not clearly understood by end-users, who usually assume that, since they are not paying for the services, they are provided for free.

Persistently describing these services as 'free' is therefore misleading. Informed users are not only crucial for exercising consent to the processing of their data, but are also vital to the good functioning of free markets (Akman 2021). The clear information on how the platform's ad-funded model works is crucial for enabling transparency and reducing cognitive bias (such as framing) from end-users. It also allows end-users to understand the changes introduced by the platform in their access alternatives and the trade-offs they entail in order to decide which offer matches their personal preferences and values (Akman 2021; Helberger 2013). Moreover, accepting this argument also inescapably leads to the assumption that companies cannot promote changes in their products or in their contracting terms when they are not following consumers' expectations. This is especially problematic in cases in which these changes were prompted by regulation.

Finally, questions arise about the European Commission's claims that a binary offer in the 'Pay or Consent' would compel users to consent to the aggregation of their data across different services for personalised advertising to maintain their free access to the platform services, since users are generally averse to paying for their data privacy. Here, it is important to acknowledge that users' preferences concerning privacy are not stable. They vary from person to person, and change according to the time and type of transaction. As data protection commentators (Nissenbaum 2010, 141) point out, consent is always dependent on context. In addition to that, users still show insufficient understanding of the monetisation model of online platforms. These factors must be considered when assessing users' preferences. A more comprehensive and detailed analysis of the scholarship on this topic presents mixed evidence about the willingness of users to pay for having less privacy-invasive transactions (Acquisti, John, and Loewenstein 2013; Bylicki, Zawojska, and Łukasik 2025; Skatova et al. 2023).

4.2.2 Freedom of choice and detriment

According to the European Commission (European Commission 2025, paras 93-98), the binary offer in Meta's 'Pay or Consent' can nudge or steer users to consent in order to maintain their access to the platform services, since they are resistant to paying for a less personalised alternative. As such, it is argued that the model fails to offer users an alternative that enables them to freely choose to opt-in to data processing and sign-in practices foreseen in Article 5(2) (DMA, Recital 36). It also disregards the GDPR requirement of a freely given consent (GDPR, Recital 42). In the Commission's understanding, only the offer of an additional, less personalised alternative for free would make the 'Pay or Consent' model compliant with the DMA.

This reasoning would require the platform to offer at least three options to users: (i) free access in return for the aggregation of their data across different services for personalised purposes, (ii) payment of a subscription fee in return for no ads, or (iii) to access the platform freely without or with less personalisation. In this scenario, these assumptions inevitably raise two questions: Does the binary offer in the 'Pay or Consent' model implemented by a gatekeeper restrict or harm users' free choice? Does the offering of an additional alternative enhance users' freedom of choice?

Regarding the first question, the concept of free choice is debated among various disciplines and commentators. Nevertheless, it is often understood through a negative approach, meaning that free choice happens in the absence of restrictions (Sen 1998). In contract law, for example, restrictions on the freedom of contract can be understood as duress and undue influence (McKendrick 2024, 628–684). Taking into consideration these factors and the elements discussed in the above sub-section, in the view of the European Commission, the implementation of the binary offer of the 'Pay or Consent' model by a gatekeeper is interpreted as a type of economic duress. In this case, a company that holds an entrenched position in the market, providing crucial services to its users and benefiting from network effects and user lock-in, is exercising undue commercial pressure on its users (Akman 2014). In essence, users would be constrained to choose between two alternatives that would bring them detriment. If they do not choose between consent or pay, they cannot use the platform services. Against this background, the less personalised option for free is the correcting factor for this imbalance.

These statements, detailed in the EDPB opinion in the context of the GDPR requirements for freely given and non-detrimental consent (EDPB 2020), need to be approached with caution in a market regulation. Firstly, social network services, despite their relevance, are not legally considered essential. Secondly, contrary to the EDPB opinion, as in many other markets, opting out of the platform services is also a legitimate choice for users. Some users do not value the services enough to consent to the aggregation of their data for personalised ad purposes or to pay a subscription fee. Opting out of the platform is a possible and legal choice for these users.

Moreover, it is well established in the European Union competition law that a firm's dominant position (or, in the case of this analysis, its designation as a gatekeeper) does not, *prima facie*, create a legal presumption of power imbalance in its transactions with users. This circumstance needs to be assessed on a case-by-case basis. The imbalance in this situation cannot be understood as an absolute presumption. This was clearly stated by Advocate General Rantos in paragraph 154 of his *Meta Platforms* Opinion,[4] which was followed by the ECJ's decision.

Finally, it is essential to emphasise that outdated contract terms are not immutable. Platforms are entitled to promote changes in their products and services, as well as in the terms of their offers. In addition to the freedom to conduct a business being protected as a fundamental right under the Charter of the Fundamental Rights of the European Union, this is a common and necessary commercial practice to reflect the different market dynamics, including adjustments necessary to comply with changes in the legal regulations applicable to their business.

Considering these elements, in the case of Meta's platform services, the 'Pay or Consent' model has introduced new contracting terms, through which users are granted a less personalised way to access the services if they do not wish to consent to data aggregation across different services for personalised-ad purposes. End-users are free to choose which way they prefer to adhere, if, according to their preferences and values, they want to continue contracting the services. If they do not agree with any proposed alternatives, they can leave the platforms. There is no coercion or undue influence in the design of these alternatives. Users are autonomous in choosing the best offer for themselves.

In addition to that, as mentioned in the previous sections, the *Meta Platforms* case has not ruled on the number of less personalised offers that should be presented to users or implied that the less personalised alternative should necessarily be free for end-users. On the contrary, the ECJ, when evaluating the functioning of Meta's ad-funded platform model, acknowledged that a less personalised offer might not offer the necessary elements for monetisation of the services by the supply side (business users and advertisers). Therefore, the introduction of an appropriate fee to end-users who do not wish to consent to the aggregation of their data across different services for personalised purposes might be necessary. The discussion on what constitutes a less personalised alternative or an appropriate fee must be conducted in a case-by-case analysis by the competent regulators.

Nonetheless, despite these clarifications, the European Commission fully endorsed the data protection understanding that the less personalised alternative must be necessarily offered for free to end-users as an additional third alternative, in addition to the pay or consent ones (EDPB 2024, 3). This contentious position, excluding *prima facie* the adoption of the 'Pay or Consent' model in the DMA context, not only goes in the opposite direction from the *Meta Platforms* ruling, but it is also prone to cause an undue restriction on the company's freedom to contract, imposing contract terms on the company without a legal basis. It is worth stressing that the appropriateness of the price in Meta's less personalised alternative (as well as the methodology and elements employed by the platform to define the fee) was not fully addressed in the DMA investigation on Meta's 'Pay or Consent'(European Commission 2025, para. 105). Even if that was the case and the price is not considered appropriate by the DMA enforcer, the platform is entitled to review it, without abandoning the offer of a paid subscription model for the less personalised offer. Other jurisdictions clearly addressed this possibility. In the United Kingdom, the data protection regulator has highlighted not only the possibility of price revision but also pointed out other alternatives for undertakings to demonstrate the implementation of an appropriate fee, such as the introduction of subscription tiers (ICO 2025).

Finally, while admitting that the less personalised offer for free would enable Meta to benefit from the revenue of contextual advertising, serious doubts remain about what would be understood as contextual advertising and its viability to duly monetise the type of service provided by the platforms to the users who opted for it (IAB 2024b). The concept of contextual advertising is not homogeneous among commentators, and there are no clear guidelines from regulators on what can be accepted in this regard for being considered less personalised. Nevertheless, there is clear evidence that contextual advertising reduces the accuracy of online adverts and jeopardises the match between the demand and supply sides of the platform. As such, in addition to the decrease in platform revenues, contextual advertising will certainly affect the experience of end-users with the services provided by the platform (Bleier 2021). Moreover, it impacts the functioning and structure of the online advertising market. More guidance and evidence about the revenue return of contextual advertising is required. Without this empirical evidence, imposing the use of contextual advertising to monetise the platform services risks creating an unintended effect in other markets.

Concerning the second question, the addition of a less personalised option for free (in addition to the binary choice of the 'Pay or Consent') while increasing the number of choices, also presents challenges for users, which in itself may limit their freedom of choice. The concept of choice overload is now well established in psychology and behavioural economics scholarship (Iyengar and Lepper 2000). It demonstrates that when individuals are presented with many options, they can feel overwhelmed and face difficulties and negative effects in their decision-making process. This can lead to paralysis or maintenance of their *status quo*. This phenomenon has been widely documented in data-driven markets (Choi, Park, and Jung 2018; OECD 2017) and it is particularly concerning in the case of offering an additional less personalised offer for free, in addition to the binary offers of the 'Pay or Consent'.

As highlighted above, the functioning and monetisation of platform models are not clearly understood by platform users. The concept of what would be acceptable as a less personalised offer is still unclear. Several questions still remain open about what would characterise a less personalised alternative. It would be unrealistic to expect users to spend a significant amount of time reading, understanding, and comparing all the offers presented to them, clearly understanding their differences. Even if they do, it is essential to consider that their chosen offer, in the end, might not meet their expectations regarding the provided services, prompting them to reconsider the offer they have chosen. As mentioned before, the lack of personalisation can affect, for some, the quality of services they are accustomed to. One example of that is the recommender systems, in which the aggregation of users' personal data across different services by complex algorithms is employed by online platforms to generate predictions about users' preferences, increasing their contentment with the services and preventing information overload in their interactions with the platforms (Goldfarb and Tucker 2019). In the end, instead of enhancing users' choices, the additional alternative is prone to introducing complexity and uncertainty into their decision, contributing to keeping them in their default position.

The offers in the Meta's model were not analysed 'as if' under the DMA requirements. On the contrary, the European Commission's reasoning has departed from a contentious interpretation that the DMA required that the less personalised offer, as foreseen in its Recitals 36 and 37, could only be offered for free to legitimise the specific offer requirement in Article 5(2) DMA. However, that is not the case. This understanding is not supported by the DMA text, nor by its recitals, nor by its provisions. Also, the ECJ, in analysing Meta's ad-funded model in the *Meta Platforms* case, recognised the lawfulness of offering a less personalised alternative to assess the platforms by charging an appropriate fee. The EDPB opinion was the only document that suggested this type of offer for free to legitimise the model when implemented by a large online platform (EDPB 2024, paras 72-82).

4.3. Assessing the remedy for Meta's 'Pay or consent'

In examining the assumptions discussed in the previous section concerning the imposition of a less personalised choice for free, it can be observed that the European Commission asserted that, despite the mixed empirical evidence, consumers usually are not willing to pay for their privacy. As such, in the DMA enforcer's view, which followed the data protection reasoning, a binary choice between paying or consenting would lead users to continue consenting, thereby maintaining the current trend of an increasing flow of personal data on the platforms. As a consequence, Meta would maintain its data advantage and entrench its market power and barriers to new entrants. Therefore, the less personalised offer for free, according to the Commission and some commentators who support this understanding (Martinez 2025), interferes with this pattern, decreasing the number of users consenting to the aggregation of personal data across different services for personalised purposes, and, as a result, reducing the data advantage of Meta's platforms. However, in addition to the mixed evidence about users' attitudes towards privacy and the network effects of digital platform models, some critical aspects regarding information markets were overlooked by this DMA investigation.

In view of this, the application of the statistical theory of large numbers in the data-driven model of big online platforms must be considered. After a certain specific point, the amount of big data collected by these data-driven businesses will not make a difference in their ability to make predictions and establish patterns, which is vital to their business on the supply side (business users and advertisers – the platform's monetisers). As a consequence, having less personal input does not necessarily change the platform's output in the supply side (businesses and advertisers).

Another crucial neglected aspect of the data advantage of firms is their ability to structure the data they collect and maximise the information they collect and aggregate from their consumers, acquiring knowledge about them. The data advantage of firms is not only formed by the quantity of data they collect and aggregate, but also by how this unstructured data, once organised, generates different types of strategic information for firms (Barker 2021). Once they are organised, they reveal salient information about consumers' preferences, values and choices as well as the context in which they were manifested. Taking notice of these factors, an unavoidable question under the DMA context is whether and how the less personalised alternative for free, in addition to the other two offers in Meta's \`Pay or Consent\`, enables the extraction of another level of information on Meta\`s users, contributing to the firm's data advantage.

In this sense, once this additional offer of a free and less personalised offer is implemented by Meta, users will have fallen into, at least four categories: (i) users who do not consent to the collection and aggregation of their data across different services for personalised purposes and access freely the platforms, (ii) users who consent to the collection and aggregation of their data to freely access the platform seeing personalised advertising, (iii) users who pay for a subscription for no-ads or (iv) users who will accept neither of the offers and leave Facebook, switching to another platform or no longer willing to use the platform services anymore. Therefore, considering this structure, the greater the range of alternatives the platform provides to its users, the more it can learn about them. Each time users make a choice, they reveal contextual preferences, attitudes towards privacy, advertisement, their usage criteria and the values they allocate to them. As a result, after these data are cleaned, organised and structured, Meta can generate precise information linking these different data and employ this information to predict patterns and adapt its businesses to them in all core digital markets in which the firm is present. This knowledge is crucial to the development of new technologies, new products and services and even new ways to monetise its businesses, enlarging the data advantage already enjoyed by the firm. The efficacy of the implementation of the less personalised alternative for free on decreasing the data advantage of Meta's platforms and improving the contestability of Meta's core services under the DMA needs to consider the output of the businesses on the platform's business side. This important economic analysis of the online advertising market and how its composition may change (or not) with the implementation of the less personalised offer for free does not seem to have been considered in this investigation.

5. Conclusion

The DMA assessment on the `Pay or Consent` model illustrates the risks of relying exclusively on data protection assumptions when assessing consent under Article 5(2) DMA. The exclusive reliance on data protection assessments by the DMA enforcer is not sufficient and accurate to pursue the DMA objectives. It is prone to cause overregulation and the design of remedies that reinforce the data advantage of gatekeepers.

The investigation has highlighted that some DMA key concepts still require better understanding and clarification in order to secure a coherent collaboration between data protection authorities and the European Commission on the DMA enforcement. One example is the criteria to be employed in the analysis of a less personalised but equivalent offer in Article 5(2) DMA.

Moreover, the tension between the different objectives of the GDPR and the DMA, as well as their different assumptions about the nature of platform services, the monetisation of their data-driven models, consumers' preferences and the concepts of freedom of choice and detriment in the assessment of consent's lawfulness, is susceptible to creating conflicts in the collaboration of these different regulators. More research into these conflicts and the inescapable trade-offs they entail is necessary and urgent to provide further clarifications and prevent the negative leveraging of different regulatory agendas.

Notes

1. Regulation (EU) 2016/679 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).
2. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).
3. 3. Article 5 (2) DMA: 'The gatekeeper shall not do any of the following:

   (a) process, for the purpose of providing online advertising services, personal data of end users using services of third parties that make use of core platform services of the gatekeeper;
   (b) combine personal data from the relevant core platform service with personal data from any further core platform services or from any other services provided by the gatekeeper or with personal data from third-party services;
   (c) cross-use personal data from the relevant core platform service in other services provided separately by the gatekeeper, including other core platform services, and vice versa; and
   (d) sign in end users to other services of the gatekeeper in order to combine personal data,

   unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679.Where the consent given for the purposes of the first subparagraph has been refused or withdrawn by the end user, the gatekeeper shall not repeat its request for consent for the same purpose more than once within a period of one year. This paragraph is without prejudice to the possibility for the gatekeeper to rely on Article 6(1), points (c), (d) and (e) of Regulation (EU) 2016/679, where applicable.'
4. Opinion of Advocate General Rantos in *Meta Platforms*: Case C-252/21 *Bundeskartellamt v Meta Platforms* [2021] ECLI:EU:C:2023:537.

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