



EUROPEAN COMMISSION

***CASES DMA.100020 Meta - online social  
networking services***

***DMA.100024 Meta – number-independent  
interpersonal communications services***

***DMA.100035 Meta - online advertising  
services***

***DMA.100044 Meta – online  
intermediation services - marketplace***

(Only the English text is authentic)

## **Digital Markets Act**

### **Regulation (EU) 2022/1925 of the European Parliament and of the Council**

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Article 3 Regulation (EU) 2022/1925

Date: 05/09/2023

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Brussels, 5.9.2023  
C(2023) 6105 final

**PUBLIC VERSION**

**COMMISSION DECISION**

**of 5.9.2023**

**designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector**

**DMA.100020 Meta - online social networking services**  
**DMA.100024 Meta - number-independent interpersonal communications services**  
**DMA.100035 Meta - online advertising services**  
**DMA.100044 Meta - online intermediation services - marketplace**

(Only the English text is authentic)

## TABLE OF CONTENTS

1.	Introduction .....	3
2.	The Undertaking .....	3
3.	Procedure .....	4
4.	Legal framework for the designation of gatekeepers pursuant to Regulation (EU) 2022/1925 .....	5
4.1.	The delineation of CPSs .....	5
4.2.	The designation of gatekeepers pursuant to Article 3 of Regulation (EU) 2022/1925 .....	6
4.3.	The rebuttal of the presumptions of Article 3(2) pursuant to Article 3(5) of Regulation (EU) 2022/1925 .....	7
5.	The core platform services .....	8
5.1.	Meta’s online social networking service Facebook .....	8
5.1.1.	CPS qualification and delineation .....	8
5.1.1.1.	The Undertaking’s view .....	8
5.1.1.2.	The Commission’s assessment .....	10
5.1.1.3.	Conclusion .....	20
5.1.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	20
5.1.2.1.	The Undertaking’s view .....	20
5.1.2.2.	The Commission’s assessment .....	21
5.1.3.	Conclusion for the online social networking service Facebook .....	22
5.2.	Meta’s online social networking service Instagram .....	22
5.2.1.	CPS qualification and delineation .....	22
5.2.1.1.	The Undertaking’s view .....	22
5.2.1.2.	The Commission’s assessment .....	22
5.2.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	23
5.2.2.1.	The Undertaking’s view .....	23
5.2.2.2.	The Commission’s assessment .....	24
5.2.3.	Conclusion for the online social networking service Instagram .....	24
5.3.	Meta’s online advertising service Meta Ads .....	24
5.3.1.	CPS qualification and delineation .....	24
5.3.1.1.	The Undertaking’s view .....	24
5.3.1.2.	The Commission’s assessment .....	25
5.3.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	27
5.3.2.1.	The Undertaking’s view .....	27
5.3.2.2.	The Commission’s assessment .....	28
5.3.3.	Conclusion for the online advertising service Meta Ads .....	29

5.4.	Meta’s number-independent interpersonal communication service WhatsApp .....	29
5.4.1.	CPS qualification and delineation .....	29
5.4.1.1.	The Undertaking’s view .....	29
5.4.1.2.	The Commission’s assessment.....	29
5.4.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	30
5.4.2.1.	Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925.....	30
5.4.2.2.	Thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.....	31
5.4.2.3.	Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925 .....	34
5.4.3.	Conclusion for the NIICS WhatsApp .....	34
5.5.	Meta’s number-independent interpersonal communication service Messenger .....	35
5.5.1.	CPS qualification and delineation .....	35
5.5.1.1.	The Undertaking’s view .....	35
5.5.1.2.	The Commission’s assessment.....	37
5.5.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	44
5.5.2.1.	Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925.....	44
5.5.2.2.	Thresholds laid down in Article 3(2)(b), of Regulation (EU) 2022/1925 in relation to Messenger .....	44
5.5.2.3.	Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925.....	47
5.5.3.	Arguments pursuant to Article 3(5) of Regulation (EU) 2022/1925 .....	48
5.5.3.1.	The Undertaking’s view .....	48
5.5.3.2.	The Commission’s assessment.....	49
5.5.4.	Conclusion for the NIICS Messenger .....	54
5.6.	Meta’s online intermediation service Marketplace .....	54
5.6.1.	CPS qualification and delineation .....	54
5.6.1.1.	The Undertaking’s view .....	54
5.6.1.2.	The Commission’s assessment.....	57
5.6.1.3.	Conclusion.....	64
5.6.2.	Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 .....	64
5.6.2.1.	Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925.....	64
5.6.2.2.	Thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.....	64
5.6.2.3.	Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925.....	66
5.6.3.	Arguments pursuant to Article 3(5) of Regulation (EU) 2022/1925 .....	68
5.6.3.1.	The Undertaking’s view .....	68
5.6.3.2.	The Commission’s assessment.....	68
5.6.4.	Conclusion for the online intermediation service Marketplace .....	71
6.	Conclusion.....	72

# COMMISSION DECISION

of 5.9.2023

**designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector**

**DMA.100020 Meta - online social networking services**

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(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to 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),<sup>1</sup> in particular Article 3 thereof,

Whereas:

## **1. INTRODUCTION**

- (1) On 3 July 2023, Meta Platforms, Inc. notified the Commission,<sup>2</sup> pursuant to Article 3(3), first subparagraph, of Regulation (EU) 2022/1925, that Meta Platforms, Inc., together with all legal entities directly or indirectly controlled by Meta Platforms, Inc. (hereinafter collectively referred to as “Meta” or “the Undertaking”)<sup>3</sup> meets the thresholds laid down in Article 3(2) of that Regulation in relation to the following core platform services (“CPSs”): (i) its single online social networking service supported by its online advertising service comprising, in Meta’s view, Facebook, Instagram, Meta Ads, Messenger, Marketplace, Facebook Dating and Facebook Gaming Play; and (ii) its number-independent interpersonal communications service (“NIICS”) WhatsApp.

## **2. THE UNDERTAKING**

- (2) Meta operates social networking services and messaging services. Meta also offers an enterprise software called Workplace and is active in the development of virtual reality hardware, technology, and services. Meta’s primary revenue-generating

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<sup>1</sup> OJ L 265, 12.10.2022, p. 1.

<sup>2</sup> Notification pursuant to Article 3 of Council Regulation (EU) no. 2022/1925, Form for Gatekeeper Designation (GD), notified on 3 July 2023 and amended on 16 July 2023 with respect to its Section 3 (hereafter referred to as ‘Form GD’).

<sup>3</sup> See Article 2, point (27) of Regulation (EU) 2022/1925.

activity is offering online advertising and related functionalities to third parties on Meta's end-user facing services.<sup>4</sup>

- (3) Meta's parent company is Meta Platforms, Inc., a publicly traded company founded in 2004, which is headquartered in Menlo Park, California, United States of America.<sup>5</sup> Meta Platforms Ireland Limited and WhatsApp Ireland Limited are Meta subsidiaries based in Ireland that operate the notified CPSs in the Union.

### 3. PROCEDURE

- (4) On 3 July 2023, Meta submitted a complete Form GD pursuant to Article 3(3), first subparagraph, of Regulation (EU) 2022/1925.
- (5) On 6 July 2023, the Commission sent Meta a request for information pursuant to Article 21(3) of Regulation (EU) 2022/1925. The information requested was necessary for the Commission to assess whether Marketplace and Messenger are distinct CPSs pursuant to Article 2, point (2), of Regulation (EU) 2022/1925 which individually meet the thresholds laid down in Article 3(2) of that Regulation. On 11 July 2023, Meta responded to that request for information.
- (6) On 10 July 2023, the Commission sent Meta a request for information, dated 7 July, pursuant to Article 21(2) of Regulation (EU) 2022/1925 in relation to Messenger. On 12 and 16 July 2023, Meta responded to that request for information.
- (7) On 16 July 2023, Meta informed the Commission that its Form GD contained an error in relation to the annual turnover figures requested in Section 3.1 of the Form GD template. It therefore resubmitted Section 3 of its Form GD.
- (8) On 26 July 2023, the Commission sent Meta a letter concerning Meta's notification under Article 3(3) of Regulation (EU) 2022/1925 ("the Commission's letter of 26 July 2023"), in which it set out its preliminary views on Meta's possible designation as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 and on its intention to list in Meta's designation decision the following CPSs that are provided by Meta and which individually appear to constitute an important gateway for business users to reach end users:
- (a) Meta's online social networking service Facebook;
  - (b) Meta's online social networking service Instagram;
  - (c) Meta's online advertising service Meta Ads;
  - (d) Meta's NIICS WhatsApp;
  - (e) Meta's NIICS Messenger; and
  - (f) Meta's online intermediation service Marketplace.
- (9) On 27 July 2023, Meta requested an extension of the deadline to respond to the Commission's letter of 26 July 2023 until 7 August 2023. On 28 July 2023, the Commission rejected that request, indicating that granting such extension would endanger the strict procedural deadlines within which the Commission must adopt a final decision pursuant to Article 3(4) of Regulation (EU) 2022/1925, and instead granted Meta an extension until 3 August 2023.

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<sup>4</sup> Form GD, paragraph 9.

<sup>5</sup> Form GD, paragraph 7.

- (10) On 3 August 2023, Meta submitted its reply to the Commission’s letter of 26 July 2023 (“Meta’s 3 August 2023 reply”).
- (11) On 13 August 2023, after the deadline set by the Commission, Meta submitted an additional letter to the Commission services in which it briefly repeated some of the arguments set out in its reply of 3 August 2023.

#### **4. LEGAL FRAMEWORK FOR THE DESIGNATION OF GATEKEEPERS PURSUANT TO REGULATION (EU) 2022/1925**

- (12) Article 3 of Regulation (EU) 2022/1925 sets out the rules for the designation of gatekeepers. An undertaking shall be designated as a gatekeeper under that Regulation if it satisfies the requirements set out in Article 3(1) thereof. An undertaking shall be presumed to satisfy those requirements where it meets the quantitative thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925. Pursuant to Article 3(9) of that Regulation, the designation decision shall list the relevant CPSs that are provided by the undertaking and that are an important gateway for business users to reach end users as referred to in Article 3(1)(b).

##### **4.1. The delineation of CPSs**

- (13) Article 2, point (2) of Regulation (EU) 2022/1925 lists ten CPS categories, namely: (a) online intermediation services, (b) online search engines, (c) online social networking services, (d) video-sharing platform services, (e) NIICS, (f) operating systems, (g) web browsers, (h) virtual assistants, (i) cloud computing services, and (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the CPSs listed in points (a) to (i).
- (14) In order to determine whether a service provided by an undertaking is a CPS that meets the requirement set out in Article 3(1)(b) of Regulation (EU) 2022/1925, it is necessary, as a preliminary step, to proceed to the delineation of this service. To delineate a service, a number of provisions in Regulation (EU) 2022/1925 are of relevance, including in particular the following.
- (15) Section D, paragraph 2, of the Annex to Regulation (EU) 2022/1925 provides that, for the purpose of calculating the number of ‘active end users’ and ‘active business users’ under Article 3(2)(b) of that Regulation:
- undertakings shall not identify CPSs that belong to the same category of CPSs pursuant to Article 2, point (2), of Regulation (EU) 2022/1925 as distinct mainly on the basis that they are provided using different domain names, whether country code top-level domains (ccTLDs) or generic top-level domains (gTLDs), or any geographic attributes;<sup>6</sup>
  - undertakings shall consider as distinct those CPSs that either (i) do not belong to the same category of CPSs pursuant to Article 2, point (2), of Regulation (EU) 2022/1925, even if they are offered in an integrated way;<sup>7</sup> or (ii) are used for different purposes by either their end users or their business users, or both, even if their end users and/or business users may be the same, even if the CPSs

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<sup>6</sup> Annex to Regulation (EU) 2022/1925, Section D, point 2(a).

<sup>7</sup> Annex to Regulation (EU) 2022/1925, Section D, point 2(c)(i).

belong to the same category pursuant to Article 2, point (2), of that Regulation, and even if they are offered in an integrated way.<sup>8</sup>

- (16) In light of the foregoing, CPSs may be considered distinct even if they fall within the same category of CPSs. In such cases, a relevant criterion for identifying distinct CPSs within the same category of CPSs is the purpose for which the service is used by either end users or business users, or both.<sup>9</sup> Furthermore, different services may constitute a single CPS, if they are used for the same purpose from both an end user and a business user perspective, unless they belong to different categories of the CPSs listed in Article 2, point (2), of Regulation (EU) 2022/1925.
- (17) Moreover, Article 13(1) of Regulation (EU) 2022/1925 provides that no practice by an undertaking providing CPSs which consists of segmenting, dividing, subdividing, fragmenting or splitting those services through contractual, commercial, technical or any other means in order to circumvent the quantitative thresholds laid down in Article 3(2) of that Regulation shall prevent the Commission from designating it as a gatekeeper pursuant to Article 3(4) of that Regulation.
- (18) As recital (11) of the preamble to Regulation (EU) 2022/1925 points out, that Regulation pursues an objective that is complementary to, but different from, that of EU competition rules, which is to protect undistorted competition on any given market. Consequently, the application of EU competition rules, including competition law precedents, is without prejudice to the application of Regulation (EU) 2022/1925, and vice versa. Accordingly, the delineation of CPSs under Regulation (EU) 2022/1925 has no bearing on the definition of the relevant market for the purpose of applying EU competition rules (and vice versa) and those two types of analyses may thus lead to different results.

#### **4.2. The designation of gatekeepers pursuant to Article 3 of Regulation (EU) 2022/1925**

- (19) According to Article 3(1) of Regulation (EU) 2022/1925, the Commission is to designate an undertaking as a gatekeeper if it fulfils three cumulative requirements, namely: (a) it has a significant impact on the internal market; (b) it provides a CPS which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future.
- (20) Article 3(2) of Regulation (EU) 2022/1925 lays down a presumption that those requirements are satisfied where certain quantitative thresholds are met, namely:
- (a) an undertaking is presumed to have a significant impact on the internal market where it achieves an annual Union turnover equal to or above EUR 7.5 billion in each of the last three financial years, or where its average market capitalisation or its equivalent fair market value amounted to at least EUR 75 billion in the last financial year, and it provides the same CPS in at least three Member States;
  - (b) an undertaking is presumed to provide a CPS which is an important gateway for business users to reach end users where it provides a CPS that, in the last financial year, had at least 45 million monthly active end users established or

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<sup>8</sup> Annex to Regulation (EU) 2022/1925, Section D, points 2(b) and (c)(ii).

<sup>9</sup> The same applies when the undertaking provides CPSs in an integrated way.



located in the Union and at least 10 000 yearly active business users established in the Union, identified and calculated in accordance with the methodology and indicators set out in the Annex to Regulation (EU) 2022/1925;

- (c) an undertaking is presumed to enjoy an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future, where the thresholds in point (b) were met in each of the last three financial years.
- (21) Pursuant to Article 3(3) of Regulation (EU) 2022/1925, an undertaking providing CPSs that meets all of the thresholds in Article 3(2) is to notify the Commission without delay and in any event within two months after those thresholds are met, by providing it with the relevant information referred to in Article 3(2). Pursuant to Article 3(4) of Regulation (EU) 2022/1925, the Commission is to designate the undertaking as a gatekeeper without undue delay and at the latest within 45 working days after receiving the complete information referred to in Article 3(3) of that Regulation.
  - (22) Pursuant to Article 3(8), first subparagraph, of Regulation (EU) 2022/1925, an undertaking that does not satisfy each of the thresholds laid down in Article 3(2) but meets each of the requirements of Article 3(1) of that Regulation is to be designated as a gatekeeper in accordance with the procedure laid down in Article 17.

#### **4.3. The rebuttal of the presumptions of Article 3(2) pursuant to Article 3(5) of Regulation (EU) 2022/1925**

- (23) Once the conditions for the applicability of the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925 are met in relation to a CPS, the undertaking concerned is deemed to be a gatekeeper in relation to that CPS, unless the undertaking concerned rebuts these presumptions pursuant to Article 3(5), first subparagraph, of Regulation (EU) 2022/1925. Pursuant to the latter provision, an undertaking that meets all the thresholds laid down in Article 3(2) of that Regulation may present, with its notification, arguments to demonstrate that, although it meets all those thresholds, it exceptionally does not satisfy the requirements laid down in Article 3(1) of that Regulation due to the circumstances in which the relevant core platform service operates.
- (24) As explained in recital (23) of the preamble to Regulation (EU) 2022/1925, the undertaking concerned bears the burden of adducing the evidence rebutting the presumptions. Moreover, as recital (23) further explains, the arguments taken into account by the Commission in that regard should relate directly to the quantitative criteria laid down in Article 3(2). Accordingly, any justification on economic grounds such as those related to market definition or to efficiencies should be discarded, because it is not relevant to the designation as a gatekeeper.
- (25) Article 3(5), second subparagraph, of Regulation (EU) 2022/1925 provides that if the arguments submitted are not sufficiently substantiated because they do not manifestly call into question the presumptions set out in Article 3(2) of that Regulation, the Commission may reject the arguments within 45 working days after receiving the complete information referred to in Article 3(3). By contrast, pursuant to Article 3(5), third subparagraph, of Regulation (EU) 2022/1925, if the undertaking presents sufficiently substantiated arguments manifestly calling into question the above-mentioned presumptions, the Commission may open a market investigation

pursuant to Article 17(3) of that Regulation. In situations in which the Commission considers that the submitted evidence is sufficient to demonstrate that the requirements laid down in Article 3(1) of Regulation (EU) 2022/1925 are not fulfilled, it may accept the rebuttal without opening a market investigation.

## **5. THE CORE PLATFORM SERVICES**

- (26) As set out in recital (1) above, Meta’s notification refers to two CPSs: (i) its single online social networking service supported by its online advertising service, which comprises, in Meta’s view, Facebook, Instagram, Meta Ads, Messenger, Marketplace, Facebook Dating and Facebook Gaming Play; and (ii) its NIICS, WhatsApp.
- (27) Since the Commission disagrees with the CPS delineation put forward by Meta for the reasons set out below, this section is structured along Meta’s CPSs as identified by the Commission, namely: Meta’s online social networking services Facebook (Section 5.1) and Instagram (Section 5.2), Meta’s online advertising service Meta Ads (Section 5.3), Meta’s NIICS WhatsApp (Section 5.4), Meta’s NIICS Messenger (Section 5.5), and Meta’s online intermediation service Marketplace (Section 5.6).

### **5.1. Meta’s online social networking service Facebook**

#### *5.1.1. CPS qualification and delineation*

##### *5.1.1.1. The Undertaking’s view*

- (28) Meta describes Facebook as a free to use service available on a variety of mobile devices via a dedicated software application and via the Facebook website that enables users to connect, share, discover and communicate in various ways.<sup>10</sup>
- (29) Meta submits that Facebook and Instagram constitute a single ad-supported online social networking CPS, comprising all features of Facebook (i.e., Messenger, Marketplace, Facebook Dating and Facebook Gaming Play) and Instagram, as well as Meta’s advertising services.<sup>11</sup>
- (30) Meta argues that Facebook and Instagram serve the same purpose, are offered in an integrated way, and, therefore, according to Section D(2)(c) of the Annex to Regulation (EU) 2022/1925, should be considered to form part of a single online social networking CPS within the meaning of Article 2, point (7), of Regulation (EU) 2022/1925. More precisely, Meta considers that the definition of an online social networking service is “surface-agnostic” and does not distinguish between different brands, websites, apps or user base characteristics.<sup>12</sup> Furthermore, Meta claims that Facebook and Instagram’s common purpose is evidenced by the fact that they provide users with virtually identical functionalities and by the fact that users are able to connect their Facebook and Instagram accounts to benefit from a “connected experience”.<sup>13</sup> Finally, Meta claims that Facebook and Instagram should not be considered as distinct services because they are provided in an integrated way[confidential].<sup>14</sup>

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<sup>10</sup> Form GD, paragraph 9 (b).

<sup>11</sup> Form GD, paragraphs 1(a), 13 to 15, 99, 232 and 241.

<sup>12</sup> Form GD, paragraph 75.

<sup>13</sup> Form GD, paragraphs 77 and 86 to 93.

<sup>14</sup> Form GD, paragraphs 94 to 97.

- (31) Finally, Meta submits that its single online social networking service also comprises Marketplace, Messenger, Facebook Dating<sup>15</sup> and Facebook Gaming Play,<sup>16</sup> as well as its online advertising service Meta Ads.<sup>17</sup>
- (32) As concerns Facebook Dating, Meta submits that it cannot individually comprise an important gateway for business users to reach end users, and therefore cannot be delineated as a standalone CPS, as this service does not intermediate between end users and business users.<sup>18</sup> Furthermore, Meta considers that dating features have always been a part of Facebook’s user experience.<sup>19</sup> Therefore, it considers that Facebook Dating is an integrated service of Facebook that falls in the definition of an online social networking service and serves the same common online social networking service purpose as Facebook.
- (33) Similarly, Meta contends that Facebook Gaming Play is an integral part of its online social networking service. Meta argues that Facebook Gaming Play is an important part of the social experience of its service that has been offered since 2007.<sup>20</sup> Meta also submits that the majority of games offered on the platform provide for social features, and that the majority of end users playing games use those features.<sup>21</sup> Therefore, it considers that Facebook Gaming Play is an integrated service of Facebook that falls within the scope of the online social networking service definition in Regulation (EU) 2022/1925 and serves the same common purpose as the online social networking service Facebook.<sup>22</sup>
- (34) While not formally providing a plausible alternative delineation, Meta considers the only alternative to the single ad-supported online social networking CPS to be the individual designation of a Meta Ads online advertising CPS that is distinct from its single online social networking CPS.<sup>23</sup>
- (35) Meta disagrees with the preliminary view set out in the Commission’s letter of 26 July 2023 that Facebook and Instagram should be considered as two distinct online social networking services. Meta submits that the definition of an online social networking service laid down in Article 2, point (7), of Regulation (EU) 2022/1925 defines the purpose of an online social networking service, and since both Facebook and Instagram share a common online social networking purpose pursuant to that definition, they should be part of a single online social networking CPS.<sup>24</sup>
- (36) Meta further submits that the fact that Facebook may have a broader set of features than Instagram, that its features are more text-focused, or that a Facebook profile may contain more detailed personal information than an Instagram profile, is not relevant or indicative of the two services being used for different purposes. Furthermore, Meta disagrees with the Commission’s preliminary view that business users use Instagram to share less information and focus on visual content, whereas business users of Facebook not only share photos and videos, but “*also provide end*

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<sup>15</sup> Form GD, paragraph 241.

<sup>16</sup> Form GD, paragraphs 6 and 232.

<sup>17</sup> Form GD, paragraphs 14 to 15 and paragraphs 18 to 21.

<sup>18</sup> Form GD, paragraph 243.

<sup>19</sup> Form GD, paragraph 242.

<sup>20</sup> Form GD, paragraph 228 to 230.

<sup>21</sup> Form GD, paragraph 234.

<sup>22</sup> Form GD, paragraph 233.

<sup>23</sup> Form GD, Section C1.

<sup>24</sup> Meta’s 3 August 2023 reply, paragraphs 2.1 to 2.10.

*users with more detailed information such as price ranges and reviews, and considered that this does not relate to a different purpose”.*<sup>25</sup>

- (37) Meta also contends that the data relied on by the Commission to reach the preliminary conclusion that Facebook and Instagram have different user bases, and therefore do not serve the same purpose, suggests, on the contrary, that 30% of both Facebook and Instagram users are between the ages 24 and 35.<sup>26</sup>
- (38) Meta also disagrees with the Commission’s preliminary view that Facebook Dating and Facebook Gaming Play should be considered as distinct services from its purported single online social networking service. Meta submits that there is no legal basis in Regulation (EU) 2022/1925 for the Commission to list services other than CPSs (‘other services’) in its designation decision.<sup>27</sup> According to Meta, the Annex to Regulation (EU) 2022/1925 only relates to the delineation of CPSs, but does not apply to other services.

#### 5.1.1.2. The Commission’s assessment

##### 5.1.1.2.1. General remarks

- (39) Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925 lists online social networking services as one of the categories of CPSs within the meaning of that Regulation. Article 2, point (7), of Regulation (EU) 2022/1925 defines ‘online social networking services’ as “a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations”.
- (40) The Commission considers that Meta provides, through its Facebook platform, a service that fulfils the definition of an online social networking service laid down in Article 2, point (7), of Regulation (EU) 2022/1925. Indeed, this service enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations. Consequently, Facebook constitutes a CPS within the meaning of Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925.
- (41) The Commission further considers, for the reasons set out in Section 5.1.1.2.2., that Facebook constitutes an online social networking CPS which is distinct from the online social networking service that Meta provides through Instagram.
- (42) Furthermore, the Commission considers that a number of services that are integrated in the Facebook platform constitute distinct CPSs. Those services are analysed individually in subsequent sections of this Decision as follows: Meta Ads (Section 5.3), Messenger (Section 5.5) and Marketplace (Section 5.6).
- (43) Finally, the Commission considers that a number of services that are integrated in the Facebook platform, namely Facebook Dating and Facebook Gaming Play, constitute distinct services from the Facebook online social networking service CPS, irrespective of whether those services constitute distinct CPSs.<sup>28</sup> Facebook Dating

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<sup>25</sup> Meta’s 3 August 2023 reply, paragraphs 2.7 and 2.8.

<sup>26</sup> Meta’s 3 August 2023 reply, paragraph 2.7 (c).

<sup>27</sup> Meta’s 3 August 2023 reply, paragraphs 5.1 to 5.11.

<sup>28</sup> As provided by Regulation (EU) 2022/1925, in particular paragraph A.1 of the Annex to that Regulation, it was Meta’s responsibility to undertake a self-assessment of whether these services constitutes CPSs meeting the thresholds laid down in Article 3(2) of that Regulation. The Commission’s

and Facebook Gaming Play are analysed in Section 5.1.1.2.3 and Section 5.1.1.2.4 respectively.

#### 5.1.1.2.2. Facebook and Instagram constitute distinct online social networking CPSs

(44) First and foremost, the Commission considers Facebook and Instagram to constitute distinct services because Meta offers them separately to end and business users on the market, as is apparent from the following features of those services:

- (a) they are branded differently: even after Instagram was acquired by Meta, Instagram was kept as a distinct brand from Facebook,<sup>29</sup> with distinct trademarked logos, names,<sup>30</sup> and branding guidelines.<sup>31</sup> Facebook and Instagram are also currently listed as distinct Meta products on Meta's website,<sup>32</sup>
- (b) they are marketed as entirely distinct services: this is apparent from the fact that each platform has a distinct webpage presenting its specific features to end users and commercial offer to business users.<sup>33</sup> Furthermore, Meta's marketing strategy for attracting business users on each platform differs significantly. For Facebook, Meta emphasises collaborations with other business Pages,<sup>34</sup> while for Instagram, Meta stresses the importance of content relevance and following other similar business accounts,<sup>35</sup>
- (c) they are accessed through entirely different domain names (i.e., Facebook.com and Instagram.com) and through different software applications with distinct and well-recognisable user interfaces,<sup>36</sup>
- (d) they require separate accounts and separate registration and log-in processes:<sup>37</sup> the fact that an end user may explicitly opt to use login information from a

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assessment of those services does not amount to an endorsement of Meta's self-assessment and is without prejudice to the Commission requesting further information in relation to that service in the future.

<sup>29</sup> See <https://about.instagram.com/brand> last accessed on 9 August 2023.

<sup>30</sup> See <https://about.meta.com/brand/resources/> last accessed on 9 August 2023.

<sup>31</sup> See <https://about.meta.com/brand/resources/meta/our-trademarks/> and <https://about.meta.com/brand/resources/facebookapp/guidelines/> last accessed on 25 July 2023.

<sup>32</sup> See <https://www.facebook.com/help/1561485474074139> last accessed on 9 August 2023.

<sup>33</sup> See <https://about.instagram.com/>; <https://business.instagram.com/>; <https://about.meta.com/technologies/facebook-app/>; <https://www.facebook.com/business/tools/facebook-pages> last accessed on 25 July 2023.

<sup>34</sup> Section "Growing your audience on Facebook" *Here are some things you can do to grow your audience on Facebook: [...] Collaborate with other business Pages to connect with one another's audiences.* See <https://www.facebook.com/business/learn/lessons/find-customers-online> last accessed on 21 August 2023.

<sup>35</sup> Section "Growing your audience on Instagram"

**Create content that's relevant to your audience.** When you share a story or posts, people can learn more about your business and consider following your Instagram account. Post often, especially when your audience is commonly online.

**Follow people or businesses that you want to connect with.** Connect with other businesses in your industry or area. You can also correspond with industry leaders and creators that you like. Follow hashtags to find people who share interests related to your business. Add hashtags to your posts and to your story so that people can find your business when searching for relevant topics. You can use different hashtags to attract different audiences. Tag and mention people you know to strengthen your relationships. Depending on their settings, they can get a notification when you tag or mention them.

See <https://www.facebook.com/business/learn/lessons/connecting-with-customers-with-facebook-instagram> last accessed on 21 August 2023.

<sup>36</sup> See <https://about.instagram.com/brand/layout> last accessed on 9 August 2023.

Facebook account to log into an Instagram account, and vice versa, or to opt to link Facebook and Instagram accounts with each other only makes the registration and log-in processes easier but does not change the fact that Facebook and Instagram are offered as distinct services;<sup>38</sup> and

(e) the use of each service is based on distinct terms of service.<sup>39</sup>

- (45) Contrary to Meta's view, the fact that Facebook and Instagram share, since Meta's acquisition of Instagram in 2012, [confidential] does not mean that those services are offered to users in an integrated way within the meaning of Section D(2)(c) of the Annex to Regulation (EU) 2022/1925. Nor does that fact illustrate an integrated offering and thus a common purpose. Instead, that fact merely relates to the way in which Facebook and Instagram operate [confidential]. This is reflected by Meta's statement that [confidential].<sup>40</sup> In any event, and contrary to what Meta suggests, even if Facebook and Instagram were offered in an integrated way (*quod non*), this, on its own, would not preclude those services from constituting distinct CPSs under Regulation (EU) 2022/1925.<sup>41</sup>
- (46) Second, and in any event, Facebook and Instagram appear to be used for different purposes by their end users and their business users. Pursuant to Section D(2)(b) of the Annex to Regulation (EU) 2022/1925, CPSs which are used for different purposes by either their end users or their business users, or both, shall be considered as distinct CPSs, even if their end users or business users may be the same and even if they belong to the same category of CPSs pursuant to Article 2, point (2), of that Regulation. The different purposes for which end users and business users use Facebook and Instagram is based on the following considerations.
- (47) From the perspective of end users, Facebook is characterised by a broader set of features than Instagram. These features allow end users to connect with other users, including but not limited to friends, family, acquaintances and businesses, communicate and discover other users and content through community groups and by sharing various types of content, including text-based posts, personal blog posts, event promotions, news articles, external web links and life events, in addition to photos and videos. Instagram, by contrast, is primarily focused on the sharing of visual content, such as photos and videos (e.g., Stories and Reels), with at most a brief caption. Facebook also allows end users to post a broader set of content on other users' profiles, while on Instagram end users are limited to leaving comments and likes on other users' content. This broader set of features for Facebook is indicative of a different purpose, because it influences the choice of end users for one or the other online social networking service, depending on the type of content they

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<sup>37</sup> See <https://www.facebook.com/help/188157731232424> and <https://help.instagram.com/155940534568753> last accessed on 9 August 2023. See also Judgment of the Court of Justice of 4 July 2023, C-252/21, ECLI:EU:C:2023:537, paragraph 103

<sup>38</sup> In this respect, the Commission notes that the Facebook login information is also used beyond Meta's services to access services provided by third parties (e.g., Amazon Cognito; see: <https://docs.aws.amazon.com/cognito/latest/developerguide/facebook.html> last accessed on 25 July 2023).

<sup>39</sup> See <https://www.facebook.com/legal/terms> and <https://help.instagram.com/581066165581870> last accessed on 25 July 2023. See also Judgment of the Court of Justice of 4 July 2023, C-252/21, ECLI:EU:C:2023:537, paragraph 103.

<sup>40</sup> Form GD, paragraph 96.

<sup>41</sup> This is also the case for Messenger, as explained in section 5.5.1.2. below, and for Marketplace, as explained in section 5.6.1.2. below.

want to share or engage with to connect and communicate with other users, or discover other users and content.

- (48) Facebook also enables end users to share more detailed personal information on their profile as compared to the limited information that end users share on their Instagram profiles. More precisely, Facebook allows end users to share information on their date of birth, relationship status, family members, work and education history, life events, events attended, and interests.<sup>42</sup> By contrast, the information that end users can share on Instagram is limited to a short (i.e., a maximum of 150 characters), text-based description of the profile (i.e., “bio”).<sup>43</sup> This shows that even in the case of features like creating a profile, which exist on both Facebook and Instagram, they are, in practice, so different that it would not be correct to state that they constitute “similar” features for both Facebook and Instagram.
- (49) The distinct purposes for which end users use Facebook and Instagram are also highlighted by the differences in the relevance of groups and communities. There is a strong community side to Facebook that is not mirrored on Instagram. Facebook has groups that allow end users with the same interest to exchange views and information about their specific interest in a decentralised manner, i.e., each user is free to create and join such groups.<sup>44</sup> Instagram does not offer its end users such a possibility to create groups.
- (50) From the perspective of business users, the two online social networking services are used for the purpose of reaching and engaging with different target user bases. The information that business users share on Instagram tends to be more limited and focused on the sharing of visual content and a short bio.<sup>45</sup> By contrast, business users rely on Facebook not only to share photos and videos, but also to provide end users with more detailed and text-based information (e.g., price ranges,<sup>46</sup> user ratings based on user reviews and recommendations<sup>47</sup> and opening hours<sup>48</sup> of a restaurant), typically through the Facebook business Pages.<sup>49</sup> Therefore, business users will typically take into account the different type of content or information they want to convey to end users when choosing Facebook or Instagram for the purpose to reach a given target user base.
- (51) Since Facebook end users tend to be older than Instagram end users,<sup>50</sup> this appears to influence the choice of business users for one or the other online social networking

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<sup>42</sup> See <https://www.facebook.com/help/203805466323736> and <https://www.facebook.com/help/779021519097028> last accessed on 11 August 2023.

<sup>43</sup> See [https://help.instagram.com/110121795815331/?helpref=hc\\_fnav](https://help.instagram.com/110121795815331/?helpref=hc_fnav) last accessed on 11 August 2023.

<sup>44</sup> See for example <https://www.facebook.com/business/learn/lessons/different-types-social-media-channels> where Facebook is described in the following manner: “You can also create groups and host events to build your community.” Last accessed on 14 August 2023 as well as *Kustomer/Facebook Decision M.10262*, paragraph 246.

<sup>45</sup> See <https://business.instagram.com/getting-started>, last accessed on 11 August 2023.

<sup>46</sup> The Commission observes that « price ranges » is one of the fields that business users can fill in on their Facebook “About” page.

<sup>47</sup> See <https://www.facebook.com/help/500762053364226> last accessed on 21 August 2023.

<sup>48</sup> See <https://www.facebook.com/help/162375557908631> last accessed on 21 August 2023.

<sup>49</sup> See [https://www.facebook.com/business/help/752342858243518?ref=fbb\\_pages](https://www.facebook.com/business/help/752342858243518?ref=fbb_pages) last accessed on 11 August 2023.

<sup>50</sup> Contrary to Meta’s view, the Commission does not assert that there is a complete lack of overlap between the user bases of Facebook and Instagram, but that, on the basis of the data underlying the differences in user demographics, Instagram’s user base tends to be younger and Facebook user base tends to be older, on average. The Commission also observes that even if the age range of 30% of

service, depending on the user base they want to connect to and communicate with, and therefore the purpose for which they use one or the other online social networking service. Meta itself encourages business users to determine the best Meta technologies for their business on the basis of the audience they want to reach.<sup>51</sup> According to Meta, “*Different Meta technologies may appeal to different types of audiences. For example, some may attract more men than women, or an older or younger demographic. As you define your business's target audience, pay attention to which social media they use.*”

- (52) The different purposes for which business users use Facebook and Instagram is also reflected in the way that communication flows on both online social networking services.<sup>52</sup> On one hand, communications on Facebook tend to follow a quasi-horizontal flow, which entails that business users use their Facebook page to communicate with their customers as part of their customer services. On the other hand, communications via Instagram follow a vertical dynamic / flow whereby business users merely post content, while engaging with other users in back-and-forth communications to a lesser extent compared to Facebook. The fact that the Instagram profiles with the largest number of followers belong to individuals, and not to companies, underpins the fact that communication on Instagram is more mono-directional than on Facebook.<sup>53</sup>
- (53) The fact that Facebook and Instagram are used for a different purpose by their end users and business users is also confirmed by Meta’s marketing material, which underlines that people use social medias, including Facebook and Instagram, for different purposes and describes differentiating factors between Facebook and Instagram including the different key functionalities and type of content available to business users and different types of target audience, as apparent from the following statements:<sup>54</sup>

*“The social media landscape is diverse and enables people to connect and share in different ways. People often use social media for different purposes. For example, they may visit one app to get the latest news, another to make professional connections and another to discover what their favourite celebrities are doing.”*

*“The social media landscape contains a wide variety of options. [...] Facebook helps people connect with one another and brands they care about. With free business tools, insights and a global community, Facebook can help your business grow. Formats available on Facebook include posts and stories. You can also create groups and host events to build your community. Instagram is a*

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Facebook and Instagram users were to overlap, this would still leave a significant part of Facebook and Instagram’s user bases where there is limited overlap.

<sup>51</sup> See <https://www.facebook.com/business/learn/lessons/different-types-social-media-channels> last accessed on 28 August 2023.

<sup>52</sup> See Kustomer/Facebook Decision M.10262 paragraph 114, 120 and 246 as well as <https://www.statista.com/statistics/269304/international-brands-on-facebook-by-number-of-fans/#:~:text=Apart%20from%20being%20the%20most,followers%20on%20the%20social%20network> last accessed on 14 August 2023.

<sup>53</sup> See <https://www.socialtracker.io/toplists/top-100-instagram-users-by-followers/> and <https://www.statista.com/statistics/269304/international-brands-on-facebook-by-number-of-fans/> last accessed on 17 August 2023.

<sup>54</sup> See <https://www.facebook.com/business/learn/lessons/different-types-social-media-channels> last accessed on 16 August 2023.



*vibrant community of people looking for inspiration and to discover things that they care about, including brands and businesses. You can tell your brand story on Instagram through photos and videos that you can edit with in-app tools and interactive stories and reels that you can share in real time.”*

*“Different Meta technologies may appeal to different types of audiences. For example, some may attract more men than women, or an older or younger demographic. As you define your business's target audience, pay attention to which social media they use.”*

*“When you consider which social media channels to use for your business, think about what type of content you will share, such as video, images, text or a combination of these.”*

- (54) In light of the foregoing, and contrary to Meta’s view, Facebook and Instagram cannot be said to offer virtually identical features. Moreover, the fact that both Facebook and Instagram provide users with the functionalities listed in the definition of an online social networking service laid down in Article 2, point (7), of Regulation (EU) 2022/1925 only means that they are both online social networking services, not that they are part of one and the same online social networking CPS.<sup>55</sup> This is confirmed by Section D(2)(c) of the Annex to Regulation (EU) 2022/1925, from which it follows that CPSs may be considered as distinct even if they belong to the same category of CPSs pursuant to Article 2, point (2), of Regulation (EU) 2022/1925.
- (55) As regards Meta’s claim that users can link their Facebook and Instagram profiles and accounts with each other,<sup>56</sup> that possibility, which is provided on a purely optional basis, does not call into question the fact that Facebook and Instagram are distinct services, which are offered separately and that each have their own user base. On the contrary, this feature rather confirms that Facebook and Instagram are two distinct online social networking services, since users have to actively ‘link’ their separate profiles and accounts as opposed to the two online social networking services being ‘linked’ with each other by default or automatically.
- (56) The Commission also notes that [confidential]. This further puts into question Meta’s claim that these services are provided in an integrated way and should be considered part of the same CPS.<sup>57</sup>
- (57) In light of the above, the Commission concludes that Facebook and Instagram constitute two distinct online social networking services within the meaning of Article 2 point (2), point (7), of Regulation (EU) 2022/1925 and thus two separate CPSs within the meaning of Article 2, point (2), subpoint (c), of that Regulation.

5.1.1.2.3. Facebook Dating is not part of the online social networking service Facebook

- (58) As a preliminary matter, and contrary to Meta’s view,<sup>58</sup> the Commission considers that it is obliged to take a position on whether Facebook Dating forms a part of the online social networking CPS Facebook as part of its obligation to list in this Decision, pursuant to Article 3(9) of Regulation (EU) 2022/1925, the CPSs that Meta offers and that individually appear to constitute an important gateway for business

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<sup>55</sup> Form GD, paragraphs 75 to 76, 78 and 86 to 88.

<sup>56</sup> See recital (30) above.

<sup>57</sup> Form GD, paragraphs 256, 258, 259, 283-285 and 293.

<sup>58</sup> Meta’s 3 August 2023 reply, paragraph 5.3.

users to reach end users. That is because, when complying with that obligation, the Commission must respect the principle of legal certainty and therefore it must, in delineating the relevant CPSs, make sure that the undertaking that is the addressee of a decision adopted pursuant to Article 3 of Regulation (EU) 2022/1925 knows with sufficient precision the object of its obligations pursuant to that Regulation. This is particularly necessary in the present case, given Meta's assertion that Facebook Dating forms part of Meta's online social networking CPS together with Facebook,<sup>59</sup> to which the Commission must respond.

- (59) The Commission considers that Facebook Dating is not a part of the online social networking CPS Facebook, since Meta offers Facebook Dating as a clearly identifiable and distinct service from that of its online social networking service Facebook and, in any event, those services fulfil specific and distinct purposes.
- (60) Facebook Dating is a service that allows Facebook users to create, on a purely optional basis, a specific dating profile, which includes data (e.g., personal data, posts, etc.) from their main Facebook profile, as well as additional data not available on Facebook (e.g., possibility to use a different profile picture, list the user's height and number of children, etc.).<sup>60</sup> This specific profile is then used for the single purpose of dating.
- (61) While the online social networking service Facebook may have facilitated dating, as one of many other uses of the Facebook platform, the Commission considers that, with the launch of Facebook Dating in September 2019,<sup>61</sup> those dating functionalities have evolved into a distinct service offering dedicated specific functionalities, which serves a purpose that is different from that of the online social networking service Facebook. While the communication functionalities of the online social networking service Facebook may facilitate dating, these are not the functionalities that are characteristic of a dating service. In contrast, Facebook Dating's functionalities focus on and have the specific purpose of matching users for dating purposes based on a dating profile that is distinct from their Facebook profile.<sup>62</sup>
- (62) The fact that Facebook Dating is offered by Meta as a clearly identifiable and distinct service from that of the online social networking service Facebook and fulfils a specific and distinct purpose is supported by the circumstance that, even if it is provided and accessed through the Facebook platform, Meta requires Facebook's end users to explicitly consent to the activation of this specific feature and to create a distinct dating profile as a condition for accessing and using the specific Facebook Dating service. Moreover, Meta specifies that activity on Facebook Dating will not be shared outside Facebook Dating, i.e., also not Facebook.<sup>63</sup> In other words, Facebook Dating is a distinct service from Facebook, which (i) is not enabled by default, (ii) is provided through a specific interface, (iii) unlike Facebook, does not encourage interactions with Facebook Friends, but rather allows users to "match"

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<sup>59</sup> Form GD, paragraph 241.

<sup>60</sup> See <https://www.facebook.com/help/312959615934334>, last accessed on 14 August 2023.

<sup>61</sup> See <https://about.fb.com/news/2019/09/facebook-dating/>. Last accessed on 25 July 2023.

<sup>62</sup> As acknowledged by Meta, Facebook Dating is "A *space just for Dating*": See <https://www.facebook.com/dating> last accessed on 10 August 2023; Also, according to Meta, Facebook Dating serves the purpose of "*meeting new people*": See <https://www.facebook.com/help/312959615934334> last accessed on 10 August 2023.

<sup>63</sup> "*Facebook Dating profiles and conversations won't be shared with anyone outside of Dating*" See <https://www.facebook.com/dating> last accessed on 10 August 2023.

with other users who are not Facebook Friends and may not belong to one's social group, and (iv) requires a specific user profile. Moreover, users on Facebook Dating may only interact with other users of that service within their own proximity, based on their geographic location, whereas users on Facebook may interact with other users irrespective of where they are located.<sup>64</sup>

- (63) The fact that Facebook Dating is offered as a distinct service that serves a different purpose from the online social networking CPS Facebook is corroborated by Meta's own description of that service:

*“Facebook Dating is different from your Facebook profile in several ways: Although you access Dating from your Facebook account, your Dating profile is different from your Facebook profile. Your current Facebook friends and anyone outside of Dating can't see your Dating profile. For example, your Dating activities don't appear in your Facebook Feed. All conversations you have in Dating are separate from your conversations on Facebook Messenger. You can delete your Dating profile without deleting your Facebook account. However, deleting your Facebook account also deletes your Dating profile”.*<sup>65</sup>

- (64) Contrary to what Meta suggests, even if Facebook Dating has some interdependencies and integrated features with the online social networking service Facebook,<sup>66</sup> this does not preclude Facebook Dating from being considered a distinct service from the online social networking service Facebook, since, as explained in recitals (59) to (61) above, there is a clear distinction between the two services which is even advertised in order to promote the use of the specific Facebook Dating service. In addition, none of the integrated features that Meta mentions indicate that Facebook Dating shares the same purpose as the online social networking Facebook. By contrast, as mentioned in recital (61) above, Facebook Dating has been created to develop a new service with the specific user purpose of dating.
- (65) Furthermore, the Commission considers that the Annex to Regulation (EU) 2022/1925 is relevant for interpreting Article 2 of that Regulation and for determining whether services that do not qualify as CPSs could be considered as distinct from CPSs provided by an undertaking. Although Sections D(2)(b) and D(2)(c) of the Annex to Regulation (EU) 2022/1925 refer to CPSs, the Commission considers that the same principle laid down in these Sections should apply to the delineation between CPSs and services that do not qualify as CPSs, in particular in relation to the exact delineation of the relevant CPS (in this case, the Facebook online social networking CPS) and thus the determination of its boundaries. Therefore, the Commission considers that the question of whether or not Facebook Dating constitutes a CPS pursuant to Article 2 of Regulation (EU) 2022/1925 does not affect the assessment of whether Facebook Dating is offered as a service distinct from the Facebook platform.
- (66) The mere fact that Facebook Dating is integrated in the Facebook platform does not exclude that Facebook Dating constitutes a distinct service from the online social networking service Facebook. This confirmed by Section D(2)(c) of the Annex to Regulation (EU) 2022/1925, according to which integrated services should be considered as distinct CPSs if they belong to different categories of CPSs or if they

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<sup>64</sup> See <https://www.facebook.com/help/312959615934334>, last accessed on 14 August 2023.

<sup>65</sup> See <https://www.facebook.com/help/312959615934334>. Last accessed on 25 July 2023.

<sup>66</sup> Meta's 3 August 2023 reply, paragraphs 5.20 to 5.22.

are used for different purposes by their end users or business users or both. This is also consistent with recital (51) of the preamble to Regulation (EU) 2022/1925, which describes the risk of conflict of interests in the case of “*vertically integrated*” gatekeepers which “*offer certain products or services to end users through their own core platform services*”. While that recital refers specifically to online intermediations services, its rationale confirms that the mere fact that a service is integrated in a CPS does not mean that that service should be considered as forming part of that CPS.

(67) The fact that, as argued by Meta, end users of Facebook Dating are only able to match and communicate with Facebook end users does not exclude that those services serve different purposes. This is confirmed by Section D(2)(b) of the Annex to Regulation (EU) 2022/1925, according to which services offered by an undertaking are to be considered distinct CPSs where they are used for different purposes by end users or business users or both, even if their end and business users may be the same. Contrary to Meta’s view, even if Facebook Dating were considered to fall within the definition of an online social networking service, this would not exclude the finding that Facebook Dating constitutes a distinct service from the online social networking CPS Facebook. Pursuant to Section D(2)(b) of the Annex to Regulation (EU) 2022/1925, CPSs which are used for different purposes by either their end users or their business users, or both, shall be considered as distinct CPSs even if they belong to the same category of CPSs pursuant to Article 2, point (2), of that Regulation. Moreover, accepting Meta’s view that integrated features of Facebook that fall within the definition of an online social networking service serve the same common online social networking service purpose as Facebook would amount to establishing an open ended definition of the online social networking CPS Facebook, which would systematically include all services integrated in the Facebook service, in contrast with Section D(2)(c) of the Annex to Regulation (EU) 2022/1925.

(68) In light of the above, the Commission considers that the service Facebook Dating does not form part of the online social networking CPS Facebook, irrespective of whether or not that service constitutes, in itself, a CPS within the meaning of Article 2, point (2), of Regulation (EU) 2022/1925. Moreover, the Commission considers that, since the data submitted by Meta indicate that Facebook Dating would not meet the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925,<sup>67</sup> it is not necessary to determine whether that service constitutes a CPS within the meaning of Article 2, point (2), of Regulation (EU) 2022/1925.

5.1.1.2.4. Facebook Gaming Play is not part of the online social networking service Facebook

(69) As a preliminary matter and contrary to Meta’s view,<sup>68</sup> the Commission considers that it is obliged to take a position on whether Facebook Gaming Play forms a part of the online social networking CPS Facebook for the same reasons as those given in recital (58) above. This is particularly necessary in the present case, given Meta’s

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<sup>67</sup> Meta’s response to the Commission’s questions of 9 March 2023, paragraphs 26 and 27, and Table 5 (Questions 2 to 6).

<sup>68</sup> Meta’s 3 August reply 2023, paragraph 5.3.

assertion that Facebook Gaming Play forms part of Meta's online social networking CPS together with Facebook,<sup>69</sup> to which the Commission must respond.

- (70) The Commission considers that Facebook Gaming Play is a distinct service from the online social networking CPS Facebook, since Meta offers Facebook Gaming Play as a clearly identifiable and distinct service, through a separate interface and under its own name, which is different from that of its online social networking CPS Facebook.
- (71) In addition, Facebook Gaming Play fulfils a specific and distinct purpose from the online social networking CPS Facebook from the perspective of end and business users. Facebook Gaming Play is used by end and business users for the specific purpose of, respectively, playing and distributing games, as opposed to connecting and communicating with other users or sharing and discovering a wide array of content. In particular, business users use Facebook Gaming Play to distribute the games they develop and in-game products and they can earn revenue through in-game advertising and purchases.<sup>70</sup> In contrast, business users use an online social networking service in order to increase their brand awareness or to advertise their products for sales that are made outside of the Facebook platform. In light of these different purposes, Facebook Gaming Play also provides end and business users with functionalities that are different from those provided by the online social networking service Facebook.
- (72) It is true that Facebook Gaming Play has, as default settings, the sharing of a user's Facebook name and profile picture and the consent that the user's gaming activities can be seen by their Facebook friends. However, these settings are optional and, before playing a game, a user of Facebook Gaming Play systematically receives a message informing of the possibility to change them. In addition, Facebook Gaming Play's users have the option to play under a different name or avatar that they would specifically create for that service and they can choose not to share their gaming activities with any other Facebook users. Therefore, contrary to Meta's argument,<sup>71</sup> while Meta tries to encourage links between the services integrated on the Facebook platform to cross-advertise these services and grow their usage, this does not put in question the fact that Facebook Gaming Play is a distinct service with a distinct purpose from the online social networking CPS Facebook.
- (73) Furthermore, on Facebook Gaming Play, many games can be played by a user alone. For those games, the default setting when a user starts playing is to play alone. In any event, contrary to what Meta claims,<sup>72</sup> the fact that a user may elect to play with other users or may be able to interact with other players, which is a common feature to most, if not all, modern gaming platforms, does not call into question that the principal purpose for which Facebook Gaming Play is used is to offer and play games, whereas the social features that such games may include are ancillary to that purpose.
- (74) In addition, the fact that users can only play games collectively with Facebook end users does not change the fact that the two services are offered as distinct services and serve different purposes. Indeed, pursuant to Section D(2)(b) of the Annex to

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<sup>69</sup> Form GD, paragraph 232.

<sup>70</sup> See <https://www.facebook.com/fbgaminghome/developers> last accessed on 16 August 2023.

<sup>71</sup> Form GD, paragraph 222.

<sup>72</sup> Form GD, paragraph 230 and Meta's 3 August 2023 reply, paragraph 5.23.

Regulation (EU) 2022/1925, services offered by an undertaking are to be considered distinct where they serve a different purpose, even if their end users may be the same.

- (75) Finally, for the same reasons as those set out in recitals (65) and (67) above, the Commission considers that whether Facebook Gaming Play constitutes a CPS or not does not change the fact that Facebook Gaming Play is offered as a distinct service and serves a different purpose for end and business users. For the same reasons as those set out in recital (66) above, contrary to what Meta suggests, the Commission also considers that the mere fact that Facebook Gaming Play may be integrated to some extent with the online social networking service Facebook does not exclude the finding that Facebook Gaming Play constitutes a distinct service from that online social networking service under Regulation (EU) 2022/1925.
- (76) In light of the above, the Commission considers that the service Facebook Gaming Play does not form part of the online social networking CPS Facebook, irrespective of whether or not it constitutes, in itself, a CPS within the meaning of Article 2, point (2), of Regulation (EU) 2022/1925. Moreover, the Commission considers that, since the data submitted by Meta indicate that Facebook Gaming Play would not meet the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925,<sup>73</sup> it is not necessary to determine whether that service constitutes a CPS within the meaning of Article 2, point (2), of Regulation (EU) 2022/1925.

#### 5.1.1.3. Conclusion

- (77) For the reasons set out above, the Commission concludes that Facebook constitutes an online social networking service within the meaning of Article 2, point (7), of Regulation (EU) 2022/1925 and therefore a CPS within the meaning of Article 2, point (2), subpoint (a), of that Regulation. For the reasons set out in Sections 5.1.1.2, 5.3.1.2, 5.5.1.2, and 5.6.1.2, the Commission concludes that this CPS does not include and is distinct from Meta's services Instagram, Facebook Dating, Facebook Gaming Play, Meta Ads, Messenger and Marketplace.

#### 5.1.2. *Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925*

##### 5.1.2.1. The Undertaking's view

- (78) Table 1 sets out the Annual Union turnover and average market capitalisation submitted by Meta.<sup>74</sup>

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<sup>73</sup> Meta's response to the Commission's questions of 16 June 2023, paragraph 20.

<sup>74</sup> Revised version of Section 3 of Form GD, submitted on 16 July 2023, paragraphs 246 and 247.

**Table 1: Annual Union turnover and average market capitalisation submitted by Meta (in EUR millions)**

Undertaking	2020 Union turnover	2021 Union turnover	2022 Union turnover	2022 Average market capitalisation
Meta	[>7 500]	[>7 500]	[>7 500]	[>75 000]

Source: Form GD submitted on 3 July 2023 as amended by email of 16 July 2023, paragraphs 246 and 247.

(79) Meta submits that its online social networking CPS (which encompasses Facebook) is provided in all Member States.<sup>75</sup>

(80) Table 2 sets out the data on Facebook’s average number of monthly active end users and yearly active business users submitted by Meta.<sup>76</sup>

**Table 2: Data on Facebook’s average number of monthly active end users and yearly active business users in the Union submitted by Meta (2020-2022)**

Year	Average number of monthly active end users in the EU (millions)	Total number of yearly active Facebook pages estimated to be businesses (millions)
2020	[> 45]	[confidential]
2021	[> 45]	[confidential]
2022	[> 45]	[confidential]

Source: Form GD dated 3 July 2023, Tables 9 and 10.

(81) Meta defines a monthly active end user as [confidential].<sup>77</sup> Meta bases the geographic location of users on a number of factors, such as [confidential].<sup>78</sup>

(82) Meta has provided data on Facebook pages that it considers to be businesses in order to estimate Facebook’s yearly active business users. To determine whether a Facebook page is located in the Union, Meta [confidential]. Facebook pages are defined as being located in the Union [confidential].

(83) The information reproduced in Table 2 Regulation (EU) 2022/1925 is also relevant for the thresholds laid down in Article 3(2)(c) of that Regulation.

#### 5.1.2.2. The Commission’s assessment

(84) Based on the information provided by Meta,<sup>79</sup> the Commission considers that Meta meets the turnover threshold laid down in Article 3(2)(a) of Regulation (EU) 2022/1925, as well as the requirement laid down in that provision that the CPS at issue, i.e., the online social networking CPS Facebook, is offered in at least three Member States.

<sup>75</sup> Form GD, paragraph 248.

<sup>76</sup> Form GD, Tables 9 and 10.

<sup>77</sup> Form GD, paragraph 256.

<sup>78</sup> Form GD, paragraph 257.

<sup>79</sup> Revised version of Section 3 of Form GD, submitted on 16 July 2023, paragraph 246; Form GD, paragraphs 247 and 248.

- (85) Moreover, based on the information provided by Meta,<sup>80</sup> the Commission considers that the online social networking CPS Facebook meets the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.
- (86) Finally, based on the information provided by Meta,<sup>81</sup> the Commission considers that the online social networking CPS Facebook meets the requirement laid down in Article 3(2)(c) of Regulation (EU) 2022/1925 that the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 were met in each of the last three financial years.
- (87) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary to determine whether Meta’s approach to identifying and estimating monthly active end users and yearly business users of the online social networking CPS Facebook is sufficiently inclusive in line with the relevant definition in Section E of the Annex to Regulation (EU) 2022/1925, given that the aforementioned thresholds are met based on the information provided by Meta.

### 5.1.3. *Conclusion for the online social networking service Facebook*

- (88) For the reasons set out in recitals (39) to (76) and (84) to (86) above, the Commission concludes that Facebook constitutes an online social networking CPS within the meaning of Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently, Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to the online social networking CPS Facebook.

## **5.2. Meta’s online social networking service Instagram**

### 5.2.1. *CPS qualification and delineation*

#### 5.2.1.1. The Undertaking’s view

- (89) Meta describes Instagram as a free to use service available on a variety of mobile devices via a software application and via the Instagram website which enables users to connect, share, discover and communicate in various ways. For the reasons set out in recitals (29) and (30) above, Meta considers that Instagram is not a self-standing online social networking CPS, but instead forms part of a single ad-supported online social networking service, which includes all features of Facebook, Instagram, as well as Meta’s advertising services.

#### 5.2.1.2. The Commission’s assessment

- (90) Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925 lists online social networking services as one of the categories of CPSs within the meaning of that Regulation. Article 2, point (7), of Regulation (EU) 2022/1925 defines ‘online social networking services’ as “a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations”.

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<sup>80</sup> Form GD, Tables 9 and 10.

<sup>81</sup> Form GD, Tables 9 and 10.



(91) The Commission considers that Instagram fulfils the definition of an online social networking service laid down in Article 2, point (7), of Regulation (EU) 2022/1925, since it enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations. Consequently, Instagram constitutes a CPS within the meaning of Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925.

(92) For the reasons set out in Section 5.1.1.2.2. above, the Commission further considers that the online social network CPS Instagram is distinct from the online social networking CPS Facebook.

### 5.2.2. Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925

#### 5.2.2.1. The Undertaking's view

(93) Meta indicates that it meets the thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925. As summarised in Table 1 above, Meta indicates that it generated an annual turnover of more than EUR 11 billion in each of the last three financial years, and that its average market capitalisation in the last financial year was above EUR 75 billion.

(94) In addition, Meta indicates that Instagram is provided in all Member States.<sup>82</sup>

(95) Table 3 sets out the data on Instagram's average number of monthly active end users and yearly active business users submitted by Meta.

**Table 3: Data on Instagram's average number of monthly active and users and yearly active business users in the Union submitted by Meta (2020-2022)**

Year	Average number of monthly active end users in the EU (millions)	Total number of yearly active Instagram Professional accounts estimated to be businesses (millions)
2020	[> 45]	[confidential]
2021	[> 45]	[confidential]
2022	[> 45]	[confidential]

Source: Form GD date 3 July 2023, Tables 9 and 10.

(96) Meta defines a monthly active end user [confidential]. Meta bases the geographic location of users on a number of factors, [confidential].

(97) Meta has provided data on Instagram professional accounts that it considers to be businesses to estimate Instagram's yearly active business users. The location of an Instagram professional account [confidential].

(98) The information provided by Meta in Table 3 relating to the thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 is also relevant for the thresholds laid down in Article 3(2)(c) of that Regulation.

<sup>82</sup> Form GD, paragraph 248.

#### 5.2.2.2. The Commission's assessment

- (99) Based on information provided by Meta,<sup>83</sup> the Commission considers that Meta meets the turnover threshold laid down in Article 3(2)(a) of Regulation (EU) 2022/1925, as well as the requirement laid down in that provision that the CPS at issue, i.e., the online social networking CPS Instagram, is offered in at least three Member States.
- (100) Moreover, based on the information provided by Meta,<sup>84</sup> the Commission considers that the online social networking CPS Instagram meets the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.
- (101) Finally, based on the information provided by Meta,<sup>85</sup> the Commission considers that the online social networking CPS Instagram meets the requirement laid down in Article 3(2)(c) of Regulation (EU) 2022/1925 that the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 were met in each of the last three financial years.
- (102) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary to determine whether Meta's approach to identifying and estimating monthly active end users and yearly business users of the online social networking CPS Instagram is sufficiently inclusive in line with the relevant definition in Section E of the Annex to Regulation (EU) 2022/1925, given that the aforementioned thresholds are met based on the information provided by Meta.

#### 5.2.3. *Conclusion for the online social networking service Instagram*

- (103) For the reasons set out in recitals (90) to (92) and (99) to (101) above, the Commission concludes that Instagram constitutes an online social networking CPS within the meaning of Article 2, point (2), subpoint (c), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently, Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to the online social networking CPS Instagram.

### **5.3. Meta's online advertising service Meta Ads**

#### 5.3.1. *CPS qualification and delineation*

##### 5.3.1.1. The Undertaking's view

- (104) Meta offers the online advertising service Meta Ads, which allows business users to advertise their products and services across Meta's advertising inventory and, to a lesser extent, intermediates ads on third-party publishers' mobile application inventory.
- (105) According to Meta, Meta Ads consists of the "Ads Manager" interface, which allows advertisers to create, design and manage their advertising campaigns across Meta's inventory, such as Facebook and Instagram.<sup>86</sup> Meta also provides an extension to Meta Ads, the "Audience Network", which allows advertisers to deliver ads on the

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<sup>83</sup> Revised version of Section 3 of Form GD, submitted on 16 July 2023, paragraph 246; Form GD, paragraphs 247 and 248.

<sup>84</sup> Form GD, Tables 9 and 10.

<sup>85</sup> Form GD, Tables 9 and 10.

<sup>86</sup> Form GD, paragraph 44.

mobile application inventory of third-party publishers that are part of the Audience Network.<sup>87</sup> According to Meta, [confidential].<sup>88</sup> The Audience Network enables advertisers to extend their advertising reach beyond Meta’s owned and operated inventory to partnering third-party mobile applications.<sup>89</sup> Finally, Meta explains that Meta Ads includes “boosted posts”,<sup>90</sup> as well as the “Shops” features of Instagram and Facebook.<sup>91</sup>

- (106) Meta submits that its online advertising services form part of a single ad-supported online social networking service, which comprises Facebook, Instagram, Meta Ads, Messenger, Marketplace, Facebook Dating and Facebook Gaming Play.<sup>92</sup> Meta submits that a single ad-supported online social networking service is supported by and consistent with, first, the definition of Article 2, point (7), and recital (58) of the preamble to Regulation (EU) 2022/1925;<sup>93</sup> second, the fact that Meta’s online social networking service and Meta Ads offering are provided to end users and business users for the same purpose and in a fully integrated way;<sup>94</sup> and third, the fact that Meta Ads is the primary gateway in which business users reach end users via Meta’s online social networking services.<sup>95</sup>
- (107) According to Meta, this ad-supported online social networking service comprises features and functionalities which are supported by revenue generated through Meta Ads.<sup>96</sup> Meta further argues that its advertising services are seamlessly integrated with this online social networking service and provide means for business users to connect with end users, and for end users to discover advertising content together with “organic content”.<sup>97</sup>
- (108) While not formally providing a plausible alternative delineation, as requested by the template set out in Annex I to Commission Implementing Regulation (EU) 2023/814,<sup>98</sup> Meta refers to a potential delineation of a distinct Meta Ads online advertising CPS comprising all advertising services provided by Meta in line with the definition laid down in Article 2, point (2), subpoint (j), of Regulation (EU) 2022/1925.<sup>99</sup>

#### 5.3.1.2. The Commission’s assessment

- (109) Article 2, point (2), subpoint (j), of Regulation (EU) 2022/1925 lists online advertising services as one of the categories of CPSs within the meaning of that Regulation. According to that provision, online advertising services include “any

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<sup>87</sup> Form GD, paragraph 44 and footnote 31.

<sup>88</sup> Form GD, subheader before paragraph 65.

<sup>89</sup> Form GD, paragraph 66 and footnote 31.

<sup>90</sup> Meta defines boosted posts as an existing piece of organic content that is subsequently converted by a user into an ad that is paid for and distributed via Meta Ads Manager interface on Facebook or Instagram (Form GD, paragraph 44 and footnote 30).

<sup>91</sup> Form GD, footnote 30.

<sup>92</sup> Form GD, paragraphs 14, 18 to 21.

<sup>93</sup> Form GD, paragraph 19(b).

<sup>94</sup> Form GD, paragraphs 22 to 25.

<sup>95</sup> Form GD, paragraphs 26 to 27.

<sup>96</sup> Form GD, paragraphs 14 and 15.

<sup>97</sup> Form GD, paragraph 21.

<sup>98</sup> Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 of the European Parliament and of the Council, OJ L 102, 17.04.2023, p. 6.

<sup>99</sup> Form GD, paragraphs 44 to 70.

*advertising networks, advertising exchanges and any other advertising services*". The Annex to Regulation (EU) 2022/1925, which specifies the methodology for identifying and calculating active end users and active business users of online advertising services, refers to "*proprietary sales of advertising space as well as advertising intermediation services*".<sup>100</sup> To be designated as gatekeeper in relation to an online advertising CPS, Article 2, point (2), subpoint (j), of Regulation 2022/1925 requires the undertaking providing those advertising services to provide at least one other CPS listed in Article 2, point (2), subpoints (a) to (i), of that Regulation.

- (110) The Commission considers that Meta Ads constitutes an online advertising service fulfilling the aforementioned definition. More specifically, Meta Ads comprises all advertising services, tools, features, interfaces and functionalities that interact with each other, the ultimate purpose of which is exposing end users to ads on Meta's own user-facing services or third-party mobile apps via Meta's Audience Network. Since Meta provides the CPSs described in Sections 5.1 to 5.2 and Sections 5.4 to 5.6 in addition to its online advertising service, the Commission considers that Meta's online advertising service Meta Ads constitutes a CPS within the meaning of Article 2, point (2), subpoint (j), of Regulation (EU) 2022/1925.
- (111) The Commission further considers that the online advertising CPS Meta Ads is distinct from Meta's other CPSs and services, such as its online social networking CPSs Facebook and Instagram. Contrary to what Meta argues, Meta Ads cannot be considered to form part of a single ad-supported online social networking service. This is so for the following reasons.
- (112) First, according to Section D(2)(c)(i) of the Annex to Regulation (EU) 2022/1925, CPSs which an undertaking offers in an integrated way should be considered as distinct if they do not belong to the same CPS category within the meaning of Article 2, point (2), of the Regulation. Consequently, even if the online advertising CPS Meta Ads is integrated into Meta's online social networking CPSs Facebook and Instagram, they do not belong to the same category of CPSs and should therefore be considered to constitute distinct CPSs.
- (113) In this regard, the Commission observes that the ultimate purpose of an advertising service is to expose end users to advertisement. The delivery and display of an advertisement on another CPS provided by the undertaking is thus the culmination of the ad selection process within the online advertising CPS, because the ad delivery and display process activates every layer of the online advertising value chain. The display of an advertisement can therefore be considered to be part of both the online advertising service and the other CPS. However, this does not alter the finding that Meta's other services displaying the advertisement and Meta's online advertising CPS remain distinct CPSs.
- (114) Second, Meta Ads is not an online advertising service provided exclusively to place ads on Meta's online social networking CPSs. As acknowledged by Meta, its advertising services use a single auction process to optimise and deliver ads across Meta Ads' surfaces and on third-party mobile applications via the Audience Network.<sup>101</sup> In any event, even if Meta were to provide its online advertising services as integrated with an online social networking CPS, such online advertising services

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<sup>100</sup> Section E of the Annex to Regulation (EU) 2022/1925.

<sup>101</sup> Form GD, paragraph 60.

would still be treated as distinct from Meta’s online social networking CPSs, as required by Section D(2)(c)(i) of the Annex to Regulation (EU) 2022/1925.

- (115) Third, while recital (58) of the preamble to Regulation (EU) 2022/1925 recognises that online advertising services may be “*fully integrated with other core platform services*”, this recital specifically concerns the scope of the transparency obligation under Article 6(8) of that Regulation, not the delineation of CPSs. Furthermore, as explained above, even if an online advertising service is integrated in, provided together with or in support of another CPS, the services do not belong to the same category of CPSs and should therefore be considered to constitute distinct CPSs. Recital (58) of the preamble to Regulation (EU) 2022/1925 merely clarifies that, when this is the case, the gatekeeper shall comply with transparency obligations also for such integrated online advertising services.
- (116) Finally, the Commission considers that the online advertising CPS Meta Ads consists of services going beyond the mere sale of advertisements on Meta’s properties and on third-party websites and software applications. In light of the broad definition of “online advertising services”, reproduced in recital (109) above, the Commission considers that the online advertising service Meta Ads comprises all the advertising services, tools, features, interfaces, and functionalities that interact with each other, the ultimate purpose of which is exposing end users to advertisements on Meta’s own services and third-party advertising inventory.
- (117) For the reasons set out above, the Commission concludes that Meta Ads constitute online advertising services and therefore a CPS within the meaning of Article 2, point (2), subpoint (j), of Regulation (EU) 2022/1925 and, despite being offered in an integrated way with e.g., the Facebook and Instagram online social networking CPSs, that Meta Ads constitutes a distinct CPS to those CPSs.

### 5.3.2. *Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925*

#### 5.3.2.1. The Undertaking’s view

- (118) Meta indicates that it meets the thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925. As summarised in Table 1 above, Meta indicates that it generated an annual Union turnover of more than EUR 11 billion in each of the last three financial years, and that its average market capitalisation in the last financial year was above EUR 75 billion.
- (119) In addition, Meta indicates that its online advertising service Meta Ads is provided in all Member States.<sup>102</sup>
- (120) Meta further indicates that it meets the active monthly end user and active yearly business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925. Meta explains that the monthly active end user figures of Meta Ads are calculated in accordance with the definition of end users of online advertising services in Section E of the Annex to Regulation (EU) 2022/1925. However, Meta indicated that [confidential].<sup>103</sup> Meta also submits that it has calculated the yearly active business user figures of Meta Ads in accordance with the definition of business users for online advertising services in Section E of the Annex to Regulation (EU) 2022/1925,

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<sup>102</sup> Form GD, paragraph 248.

<sup>103</sup> Form GD, paragraph 258.

which include advertisers active on Meta Ads and publishers active on Audience Network.<sup>104</sup>

- (121) Finally, in relation to Article 3(2)(c) of Regulation (EU) 2022/1925, Meta indicates that it has met the thresholds laid down in Article 3(2)(b) of that Regulation in each of the last three financial years, namely 2020 until 2022, concerning a distinct Meta Ads online advertising CPS.<sup>105</sup> The user figures are summarised in Table 4.

**Table 4: Data on Meta Ads’ average number of monthly active end users and yearly active business users in the Union submitted by Meta (2020-2022)<sup>106</sup>**

Year	Monthly active end users		Yearly active business users	
	Average number of monthly active end users on Facebook (incl. Messenger) (millions)	Average number of monthly active end users on Instagram (millions)	Total number of EU advertisers active on Meta Ads (millions)	Total number of publishers active on Audience Network
2020	[>45]	[>45]	[confidential]	[confidential]
2021	[>45]	[>45]	[confidential]	[confidential]
2022	[>45]	[>45]	[confidential]	[confidential]

Source: Form GD Section 4.3.

#### 5.3.2.2. The Commission’s assessment

- (122) Based on the information provided by Meta,<sup>107</sup> the Commission considers that Meta meets the turnover threshold laid down in Article 3(2)(a) of Regulation (EU) 2022/1925, as well as the requirement laid down in that provision that the CPS at issue, i.e., the online advertising CPS Meta Ads, is provided in at least three Member States.
- (123) Moreover, based on the information provided by Meta,<sup>108</sup> the Commission considers that the online advertising CPS Meta Ads meets the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.
- (124) Finally, based on the same information provided by Meta, the Commission considers that the online advertising CPS Meta Ads meets the requirement laid down in Article 3(2)(c) of Regulation (EU) 2022/1925 that the monthly active end user and the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 were met in each of the last three financial years.
- (125) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary to determine whether Meta’s approach to identifying and estimating monthly active end users and yearly business users of the online advertising CPS Meta Ads is sufficiently inclusive in line with the relevant

<sup>104</sup> Form GD, Section 4.3, Tables 6 to 8.

<sup>105</sup> Form GD, paragraph 271.

<sup>106</sup> Form GD, Section 4.3, Tables 6 to 8.

<sup>107</sup> Revised Section 3 of Form GD of 16 July, paragraphs 246 to 248.

<sup>108</sup> Form GD, Section 4.3, Tables 6 to 8.

definitions in Section E of the Annex to Regulation (EU) 2022/1925, given that the aforementioned thresholds are met based on the information provided by Meta.

### 5.3.3. *Conclusion for the online advertising service Meta Ads*

(126) For the reasons set out in recitals (109) to (117) and (122) to (125) above, the Commission concludes that Meta’s online advertising service Meta Ads constitutes an online advertising CPS within the meaning of Article 2, point (2), subpoint (j), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently, Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to its online advertising CPS Meta Ads.

## **5.4. Meta’s number-independent interpersonal communication service WhatsApp**

### 5.4.1. *CPS qualification and delineation*

#### 5.4.1.1. The Undertaking’s view

(127) Meta describes WhatsApp as a messaging and Voice over Internet Protocol calling software application that is used by people around the world and is available on a variety of devices. This instant messaging service uses a proprietary network protocol for data exchanges. In order to communicate with one another, users need the WhatsApp software application and an internet connection. Users can send and receive media such as text messages, photos, videos, documents, locations, voice messages and voice calls. WhatsApp has been free of charge for individual users since 2016.<sup>109</sup>

(128) Meta considers that the starting point for assessing a messaging functionality’s CPS definitional status is first to assess whether it comprises the chat functionality of an online social networking service CPS. Moreover, Meta notes that WhatsApp is a standalone communication service. On that basis, Meta considers that WhatsApp constitutes a NIICS within the meaning of Article 2, point (9), of Regulation (EU) 2022/1925 and a CPS within the meaning of Article 2, point (2), subpoint (e), of that Regulation.<sup>110</sup>

#### 5.4.1.2. The Commission’s assessment

(129) Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925 lists NIICS as one of the categories of CPSs within the meaning of that Regulation. Article 2, point (9), of Regulation (EU) 2022/1925 defines NIICS by cross-referring to Article 2, point (7), of Directive (EU) 2018/1972.<sup>111</sup> According to the latter provision, a NIICS is “an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans”. According to Article 2, point (5), of Directive (EU) 2018/1972, an interpersonal communication service is “*a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the*

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<sup>109</sup> Form GD, paragraph 9.

<sup>110</sup> Form GD, paragraph 34 to 39; Meta’s 3 August 2023 reply, paragraph 3.6.

<sup>111</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

*communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service”.*

- (130) WhatsApp allows end users to send text messages and to make voice and video calls to other individual WhatsApp end users or within WhatsApp groups, as well as to share pictures, videos, and other content. In the context of the WhatsApp platform, Meta also provides various business tools and interfaces, such as WhatsApp Business App and WhatsApp for Business Application Programming Interface (API), which are designed to enhance the communication between businesses and their customers.
- (131) In line with Meta’s view, the Commission considers that WhatsApp is a standalone communication service that constitutes a NIICS within the meaning of Article 2, point (9), of Regulation (EU) 2022/1925 and, consequently, a CPS pursuant to Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925. Moreover, the Commission considers that tools such as WhatsApp for Business App and WhatsApp for Business API, which are designed to enhance the usage of Whatsapp, should be considered to form a part of the NIICS CPS WhatsApp.
- (132) Contrary to Meta’s view, the Commission does not consider it necessary to first assess whether WhatsApp comprises the chat functionality of an online social networking service before classifying it as a NIICS. Such an interpretation has no basis in Article 2 of Regulation (EU) 2022/1925 and disregards the legal framework established therein.
- (133) More specifically, the Commission considers that neither Article 2 of Regulation (EU) 2022/1925, nor any other provision of that Regulation suggests that online social networking services constitute an overarching CPS category which should form the starting point of any analysis of the delineation of a messaging service. As a matter of fact, nothing in that Regulation suggests that there is any pre-determined hierarchy between the different categories of CPSs and that meeting the definition of a certain category of CPS would automatically prevent the Commission from assessing the service against another CPS category. The analysis of whether a particular service fulfils the definition of a particular CPS category must be conducted on the basis of the specific characteristics of the service in question.
- (134) For the reasons set out above, the Commission concludes that WhatsApp constitutes a NIICS pursuant to Article 2, point (9), of Regulation (EU) 2022/1925 and therefore a CPS pursuant to Article 2, point (2), subpoint (e), of that Regulation.

#### 5.4.2. *Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925*

##### 5.4.2.1. Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925

###### 5.4.2.1.1. The Undertaking’s view

- (135) Table 1 above sets out Meta’s annual Union turnover and average market capitalisation, as submitted by Meta. Moreover, Meta submits that WhatsApp is provided in all Member States.<sup>112</sup>

###### 5.4.2.1.2. The Commission’s assessment

- (136) Based on the information provided by Meta, the Commission considers that Meta meets the turnover threshold laid down in Article 3(2)(a) of Regulation (EU)

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<sup>112</sup> Form GD, paragraph 248.



2022/1925, as well as the requirement laid down in that provision that the CPS at issue, i.e., the NIICS CPS WhatsApp, is offered in at least three Member States.

#### 5.4.2.2. Thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925

##### 5.4.2.2.1. The Undertaking's view

(i) Monthly active end users established or located in the Union

(137) Table 5 summarises the data submitted by Meta on the number of average monthly active end users of WhatsApp in the Union.

**Table 5: Average number of monthly active end users of WhatsApp in the Union**

Year	Average number of monthly active end users of WhatsApp in the Union (millions)
2020	[>45]
2021	[>45]
2022	[>45]

Source: Form GD, paragraph 266.

(138) Meta defines WhatsApp's monthly active end users as [confidential].<sup>113</sup> According to Meta, the manner in which it determined WhatsApp's monthly active end users [confidential], since Meta's calculation [confidential]. As a result, the number of monthly active end users estimated by Meta is allegedly higher than the number of end users who actively engaged in communication on WhatsApp. Meta indicated that data regarding the geographic location of these end users is estimated based on a number of factors, [confidential]. These factors may not always accurately reflect the user's actual location.

(ii) Yearly active business users established in the Union

(139) In relation to business users, Meta provides two different sets of data estimating the number of yearly business users of WhatsApp in the Union.

(140) First, Meta defines yearly active business users of WhatsApp as users that sent a message using the WhatsApp for Business API in the relevant year.<sup>114</sup> Meta indicates that the data for the number of yearly active businesses which have sent a message through WhatsApp Business API are not available on a consistent basis prior to 2021. On that basis, Table 6 sets out the data provided by Meta regarding the total number of yearly active business users in 2021 and 2022 which have sent a message through WhatsApp Business API.

**Table 6: Yearly active businesses established in the Union which have sent a message through WhatsApp Business API**

Year	Total number of yearly active businesses established in the Union which have sent a message through WhatsApp Business API
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<sup>113</sup> Form GD, paragraphs 264 to 266.

<sup>114</sup> Meta explains that the WhatsApp Business Platform API enables business users to integrate WhatsApp within their backend systems, including to connect to a business' agents. Form GD, paragraph 267, footnote 165.

2021	[< 10 000]
2022	[>10 000]

Source: Form GD, paragraph 268.

- (141) Second, Meta indicates “for completeness” that it offers an app called the WhatsApp Business App, which was originally intended to support particularly small and medium-sized enterprises’ interaction with their customers, including via tools to automate and respond quickly to messages. Meta considers that this metric (possibly significantly) overstates the number of actual business users using WhatsApp, since this application is free and [confidential].<sup>115</sup>
- (142) Table 7 sets out the data provided by Meta regarding the total number of yearly active users of the WhatsApp for Business app.

**Table 7: Number of yearly active users of the WhatsApp for Business app in the Union**

Year	Number of yearly active users of the WhatsApp for Business app in the Union (millions)
2020	[confidential]
2021	[confidential]
2022	[confidential]

Source: Form GD, paragraph 270.

#### 5.4.2.2.2. The Commission’s assessment

- (i) Monthly active end users established or located in the Union
- (143) On the basis of the information provided by Meta, the Commission considers that Meta meets the end user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in relation to the NIICS CPS WhatsApp.
- (ii) Yearly active business users established in the Union
- (144) It follows from several provisions of Regulation (EU) 2022/1925 that WhatsApp’s business users should include any natural or legal persons, who (i) have used WhatsApp with a business account or (ii) have communicated via WhatsApp with an end user in a commercial or professional capacity for the purpose of or in the course of providing goods or services to end users at least once during the year.
- (145) This is in line with the definition of ‘business user’ set out in Article 2, point (21), of Regulation (EU) 2022/1925, according to which “*any natural or legal person acting in a commercial or professional capacity using CPSs for the purpose of or in the course of providing goods or services to end users*” should be considered to constitute a business user. It is also in line with Section C of the Annex to Regulation (EU) 2022/1925, which provides that “[t]he number of ‘unique users’ as regards ‘active business users’ is to be determined, where applicable, at the account level with each distinct business account associated with the use of a core platform service

<sup>115</sup> Form GD, paragraph 269 and 270. For completeness, the Letter of 26 July the Commission addressed this point. While Meta in its Reply of 3 August 2023 stated that it maintains all the positions it set out in the Form GD, it did not raise any specific counter-argument in this respect.

*provided by the undertaking constituting one unique business user of that respective core platform service. If the notion of ‘business account’ does not apply to a given core platform service, the relevant undertaking providing core platform services shall determine the number of unique business users by referring to the relevant undertaking”.* Finally, Section E of the Annex to Regulation (EU) 2022/1925 defines yearly active business users for NIICS as “*unique business users who used a business account or otherwise initiated or participated in any way in a communication through the number-independent interpersonal communication service to communicate directly with an end user at least once during the year*”.

- (146) In light of these provisions, the Commission considers that the second set of data Meta provided, namely that based on the number of yearly active users of the WhatsApp for Business App as reflected in Table 7, provides a more reliable metric of the total number of yearly active business users of WhatsApp in the Union than the data it provided on the number of users that sent a message using the WhatsApp for Business API, as reflected in Table 6.
- (147) WhatsApp’s number of active business users should not be limited to those users who have communicated via the tools provided by WhatsApp to businesses, such as the WhatsApp Business API, or via the WhatsApp for Business apps. It should also include all other users who have used the NIICS CPS WhatsApp in their commercial or professional capacity to reach out to their customers, irrespective of whether they have set up a business account or used the specific tools developed by Meta for businesses (to enable the use of WhatsApp for Business App or to be able to send message through WhatsApp Business API). Only such an approach to determine the number of active business users respects the definitions of ‘business users’ reproduced above.
- (148) The WhatsApp for Business App was developed to provide businesses with specific tools to interact with customers and present their products to customers.<sup>116</sup> Moreover, in order to use that application, users must agree to the WhatsApp Business terms and conditions.<sup>117</sup> According to those terms and conditions, users of the application are required to set up a “WhatsApp Business Account” and, in order to do so, they must confirm (i) that they are an undertaking and (ii) that they will only use the application in a professional or commercial capacity and not for personal use. Meta’s arguments that the application is free to download and that it therefore does not record data that would allow it to identify whether a user is using the application in a professional or commercial capacity is irrelevant for the purpose of determining whether users of the application qualify as business users. Consequently, users of WhatsApp for Business App can be considered to have used business accounts for WhatsApp within the meaning of Section E of the Annex to Regulation (EU) 2022/1925, and therefore are deemed to be active business users of WhatsApp.
- (149) For the sake of completeness, the Commission observes that even if the data reflected in Table 7 were to (significantly) overstate the number of actual business users using WhatsApp, as Meta submits (*quod non*), it would be sufficient that only [0-5]% of users of WhatsApp for Business App use that application in a commercial

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<sup>116</sup> See for instance: <https://apps.apple.com/ie/app/whatsapp-business/id1386412985> (last accessed on 29 August 2023).

<sup>117</sup> See <https://www.whatsapp.com/legal/business-terms> (last accessed on 1 August 2023).

capacity for the threshold of 10 000 business users to be met in each of the last three financial years.<sup>118</sup>

(iii) Conclusion

(150) In light of the above, the Commission considers that the NIICS CPS WhatsApp meets the thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.

5.4.2.3. Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925

5.4.2.3.1. The Undertaking's view

(151) The data provided by Meta and summarised in Tables 6 and 7 above in relation to the thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 are also relevant for the assessment of thresholds laid down in Article 3(2)(c), of that Regulation.

5.4.2.3.2. The Commission's assessment

(152) On the basis of the data provided by Meta, as reflected in Table 5 above, and for the reasons set out in recital (143) above, the Commission considers that Meta's NIICS CPS WhatsApp met the active monthly end user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.

(153) On the basis of the data provided by Meta, as reflected in Table 7, and for the reasons set out in recitals (144) to (149) above, the Commission considers that Meta's NIICS CPS WhatsApp met the active yearly business user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.

(154) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary for the Commission to determine, beyond the above assessment, whether Meta's approach to identifying and estimating monthly active end and yearly business users of the NIICS CPS WhatsApp is sufficiently inclusive in line with the relevant definition in Section E of the Annex to Regulation (EU) 2022/1925, since the Commission's assessment of the information provided by Meta, as set out above, indicates that the relevant thresholds are met.

5.4.3. *Conclusion for the NIICS WhatsApp*

(155) For the reasons set out in recitals (129) to (134), (136), (143), (144) to (149), (152) to (154) above, the Commission concludes that WhatsApp constitutes a NIICS CPS within the meaning of Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently, Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to the NIICS CPS WhatsApp.

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<sup>118</sup> For the year 2020, where the number of yearly users of the WhatsApp for Business app was [confidential] million (and even assuming that the number of users of the WhatsApp Business API which is not provided by Meta for that year would be 0, which is again very unlikely). A fortiori, for 2021, where the number of users of the WhatsApp Business API reported by Meta was [<10 000], it would be sufficient if [0-5]% of the [confidential] million users of WhatsApp for Business application had used the application in a commercial capacity. For 2022, Meta's best approximation for the number of business users is above 10,000.

## 5.5. Meta’s number-independent interpersonal communication service Messenger

### 5.5.1. CPS qualification and delineation

#### 5.5.1.1. The Undertaking’s view

- (156) Messenger is a communication service provided by Meta. Meta submits that Messenger is not a standalone CPS, since it is the chat function and therefore a part of the online social networking service Facebook.<sup>119</sup> To support its claims, Meta submits the following arguments.
- (157) First, Meta submits that the definition of an online social networking CPS laid down in Regulation (EU) 2022/1925 includes a chat functionality as an essential element of the definition of online social networking services.<sup>120</sup> In this context, Meta argues that the definition of NIICS under the Directive (EU) 2018/1972 does not override the definition of an online social networking service laid down in Regulation (EU) 2022/1925, since it would otherwise prevent Messenger from being part of any online social networking service.<sup>121</sup> Given that the chat functionality is included in the definition of online social networking services, Meta suggests that there is no need to look at any other provisions of Regulation (EU) 2022/1925 to assess whether Messenger forms part of any other CPS.<sup>122</sup> Meta contends that the designation of a service as a NIICS is limited to the case where the service is not part of an online social networking service.<sup>123</sup> Meta furthermore contends that the Commission’s Letter of 26 July 2023 wrongfully gave primacy to the definition of Directive (EU) 2018/1972, while ignoring the explicit reference of the chat functionality in the definition of social networking services laid down in Regulation (EU) 2022/1925.<sup>124</sup>
- (158) Second, Meta submits that, should Messenger be considered a separate service from Facebook, it does not individually constitute an important gateway for business users to reach end users. In this respect, Meta stresses the very limited importance of Messenger for business communications, given that Messenger represents only [0-5]% of traffic for all business-to-consumer (“B2C”) communications in the European Economic Area (“EEA”), which include emails and phone contacts. Furthermore, Meta submits that the presence of business tools within Messenger does not necessarily affirm its role as a primary business gateway, nor as a service separate from the online social networking service Facebook.<sup>125</sup>
- (159) Third, while questioning the legal value of the Annex to Regulation (EU) 2022/1925,<sup>126</sup> Meta argues that the inclusion of Messenger within Facebook is consistent with the guidance provided in that Annex. Specifically, Meta argues that both Facebook and Messenger serve an overarching purpose of allowing users to connect, communicate, share content, and discover others, which is enshrined in the definition of an online social networking CPS. Meta asserts that Messenger and

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<sup>119</sup> Form GD, Section D.1; and in particular paragraph 118 et seq.

<sup>120</sup> Form GD, paragraphs 119 to 121.

<sup>121</sup> Meta’s 3 August 2023 reply, paragraphs 3.5 to 3.7.

<sup>122</sup> Form GD, paragraph 125; Meta’s 3 August 2023 reply, paragraph 3.6.

<sup>123</sup> Meta’s 3 August 2023 reply, paragraph 3.6.

<sup>124</sup> Meta’s 3 August 2023 reply, paragraph 3.7.

<sup>125</sup> Form GD, paragraphs 127 to 136; Meta’s 3 August 2023 reply, paragraph 3.3. Meta has also developed these arguments further in Annex 2.1 to the Form GD regarding the rebuttal of the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925. The Commission addresses these arguments below in Section 5.5.3.

<sup>126</sup> Form GD, paragraphs 112 and 113.

Facebook cater to the same user intentions and, as such, their functions are intertwined. Finally, Meta claims that the assertion in the Commission’s Letter of 26 July 2023 that Facebook and Messenger are used for different purposes by both end users and business users equally applies to other online social networking CPS and their respective chat functions.<sup>127</sup>

- (160) Fourth, Meta submits that users’ ability to access Messenger with a deactivated Facebook account or via an additional app/website is irrelevant and does not influence the delineation of that service.<sup>128</sup> Furthermore, Meta submits that deactivated accounts through which users make use of Messenger are not the same as deleted Facebook accounts, which do not allow access to Messenger. This is because the use of Messenger remains intrinsically tied to the Facebook ID, profile [confidential], despite the fact that the related Facebook account has been deactivated.<sup>129</sup> Meta also underscores that [confidential] uses Messenger with a deactivated account.<sup>130</sup>
- (161) Fifth, in Meta’s view breaking the link between Facebook and Messenger through the designation of Messenger as a separate CPS would [confidential]. This result, according to Meta, makes clear that any such designation would be artificial and inconsistent with Regulation (EU) 2022/1925. Meta claims that the [confidential].<sup>131</sup>
- (162) Sixth, Meta claims that the fact that Messenger could qualify as a NIICS under the Directive (EU) 2018/1972<sup>132</sup> and the fact that Facebook, excluding Messenger, has been designated as a ‘very large online platform’ under Regulation (EU) 2022/2065<sup>133</sup> is not inconsistent with its claim that Messenger should be considered a chat function of the online social networking CPS Facebook under Regulation (EU) 2022/1925.<sup>134</sup> Regarding Directive (EU) 2018/1972, Meta argues, in essence, that given the serious sanctions for non-compliance with Union laws governing electronic communication services, it adopted a conservative approach when considering that Messenger is a NIICS under that Directive.<sup>135</sup> As regards Regulation (EU) 2022/2065, Meta asserts that the exclusion of Messenger from Facebook results from the definition of an online platform laid down in Article 3, point (i), of that Regulation, which excludes messaging services.<sup>136</sup>
- (163) Seventh, Meta considers that the Commission has not sufficiently engaged with the quantitative or qualitative evidence provided by Meta to support its claims. Such evidence includes [confidential].<sup>137</sup>
- (164) Eighth, Meta asserts that, should the Commission conclude that Messenger is a standalone CPS which is not part of its online social networking service Facebook, the Commission would be discriminating against Meta and Messenger vis-à-vis chat

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<sup>127</sup> Form GD, paragraphs 137 to 152; Meta’s 3 August 2023 reply, paragraph 3.10.

<sup>128</sup> Form GD, paragraphs 153 to 160; Meta’s 3 August 2023 reply, paragraph 2.9, point (c).

<sup>129</sup> Meta’s 3 August 2023 reply, paragraph 3.9, (c)

<sup>130</sup> Meta’s 3 August 2023 reply Paragraph 3.9, (c)

<sup>131</sup> Form GD, paragraphs 161 to 164; Meta’s 3 August 2023 reply, paragraph 2.3

<sup>132</sup> Form GD, paragraphs 165 to 174; Meta’s 3 August 2023 reply, paragraphs 3.5 to 3.7.

<sup>133</sup> Form GD, paragraphs 175 to 179. Regulation (EU) 2022/2965 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277, 27.10.2022, p. 1).

<sup>134</sup> Form GD, paragraphs 165 to 179.

<sup>135</sup> Form GD, paragraph 168. Meta indicates that it has [confidential]

<sup>136</sup> Form GD, paragraphs 178 and 179.

<sup>137</sup> Meta’s 3 August 2023 reply, paragraph 3.8.

functions of other online social networking CPSs that may be designated as gatekeepers under Regulation (EU) 2022/1925. Moreover, Meta adds that such a scenario would directly contradict the objectives of that Regulation, which seeks to ensure equal and fair treatment on digital markets.<sup>138</sup>

#### 5.5.1.2. The Commission's assessment

- (165) Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925 lists NIICS as one of the categories of CPSs within the meaning of that Regulation. Article 2, point (9), of Regulation (EU) 2022/1925 defines NIICS by cross-referring to Article 2, point (7), of Directive (EU) 2018/1972.<sup>139</sup> According to the latter provision, a NIICS is “an interpersonal communications service which does not connect with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which does not enable communication with a number or numbers in national or international numbering plans”. According to Article 2, point (5), of Directive (EU) 2018/1972, an interpersonal communication service is “*a service normally provided for remuneration that enables direct interpersonal and interactive exchange of information via electronic communications networks between a finite number of persons, whereby the persons initiating or participating in the communication determine its recipient(s) and does not include services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service*”.
- (166) The Commission considers that Messenger fulfils the definitions set out above, since that service enables the interpersonal and interactive exchange of information between a finite number of persons and it does not connect with publicly assigned numbering resources. More specifically, Messenger enables users to communicate with other individual users or within groups via text, voice calls, video calls as well as to share pictures, videos, their position and other content. Consequently, Messenger constitutes a NIICS CPS pursuant to Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925. Meta's arguments to the contrary are unfounded for the following reasons.
- (167) In the first place, Meta did not dispute that Messenger falls under the definition of NIICS in the context of Directive (EU) 2018/1972.<sup>140</sup> Although Meta's previous qualification of its own services for the purpose of Directive (EU) 2018/1972 is not decisive for the assessment of whether that service constitutes a CPS for the purposes of Article 2, point (2), of Regulation (EU) 2022/1925, Meta has indicated that [confidential].<sup>141</sup>
- (168) In any event, Messenger cannot fall under the narrow exception for “minor ancillary features” contained in the definition of interpersonal communication services laid down in Article 2, point (5), of Directive (EU) 2018/1972. According to recital (17) of the preamble to that Directive, it is only in exceptional circumstances that a service should not be considered an interpersonal communication service, and only (i) if the interpersonal and interactive communication facility is a minor and purely ancillary feature to another service, and (ii) for objective and technical reasons,

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<sup>138</sup> Meta's 3 August 2023 reply, paragraphs 3.7(c) and 3.9(b).

<sup>139</sup> Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ L 321, 17.12.2018, p. 36).

<sup>140</sup> Form GD, paragraphs 173 to 174

<sup>141</sup> Form GD, paragraphs 169 to 171.

cannot be used without that principal service, and (iii) if its integration is not a means to circumvent the applicability of the rules governing the electronic communications service. Given the narrow nature of the exception, the notions of ‘minor’ and ‘purely ancillary’ should be interpreted narrowly and from an end user’s perspective. The same recital further explains that an interpersonal communication feature could be considered minor where its objective utility for an end user is very limited and where it is, in reality, barely used by end users.

- (169) It therefore follows that, while not all communications features provided together with an online social networking service, or any other service, necessarily qualify as a NIICS, whether the exception for “minor and purely ancillary” communication features provided in Directive (EU) 2018/1972 applies in a particular case requires a case-by-case assessment based on the conditions under which the service in question is actually being provided. According to the Commission, that narrow exception does not apply in the case of Messenger, particularly when considering it from an end user’s perspective, since Messenger can be used, and is effectively used, irrespective of whether the end users of that service also use the Facebook online social networking service. This is, in particular, the case where users use Messenger via a separate application or with a deactivated Facebook account. The circumstance that Messenger could be considered to be provided in an integrated way with Facebook within the meaning of Section D(2)(c)(i) of the Annex to Regulation (EU) 2022/1925, in particular since Messenger relies on the Facebook ID [confidential] to connect Messenger users with each other, does not affect this finding. As explained in recitals (177) to (182) below, these design features of Messenger do not call into question the Commission’s finding that Messenger is a distinct service that end users can use separately from Facebook.
- (170) In the second place, the Commission considers that the legal test proposed by Meta to assess whether Messenger constitutes a NIICS within the meaning of Article 2, point (9), of Regulation (EU) 2022/1925, according to which the Commission should first assess whether Messenger is a chat functionality of an online social networking service within the meaning of Article 2, point (7), of that Regulation, is legally flawed. This is so for the following reasons.
- (171) First, contrary to Meta’s view, such a test finds no basis in the text of Regulation (EU) 2022/1925 and disregards the legal framework established therein. Indeed, as already indicated in recital (133) above, neither Article 2, point (7), of Regulation (EU) 2022/1925, nor any other provision of that Regulation, suggests that online social networking services should be considered to constitute an overarching CPS category. In fact, nothing in Regulation (EU) 2022/1925 suggests that there is any hierarchy between different categories of CPSs and that meeting the definition of a certain category of CPS would automatically prevent the Commission from even assessing whether a particular service falls into any other CPS category. Rather, the analysis of whether a specific service fulfils the definition of one or another CPS must be conducted on the basis of an assessment of the specific characteristics of the service in question.
- (172) Second, Section D(2)(c)(i) of the Annex to Regulation (EU) 2022/1925 specifically covers the situation in which an undertaking offers various CPSs in an integrated way. It states that such undertaking shall consider services provided in an integrated way, not belonging to the same CPS category, as distinct CPS. As explained in recitals (165) to (169) above, Facebook and Messenger belong to different categories



of CPSs under Article 2, point (2), of Regulation 2022/1925, and should therefore be considered distinct CPSs.

- (173) Third, nothing in Regulation (EU) 2022/1925 suggests that, exceptionally, the legal framework laid down in the Annex to that Regulation is different or should be applied differently in situations where one of two integrated services is a NIICS and the other is an online social networking service. To the contrary, recital (64) of the preamble to Regulation (EU) 2022/1925 acknowledges that NIICS in particular are susceptible of being provided in the context of integrated platforms: “[...] *gatekeepers often provide number-independent interpersonal communications services as part of their platform ecosystem, and this further exacerbates entry barriers for alternative providers of such services and increases costs for end users to switch*”.
- (174) Fourth, to accept Meta’s legal test (*quod non*) would require applying an additional legal test according to which any messaging service<sup>142</sup> could be designated as a NIICS CPS under Article 2, point (9), of Regulation (EU) 2022/1925 only to the extent that it is not integrated with an online social networking CPS. In other words, a NIICS provided in an integrated way with any online social networking service would always be part of, and therefore absorbed by, the online social networking CPS under Article 2, point (7), of Regulation (EU) 2022/1925. By applying such a legal test, the NIICS CPS category would inevitably constitute a subsidiary category to the online social networking service CPS category. As explained in recital (171) above, such a hierarchy of categories finds no basis in Regulation (EU) 2022/1925 and also undermines the definition of NIICS in Directive (EU) 2018/1972, clarified in recitals (16) and (17) of the preamble to that Directive (as further explained in the following recital).
- (175) Fifth, the legal test proposed by Meta ignores the very definition of NIICS laid down in Directive (EU) 2018/1972, to which Article 2, point (9) of Regulation (EU) 2022/1925 cross-refers. As explained in recitals (16) and (17) of the preamble to that Directive, interpersonal communication services, which include “[...] *all types of emails, messaging services, or group chats*”, are defined specifically in opposition to communication between a potentially unlimited number of persons, such as “[...] *linear broadcasting, video on demand, websites, social networks, blogs [...]*” (emphasis added). On that basis, the Commission considers that NIICS and online social networking services are distinct services for the purpose of Regulation (EU) 2022/1925, unless a communication feature provided together with an online social networking service constitutes a “minor ancillary feature” of the said online social networking service (and therefore falls outside of the definition of interpersonal communication services), in which case it would constitute just the “chat” function of that social network and thus remain within the boundaries of the online social networking CPS.

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<sup>142</sup> Meta is applying the same test in its Form GD in relation to WhatsApp and indicates that it is generally relevant for the purpose of assessing the status of a messaging functionality under Regulation (EU) 2022/1925 (paragraphs 36 and 37 of the Form GD in relation to WhatsApp). In Meta’s 3 August 2023 reply, Meta further indicates that the “*NI-ICS category in Article 2(2) enables the Commission to assess whether interpersonal communication services that are not part of an OSN – such as Meta’s WhatsApp, as laid out in the Form GD, but also Apple’s iMessage or Microsoft’s Skype – can nevertheless comprise an important gateway for business users to reach end users subject to the DMA*” (paragraph 3.6).

- (176) In the third place, the Commission considers that, contrary to Meta’s claim, Messenger is a standalone NIICS CPS and cannot be considered to merely be the chat functionality of the online social networking CPS Facebook. This finding is supported by the following arguments.
- (177) First, it is apparent from the way in which Messenger is provided that, even if that service might have started out as a mere chat functionality of the Facebook online social networking service, over the years it has evolved into a distinct, standalone NIICS beyond the online social networking service Facebook.<sup>143</sup> For example, Meta has developed standalone Messenger applications for mobile,<sup>144</sup> desktops,<sup>145</sup> and other type of devices,<sup>146</sup> including Meta’s recent virtual reality headsets,<sup>147</sup> as well as a dedicated website for Messenger.<sup>148</sup> While Meta claims that the Messenger app is [confidential],<sup>149</sup> this does not explain why Meta, during all this time, has maintained and improved a separate and self-standing application for mobile devices, which constitutes the entry point to Messenger for the vast majority of users.<sup>150</sup> A fortiori, this “[confidential]” does not explain Meta’s choice to develop over the years self-standing applications for desktop and other type of devices where [confidential]. In fact, in a recent communication with investors, the Chief Executive Officer of Meta presented Messenger as an example of a service that started as a functionality inside Facebook and successfully developed as a standalone experience.<sup>151</sup>
- (178) Second, Meta’s public marketing communication, communications to investors and communications to users confirm that Meta itself conceives, presents, and positions Messenger as an autonomous NIICS, going beyond a mere chat function of Facebook.

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<sup>143</sup> For the avoidance of doubt, the circumstance that Messenger is also used as the communication feature including in the context of the use of the Facebook online social network does not contradict the finding that Messenger is a standalone NIICS.

<sup>144</sup> On mobile devices, Messenger applications have been developed for iOS and Android (launched in 2011) as well as on other mobile OS which have been discontinued in the meantime.

<sup>145</sup> Desktops applications have been developed for Windows (see <https://apps.microsoft.com/store/detail/messenger/9WZDNCRF0083>, last accessed on 27 June 2023) and iMac (see <https://apps.apple.com/us/app/messenger/id1480068668>, last accessed on 27 June 2023). It is relevant to note that the Messenger app is pre-installed on Windows, while there is no pre-installation for the Facebook app.

<sup>146</sup> For example, iPad devices (see <https://apps.apple.com/us/app/messenger/id454638411?platform=ipad>, last accessed on 27 June 2023).

<sup>147</sup> See <https://www.meta.com/en-gb/help/quest/articles/in-vr-experiences/social-features-and-sharing/messenger-in-vr/> (last accessed on 29 August 2023).

<sup>148</sup> See <https://www.messenger.com/> (last accessed on 29 August 2023).

<sup>149</sup> Form GD, paragraph 158.

<sup>150</sup> On mobile devices it is not possible to access Messenger via the Facebook app or the Facebook website. Meta indicates, in its reply of 30 May 2023 to the Commission’s question, that it is possible to access the Messenger functionality within the Facebook Lite App, but notes that this application is only available on Android (not on iOS) and Meta only reports [confidential] million monthly active end users for this app in the Union. This means that on mobile devices, which represent [confidential] of Messenger’s usage, the Messenger app is generally the only possible entry point to the Messenger service.

<sup>151</sup> See transcript of Meta’s Second Quarter 2023 Results Conference Call (26 July 2023), available at [https://s21.q4cdn.com/399680738/files/doc\\_financials/2023/q2/META-Q2-2023-Earnings-Call-Transcript.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2023/q2/META-Q2-2023-Earnings-Call-Transcript.pdf) (last accessed on 30 August 2023), page 15: “[...] on the one hand, we’ve tried a bunch of standalone experiences over time, and in general, we haven’t had a lot of success with building kind of standalone apps. The biggest exception to that, of course, is Messenger, but that started off as functionality inside Facebook and was spun out [...]”

- (179) According to Meta’s own description: “More than a billion people trust Messenger to connect and share in the moment. Messenger is both a communication service that enables people to message on Facebook and Instagram, and a standalone app for people who want quick access to meaningful conversations with their friends, family, communities or creators they want to be closer to. On Messenger, anyone can customize their chat with themes and emojis, show their reactions, share photos and videos, make audio and video calls and much more. Beyond connecting with friends, it has also become a thriving place for businesses, creators and communities to connect with each other and the things they love. We work hard to make Messenger a trusted and fun messaging experience regardless of which device, platform or Meta experience you choose to use”.<sup>152</sup> Furthermore, as indicated in this description, Meta introduced in 2020 across the world (although not in the Union)<sup>153</sup> the possibility for users on Messenger to connect and message users on Instagram directly through a number of features.<sup>154</sup> While Meta has indicated that it [confidential],<sup>155</sup> its roll-out confirms Meta’s publicly announced and several times confirmed strategy to position Messenger as a standalone communication service available across the various Meta platforms.<sup>156</sup> This also suggests that the alleged intrinsic nature of the link between Messenger and Facebook is not as important as Meta argues.
- (180) Similarly, in its financial reporting, Meta clearly distinguishes the following four services within its “Family of App Products”: Facebook, Instagram, Messenger and WhatsApp.<sup>157</sup> In other communications to investors, Meta refers to the monetisation of Messenger as such, and indicates that messaging, provided through WhatsApp and Messenger, constitutes a “major monetisation opportunity” through the development of products such as Click-to-Messenger and paid messaging.<sup>158</sup>

<sup>152</sup> See <https://messengernews.fb.com/about/> (last accessed on 27 June 2023).

<sup>153</sup> Meta indicated that outside of the Union, this experience is available in all other regions of the world (although not necessarily in all countries within a region; e.g., it is available in Asia but not in Japan). Meta’s reply of 31 March 2023 to the Commission’s questions of 9 March 2023, questions 19 and 20, footnote 11).

<sup>154</sup> As announced by Meta in September 2020, Meta has introduced the possibility to use Messenger as the communication channel on Instagram (instead of Instagram Direct), as well as the possibility to change the communication channel on the Instagram in order to have a “new Messenger experience”. See <https://about.fb.com/news/2020/09/new-messaging-features-for-instagram/>, last accessed on 24 August 2023.

<sup>155</sup> Meta’s response of 21 June 2023 to the Commission’s questions of 30 May 2023, question 12.

<sup>156</sup> See also the webpage <https://www.messenger.com/features> (last accessed on 27 June 2023) where Meta does not present Messenger as the chat function of Facebook but as a “cross communication app” that manages communications across the various Meta platforms (Facebook, Instagram, Portal and Oculus). Similarly, the description of the mobile Messenger app in Google’s Play Store and Apple’s App Store contain no references to Facebook.

<sup>157</sup> See Meta Platforms, Inc. Form 10-K for Fiscal Year Ended on 31 December 2022, page 7. Messenger is presented with the following description: “*Messenger is a simple yet powerful messaging application for people to connect with friends, family, communities, and businesses across platforms and devices through text, audio and video calls.*” Available at <https://www.sec.gov/Archives/edgar/data/1326801/000132680123000013/meta-20221231.htm>, last accessed on 30 August 2023.

<sup>158</sup> See the transcript of Meta’s Third Quarter 2022 Results Conference Call (26 October 2022), page 3: “*messaging is another major monetization opportunity. Billions of people and millions of businesses use WhatsApp and Messenger every day, and we’re confident we can connect them in ways that create valuable experiences*” (available at [https://s21.q4cdn.com/399680738/files/doc\\_financials/2022/q3/Meta-Q3-2022-Earnings-Call-Transcript.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2022/q3/Meta-Q3-2022-Earnings-Call-Transcript.pdf)), last accessed on 30 August 2023.

- (181) Moreover, Meta provides and promotes a number of tools to engage with an expansive user base, enabling activities such as lead generation, customer service, and customer re-engagement.<sup>159</sup> These tools, which the Commission considers to form part of the Messenger NIICS CPS, reflect that Meta conceives and promotes Messenger as a self-standing platform within its ecosystem.<sup>160</sup>
- (182) Third, Meta’s argument that all communications on Messenger take place between users that have Facebook accounts is merely the consequence of the current design of that service, as currently provided by Meta. While users are required to have a Facebook account and are identified on Messenger via their unique Facebook ID, this circumstance does not affect the possibility for both end users and business users to use Messenger irrespective of whether they use Facebook. Once identified through a Facebook ID, users can use Messenger irrespective of whether their Facebook account is activated or deactivated and irrespective of being active on the online social network Facebook at all.
- (183) In the fourth place, contrary to Meta’s assertions, the Commission has indeed analysed and probed with Meta itself the alleged empirical evidence which, according to Meta, shows the existence of a strong correlation between the use of Messenger and of Facebook and, thus, the nature of the former as the chat of the latter. However, a more accurate analysis of that evidence, as well as of publicly available information, leads the Commission to the following findings.
- (184) First, according to Meta, the fact that [60-90]% of mobile Messenger weekly active users accessed Messenger and Facebook within 10 seconds of each other is highly reflective of how Facebook users use and access Messenger.<sup>161</sup> However, the additional data provided by Meta in response to the Commission’s request for information<sup>162</sup> show that Messenger’s weekly active users (“WAUs”) on average use Messenger and Facebook within 10 seconds of each other on their mobile device for only [confidential] out of [confidential] of their Messenger sessions. In the remaining [confidential] of instances of use of Messenger, there is no reason to assume, on the basis of Meta’s own data, that the use of Messenger is related to the use of Facebook.
- (185) Second, as regards Meta’s contention about the relevance of entry points, the data provided by Meta itself seem to corroborate the finding that the use of Messenger is largely independent from Facebook. In particular, Meta indicated that close to [10-20] million European users entered the Messenger mobile app through a link on the online social network Facebook and that this corresponds to [0-30]% of the Messenger mobile app user base every day.<sup>163</sup> This data pertains to Union mobile users of both Facebook and Messenger whose initial Messenger session for the day was initiated by selecting an integrated Messenger link on the Facebook app. This data suggests that [70-100]% of the Messenger mobile app daily user base first

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<sup>159</sup> On the tools proposed by Meta to businesses to communicate with end users via Messenger, see also recital (203) below.

<sup>160</sup> See for instance: <https://www.facebook.com/business/marketing/messenger>, last accessed on 14 July 2023; and [https://developers.facebook.com/products/messenger/?locale=en\\_IE](https://developers.facebook.com/products/messenger/?locale=en_IE), last accessed on 24 July 2023.

<sup>161</sup> Form GD on 3 July 2023, paragraph 152.

<sup>162</sup> Meta’s reply of 16 July to the Commission’s request for information dated 7 July 2023 (questions 1 and 2).

<sup>163</sup> Meta’s reply of 12 June 2023 to the Commission’s questions of 30 May 2023 (question 1).

entered the Messenger mobile app without going through the Facebook app and thus that the use of Messenger is, to a large extent, not triggered by the use of Facebook.

- (186) Third, the Commission contests Meta’s interpretation of a high positive correlation between average time spent on Facebook and Messenger.<sup>164</sup> In fact, the same methodology returns a similar positive correlation between average time spent on Facebook and WhatsApp.<sup>165</sup> This suggests that the correlation values provided by Meta mainly capture the general presence of common trends and patterns in the usage of such popular applications as Facebook, Messenger or WhatsApp. The somewhat higher correlation between average time spent on Facebook and Messenger is consistent with the fact that those services are provided in an integrated way, but this does not put into question the finding that Messenger is a distinct NIICS CPS.
- (187) Fourth, contrary to Meta’s views, not only monthly active users of Messenger with deactivated Facebook accounts, or who were not also monthly active users of Facebook during the same period, should be counted as monthly active end users of Messenger. The circumstance that Messenger’s end users are, in many cases, also monthly active users of Facebook has no impact on the fact that these users are monthly active end users of Messenger, as also follows from Sections A(3) and D(2)(c) of the Annex to Regulation (EU) 2022/1925. In particular, Section A(3) of that Annex clarifies that “*the same natural or legal person can simultaneously constitute an ‘active end user’ or an ‘active business user’ for different core platform services*”. The partial overlap between monthly active end users of Messenger and of Facebook is also not surprising, given the choice of using the Facebook ID as an identifier for Messenger users. That circumstance also has no bearing on the fact that these users are monthly active end users of Messenger pursuant to the Annex to Regulation (EU) 2022/1925.
- (188) For all the reasons set out above, the Commission concludes that Messenger is a NIICS within the meaning of Article 2, point (9), of Regulation (EU) 2022/1925 and therefore a CPS within the meaning of Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925.
- (189) Contrary to Meta’s claim, that conclusion does not result in any discriminatory treatment of Meta vis-à-vis other online social networking services provided by third parties that may eventually be designated as gatekeepers under Regulation (EU) 2022/1925. As explained in recital (169) above, not all communications features provided together with an online social networking service, or any other service, necessarily qualify as NIICS, given that such a conclusion may only be reached after a case-by-case assessment based on the conditions and specific circumstances under which the service is actually provided and against the conditions laid down in the applicable legal framework.
- (190) As regards Meta’s claim that [confidential], the Commission observes that compliance with the prohibitions and obligations laid down in that Regulation by designated gatekeepers in relation to their relevant CPSs cannot affect or condition the

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<sup>164</sup> Meta argues that there is there is a very strong positive correlation [0.5-1] between average time spent on Facebook and Facebook Messenger (Form GD, paragraph 141 (d) and Meta’s 3 August reply, Paragraph 3.8(d)).

<sup>165</sup> Meta’s response of 12 July 2023 to the Commission’s request for information dated 7 July 2023 (question 3).

qualification of the services provided by such gatekeepers as CPSs and their designation for the purpose of said Regulation.

#### 5.5.2. *Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925*

##### 5.5.2.1. Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925

###### 5.5.2.1.1. The Undertaking's view

(191) Table 1 above sets out Meta's annual Union turnover and average market capitalisation, as submitted by Meta. Meta did not specify in which countries it offers Messenger.

###### 5.5.2.1.2. The Commission's assessment

(192) Based on the information provided by Meta,<sup>166</sup> the Commission considers that Meta meets the turnover threshold laid down in Article 3(2)(a) of Regulation (EU) 2022/1925.

(193) Although Meta did not specify in which Member States it offers the NIICS CPS Messenger, the Commission considers that that CPS meets the requirement laid down in that provision of being offered in at least three Member States, since Messenger is provided in an integrated way with Facebook which, according to the information provided by Meta,<sup>167</sup> is provided in all Member States.

##### 5.5.2.2. Thresholds laid down in Article 3(2)(b), of Regulation (EU) 2022/1925 in relation to Messenger

###### 5.5.2.2.1. The Undertaking's view

(194) While Meta contests that Messenger is a standalone CPS, it indicates that the best approximation of the number of monthly active end users of Facebook Messenger as an individual service distinct from Facebook comprises the number of: (i) deactivated Facebook users who are monthly active users of Facebook Messenger; and (ii) monthly active users of Facebook Messenger that are not monthly active users of other Facebook features. On that basis, Meta indicates that the average number of monthly active end users of Messenger with deactivated Facebook accounts for 2020 to 2022 was [0-5] million; and that the average number of monthly active end users of Messenger which were not monthly active end users of Facebook over the period 2020-2022 was [0-5] million.

(195) Moreover, Meta provides "for completeness" the number of monthly active end users of Messenger in the Union, to which Meta refers as "Facebook profiles that used Facebook Messenger".<sup>168</sup> Table 8 sets out the data on Messenger average number of monthly active end users submitted by Meta.

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<sup>166</sup> Form GD, paragraphs 246 and 247.

<sup>167</sup> Form GD, paragraphs 248 and 262, Table 2.

<sup>168</sup> Annex 4.1 to the Form GD.

**Table 8: Average number of monthly active end users of Messenger in the Union**

Year	Average number of monthly active end users of Messenger in the Union (millions)
2020	>45
2021	>45
2022	>45

Source: Form GD, Annex 4.1.

(196) With respect to the number of yearly active business users, Meta indicates that it is unable to provide data on the number of unique active business users that communicated on Messenger in each of the last three years in the Union.<sup>169</sup> Meta indicates that, on 30 September 2020, [5-10] million Facebook pages estimated to be businesses had sent at least one message in the past 28 days over all Messenger surfaces including the API, Messenger app, business products and other products.<sup>170</sup> Meta further indicates that in late 2020 it made changes to the way it recorded certain data to comply with national implementations of the Directive 2002/58/EC on privacy and electronic communications<sup>171</sup>, whose scope of applications was extended to include NIICSs – hence also Messenger – from December 2020 onwards. As a result of these changes, Meta indicates that [confidential]. For this reason, Meta provides no estimate of the number of yearly active business users in the Union for the years 2021 and 2022 in its notification.

#### 5.5.2.2.2. The Commission’s assessment

##### (i) Monthly active end users established or located in the Union

(197) Contrary to what Meta claims, the Commission considers that all monthly active end users of Messenger should be counted to determine whether the number of monthly active end users of that CPS exceeds the threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925. As explained in recital (187) above, the circumstance that monthly active end users of a CPS may also be monthly active end users of another CPS has no impact on their counting as monthly active end users of each CPS pursuant to the Annex to Regulation (EU) 2022/1925, including where the two CPSs are provided in an integrated way. Consequently, based on the information provided by Meta “for completeness”, which are reproduced in Table 8 above, the Commission considers that the NIICS CPS Messenger meets the monthly active end users threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.

##### (ii) Yearly active business users established in the Union

(198) According to Section A, point 1 of the Annex to Regulation (EU) 2022/1925, it is the responsibility of the undertaking, when identifying and calculating the active end users and business users for the purpose of that Regulation, to come to the best

<sup>169</sup> Annex 4.1 to the Form GD.

<sup>170</sup> Meta’s approximation of the number of businesses with access to Messenger is based on the number of Facebook pages estimated to be actual or potential advertisers in the EU.

<sup>171</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37.

approximation possible in line with the common principles and specific methodology set out in the Annex to that Regulation. Nothing in that Annex precludes the Commission, within the time limits laid down in the relevant provisions of this regulation, from requiring the undertaking providing CPSs to provide the information necessary to identify and calculate the ‘active end users’ and the ‘active business users’. Finally, compliance with Article 13(3) of Regulation (EU) 2022/1925 also means identifying and calculating ‘active end users’ and ‘active business users’ based either on a precise measurement or on the best approximation available, in line with the actual identification and calculation capacities that the undertaking providing CPSs possesses at the relevant point in time.

- (199) In light of these preliminary considerations, the Commission observes that the only approximation provided by Meta with respect to the number of yearly active business users of the NIICS CPS Messenger established in the Union is the number of Facebook pages estimated to be businesses in the Union which had sent at least one message over all Messenger surfaces including the API, Messenger app, business products and other products in September 2020 ([5-10] million). This figure, which likely underestimates the total number of yearly active business users of Messenger due to methodological shortcomings,<sup>172</sup> already exceeds by a large margin the threshold of 10 000 yearly active business users.
- (200) To ensure that the number of yearly active business users for 2021 and 2022 was not significantly lower than the number for 2020 and did not fall below the threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925, the Commission requested Meta to provide an extrapolation of the number of estimated businesses that sent or received at least one message via Messenger in 2020, 2021 and 2022, based on the aforementioned figure for September 2020.<sup>173</sup> Meta provided these extrapolations<sup>174</sup> with the caveat that it does not present this data as its internal estimation of, nor as a reliable proxy for, yearly active Facebook business users using Facebook Messenger in 2020, 2021 and 2022.
- (201) To perform these extrapolations, Meta applied the following methodology: [confidential]. The result obtained through this methodology is presented in Table 9.

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<sup>172</sup> The Commission considers that the methodology used by Meta to calculate this figure is not in line with that prescribed in the Annex to Regulation (EU) 2022/1925 in several aspects. First, all the persons who are business users (as defined under Article 2, point (21), of Regulation (EU) 2022/1925)<sup>172</sup> and which have communicated with end users at least once during the year (for instance by receiving and/or sending a message, or by making a voice or video call) qualify as active business users of Messenger. The figure provided by Meta only takes into account the businesses that have communicated via Messenger through the dedicated business tools proposed by Meta (including the API, Messenger app, business products and other products) and does not take into account the business users which may use Messenger to communicate with end users. Second, the figure provided by Meta only takes into account those Facebook pages which had sent a message in the past 28 days, while for active business users the relevant time reference under Article 3(2)(b) and Section E of the Annex to Regulation (EU) 2022/1925 is a year. Third, the figure provided by Meta does not take into account the business users which have received a message during the year without themselves sending a message during that period. Based on all these elements, the Commission considers that the figure provided by Meta is likely to underestimate the total number of business users of Messenger.

<sup>173</sup> Commission Decision of 6 July 2023 relating to a proceeding pursuant to Article 21(3) and Article 31(1) of Regulation (EU) 2022/1925, C(2023) 4726 final.

<sup>174</sup> Meta’s response to Question 5 of Commission’s RFI of 6 July 2023 which also includes a detailed description of the methodology followed by the Meta for providing such extrapolations.



**Table 9: Extrapolation of the number of Facebook Pages in the Union estimated to be business pages that have sent at least one message via Messenger**

Year	Number of yearly active Facebook Pages estimated to be business pages in the Union that have sent at least one message via Messenger, in millions
2020	[confidential]
2021	[confidential]
2022	[confidential]

Source: Meta’s response to Question 5 of Commission’s RFI of 6 July 2023

- (202) While Meta indicates that it does not present these figures as a reliable proxy, it does not explain why these figures, which are based on its own data and methodology, would be insufficiently reliable to determine the number of yearly active business users of Messenger in the Union. In the absence of any approximation provided by Meta for the years 2021 and 2022, the Commission considers that the data presented in Table 9 provide a sufficiently reliable indication that the number of yearly business users of Messenger clearly remained in the order of multiple millions in 2021 and 2022, and in any case significantly above the threshold of 10 000 business users laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.<sup>175</sup>
- (203) For the sake of completeness, the Commission notes that, in addition to the business tools mentioned in recital (181) above, Meta also provides businesses with the possibility to set up automated responses.<sup>176</sup> In response to a request for information, Meta indicated that [1-2 million] business users sent at least one automated response in the period of nine days between 27 June and 5 July 2023. While Meta [confidential],<sup>177</sup> the Commission considers these data further illustrate that business engagement with Messenger’s B2C tools has remained at a very high level, further confirming that the number of yearly active business users of Messenger remained in the order of [confidential] millions in the last three financial years.
- (204) In light of the above, the Commission considers that sufficient evidence exists that the NIICS CPS Messenger meets the yearly active business user thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.

5.5.2.3. Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925

5.5.2.3.1. The Undertaking’s view

- (205) The information in 5.5.2.2.1 is equally relevant for determining whether the requirement laid down in Article 3(2)(c) of that Regulation has been met.

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<sup>175</sup> In particular, the Commission notes that the number of businesses identified by Meta (ie the Facebook pages estimated to be businesses) which are susceptible to communicate via Messenger has not decreased over the period (there were [confidential] million businesses in 2020, [confidential] in 2021 and [confidential] in 2022). Moreover, Meta provides no indications that other factors could have led to a decrease in the number of businesses which communicated via Messenger over the period 2020-2022.

<sup>176</sup> Businesses can for instance set up “instant replies” in response to the first message received by an end user; “away messages”; or “ad intro messages” when the end user clicks on a “click-to-message” ad (Meta’s response to Question 4 of Commission’s RFI of 6 July 2023).

<sup>177</sup> Meta indicates [confidential].

#### 5.5.2.3.2. The Commission’s assessment

- (206) Based on information provided by Meta, as reflected in Table 5, the Commission considers that Meta’s NIICS CPS Messenger met the active monthly end user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.
- (207) Based on the considerations set out in recitals (198) to (204), the Commission considers that Meta’s NIICS CPS Messenger met the active yearly business user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.
- (208) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary for the Commission to determine, beyond the assessment made above, whether Meta’s approach to identifying and estimating monthly active end users and yearly business users of the NIICS CPS Messenger is sufficiently inclusive in line with the relevant definition in Section E of the Annex to Regulation (EU) 2022/1925, since the Commission’s assessment of the information provided by Meta, as set out above, indicates that the relevant thresholds are met.

#### 5.5.3. Arguments pursuant to Article 3(5) of Regulation (EU) 2022/1925

##### 5.5.3.1. The Undertaking’s view

- (209) As part of its notification, Meta presents arguments aimed at demonstrating that, even if it were to meet all of the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to Messenger, it exceptionally would not satisfy the requirements listed in Article 3(1) of that Regulation, due to the circumstances in which Messenger operates.<sup>178</sup>
- (210) First, Meta submits that Messenger does not comprise a “gateway” between business and end users for the purpose of Regulation (EU) 2022/1925.<sup>179</sup> According to Meta, business users do not have an important degree of economic dependence on Messenger to reach their customers, nor is Messenger able to “influence the operations” of business users.<sup>180</sup> Meta explains that B2C communications on Messenger [confidential]. This is in contrast to other forms of B2C communications, like emails, text messages, or phone calls, [confidential].<sup>181</sup> Meta further submits that [confidential].<sup>182</sup>
- (211) Second, Meta submits that even if Messenger were to be considered as a gateway, it is not an *important* gateway for business users to reach end users.<sup>183</sup> Meta claims that Messenger is primarily a consumer-to-consumer (“C2C”) feature, and represents less than [0-5]% of all B2C communications in the EEA, including emails and phone communications. Moreover, Messenger faces considerable competition across other direct message, social networking, and video conferencing services, which serves to reinforce its small scale relative to the “overall scale of activities”.<sup>184</sup>

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<sup>178</sup> Annex 2.1 to the Form GD; Meta’s 3 August 2023 reply, paragraphs 3.16

<sup>179</sup> Form GD, Annex 2.1, paragraphs 4 to 6.

<sup>180</sup> Recital (20) of the preamble of Regulation (EU) 2022/1925.

<sup>181</sup> Form GD, Annex 2.1, paragraph 6(a).

<sup>182</sup> Form GD, Annex 2.1, paragraph 6(b).

<sup>183</sup> Form GD, Annex 2.1, paragraphs 7 to 10.

<sup>184</sup> Form GD, Annex 2.1, paragraph 7.

- (212) Third, Meta points to the prevalence of multi-homing among users of Messenger end users, with 73% of them using more than one online messaging service.<sup>185</sup> Meta submits that end users and business users of Messenger are incentivised to multi-home among other NIICS. Meta points to the development and expansion of alternatives, including videoconferencing services, as demonstrative of switching and multi-homing amongst Messenger users.<sup>186</sup>
- (213) Fourth, Meta submits that Messenger cannot individually comprise an important gateway for business users to reach end users.<sup>187</sup> It argues that recital (15) of the preamble to Regulation (EU) 2022/1925 requires that, for a CPS to be separately designated, its importance to business users must be derived from its standalone functionality and not from its provision with another service.<sup>188</sup> Meta suggests that the Commission relies too heavily on the fact that Messenger can be used with a temporarily deactivated Facebook account and that it can be accessed via a separate app or website to reach the conclusion that Messenger is a distinct NIICS CPS from the online social networking service CPS Facebook. Meta submits that, taking only those monthly active users with deactivated accounts, Messenger would not exceed the threshold for monthly active end user laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.<sup>189</sup> Meta argues that any other methodology to calculate the thresholds of Article 3(2)(b) would double-count the overwhelming majority of Facebook users that use Messenger as a chat function of the online social network Facebook, rather than individually.
- (214) Finally, Meta indicates that, to the extent that the Commission disagrees with Meta's arguments, it should open a market investigation under Articles 17(1) or (3) of Regulation (EU) 2022/1925 to assess whether Messenger should be listed as a CPS in Meta's designation decision. In that respect, Meta argues, in its reply of 3 August 2023,<sup>190</sup> that a market investigation pursuant to Article 17(1) of Regulation (EU) 2022/1925 could be opened even in cases where the undertaking satisfies each of the thresholds set out in Article 3(2) of that Regulation in relation to a CPS.

#### 5.5.3.2. The Commission's assessment

- (215) As a preliminary matter, the Commission considers that Meta's interpretation of Article 17(1) of Regulation (EU) 2022/1925 is legally flawed and is not supported by the text of that Regulation. A market investigation may be initiated by the Commission pursuant to that provision in circumstances where it considers that an undertaking providing CPSs may meet each of the requirements laid down in Article 3(1) of Regulation (EU) 2022/1925, although it does not satisfy each of the thresholds laid down in Article 3(2) of that Regulation. It follows from the terms of Article 3(8) of Regulation (EU) 2022/1925 that a market investigation pursuant to Article 17(1) of that Regulation is not possible if the thresholds laid down in Article 3(2) of that Regulation are met. Any market investigation into circumstances of an undertaking that provides a CPS and meets the thresholds under Article 3(2) of

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<sup>185</sup> Form GD, Annex 2.1, paragraph 7(d).

<sup>186</sup> Form GD, Annex 2.1, paragraph 9.

<sup>187</sup> Form GD, Annex 2.1, paragraphs 11 to 16.

<sup>188</sup> Form GD, Annex 2.1, point 11.

<sup>189</sup> Form GD, Annex 2.1, point 13; Meta submits that from January – December 2022, there were only [0-5] million Facebook Messenger monthly active end users with deactivated Facebook accounts, far below the 45 million threshold required by Article 3(2)(b) of Regulation (EU) 2022/1925.

<sup>190</sup> Meta's 3 August 2023 reply, paragraph 3.18.

Regulation (EU) 2022/1925 in relation to that CPS may only take place in the context of a market investigation initiated pursuant to Article 17(3) of Regulation (EU) 2022/1925, where the conditions laid down in Article 3(5), third paragraph, of that Regulation are met.

- (216) Contrary to Meta’s claim,<sup>191</sup> the fact that Article 17(1) of Regulation (EU) 2022/1925 refers not only to Article 3(8) of that Regulation but also to Article 3(9) of that Regulation does not extend the scope of Article 17(1) of Regulation (EU) 2022/1925 to also cover situations in which the thresholds laid down in Article 3(2) of that Regulation are met. Rather, the reference to Article 3(9) of Regulation (EU) 2022/1925 is designed to cover the situation where an undertaking has already been designated as a gatekeeper in relation to one or more CPSs and the Commission intends to conduct a market investigation into whether another service provided by that same undertaking, which does not satisfy the thresholds of Article 3(2) of Regulation (EU) 2022/1925, meets the requirements of Article 3(1) of that Regulation. In such a case, if the outcome of that market investigation shows that the requirements of Article 3(1) of that Regulation are met in relation to the service at issue, the Commission would complement the list of CPSs in relation to which the undertaking is designated as gatekeeper pursuant to Articles 17(1) and 3(9).
- (217) Article 3(5) of Regulation (EU) 2022/1925 clearly sets out, in its second and third subparagraphs, that, following the submission by the notifying undertaking of arguments seeking to call the presumptions laid down in Article 3(2) of that Regulation into question, the legal standard for the Commission to decide whether it should open a market investigation pursuant to Article 17(3) of Regulation (EU) 2022/1925 is whether those arguments are sufficiently substantiated to “*manifestly call into question*” those presumptions. In any event, it follows from Article 3(5), third subparagraph, of Regulation (EU) 2022/1925 that, even if the Commission considers that legal standard to be met in a given case, it has discretion as to whether to open a market investigation, as the use of the word “may” in that provision shows. This is a different situation compared to a market investigation opened pursuant to Article 3(8) and 17(1) of Regulation (EU) 2022/1925, which is aimed at determining whether an undertaking providing CPSs meets the requirements laid down in Article 3(1) of that Regulation, when it does not satisfy each of the thresholds laid down in Article 3(2).
- (218) In light of the foregoing, the Commission considers that, contrary to Meta’s view, there is no legal ground for it to open a market investigation pursuant to Article 17(1) of Regulation (EU) 2022/1925 in relation to the Messenger CPS.<sup>192</sup> Meta’s arguments aimed at rebutting the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS are to be assessed solely under the framework of Article 3(5) of that Regulation.
- (219) For the following reasons, the Commission considers that the arguments submitted by Meta pursuant to Article 3(5), first subparagraph, of Regulation (EU) 2022/1925 are not sufficiently substantiated so as to manifestly call into question the application of the presumptions laid down in Article 3(2)(b) of that Regulation in relation to Messenger.

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<sup>191</sup> Meta’s 3 August 2023 reply, paragraph 3.18.

<sup>192</sup> Meta’s Form GD, Annex 2.1, page 1.

- (220) In the first place, Meta’s claim that Messenger does not comprise a gateway for business users to reach end users is belied by the fact that the number of yearly active business users of Messenger significantly exceeds the threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925, as explained in recitals (198) to (204) above. As explained in recital (23) of the preamble to Regulation (EU) 2022/1925, one of the elements that the Commission should take into account when assessing arguments submitted pursuant to Article 3(5) of Regulation (EU) 2022/1925 is by how much the actual business user numbers exceed the thresholds. The data presented in the aforementioned recitals concerning Messenger exceed, by a factor of [confidential], the yearly active business user threshold laid down in Article 3(2)(b) of Regulation 2022/1925.
- (221) The Commission recalls that it is incumbent on an undertaking seeking to rebut the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925 to produce convincing evidence that, even if its CPS exceeds the thresholds laid down in that provision by a very large margin, as is the case with Messenger, that CPS is not a gateway for business users. Meta failed to adduce such convincing evidence. In contrast, various reports and public sources confirm that Messenger is one of the most widely used messaging services in the Union. For example, publicly available figures show that, in all the Member States for which data are available, Messenger is either the second most widely used messaging service after WhatsApp, or even the most widely used in some Member States.<sup>193</sup>
- (222) While not decisive in itself to establish whether a specific CPS individually constitutes a gateway, Meta itself provides a number of tools specific for businesses to communicate with end users via Messenger, such as a dedicated API, the Messenger app, and other business products, including the Chat Plugin that third-party websites can install to communicate with visitors. The circumstance that, according to Meta, business users may not be able to initiate communication with end users does not affect Messenger’s qualification as a gateway. This circumstance has not prevented businesses from widely using the tools proposed by Meta as described in recital (181) above. Moreover, Meta proposes to businesses advertising tools designed to “*send people to a Messenger conversation*”.<sup>194</sup> Such campaigns can

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<sup>193</sup> Figures published by Statista show that in all the Member States for which data are available, Messenger is either the second most widely used messaging service after WhatsApp, or even the most widely used in some Member States such as Poland and Sweden. Based on these figures, Messenger’s market penetration in the surveyed Member States is as follows: Austria - 32%, Finland - 50%, France - 65%, Germany - 35%, Italy - 45%, Netherlands - 46%, Poland - 84%, Spain - 33%, and Sweden - 80%. Source: Statista Consumer Insights, Messenger usage by brand (2023 – Update 1), <https://www.statista.com/global-consumer-survey/surveys> last accessed on 29 August 2023.

See also the report by PPMI for the Body of European Regulators for Electronic Communications (BEREC) analysing EU consumer perceptions and behaviour on digital platforms for communication (BoR (21) 89), available at <https://www.berec.europa.eu/en/document-categories/berec/reports/analysing-eu-consumer-perceptions-and-behaviour-on-digital-platforms-for-communication-analysis-report>, last accessed on 13 July 2023. The report highlights in particular that “*WhatsApp is the most widely and intensively used messenger application among users in the countries surveyed, with 62% of respondents reporting using it daily. Facebook Messenger ranks second, while other applications are used at a notably lower rates and levels of intensity. However, rates of preference observed for the main messenger applications varied markedly between European countries. These can be grouped into WhatsApp vs Messenger-dominated markets*” (see page 10).

<sup>194</sup> See for instance <https://www.facebook.com/business/help/212519562595207?id=371525583593535>, last accessed on 28 August 2023

represent an important source of revenue for Meta.<sup>195</sup> In any event, the possibility to initiate a communication by business users is not required under the definition of active business users for NIICS pursuant to Section E of the Annex to Regulation (EU) 2022/1925, and its absence therefore cannot prevent a NIICS CPS from being a gateway between business users and end users.

- (223) Finally, while Meta claims that Messenger is primarily a C2C feature, the circumstance that a service is also used for C2C communication, even in the majority of cases, does not preclude a finding that that service is an important gateway for business users to reach end users, as highlighted in recital (15) of the preamble to Regulation (EU) 2022/1925.<sup>196</sup> Moreover, the Commission considers that Messenger's importance as a B2C channel is linked to its very high penetration amongst users across the entire Union, being either the second or the first messaging service used by users alternating its position with WhatsApp.<sup>197</sup>
- (224) In the second place, Meta's claim that Messenger is not an *important* gateway for business users to reach end users, given its relatively small scale, is belied by the data Meta provided on that service's number of end and business users. According to those data, Messenger's number of monthly active end users for the last three fiscal years was between [100] and [200] million, while its number of yearly active business users can be estimated at between [5 and 10] million. These figures are moreover close to those provided by Meta in relation to WhatsApp,<sup>198</sup> which is the largest messaging service in the Union.
- (225) Meta's assertion that Messenger is a negligible B2C channel, because it represents only [0-5]% of the B2C traffic in the EEA including emails and phone communications,<sup>199</sup> should be rejected for the following reasons.
- (226) First, beyond this general assertion, Meta has failed to present any data or explanations supporting this assertion.

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<sup>195</sup> See for instance transcript of Meta's Fourth Quarter 2022 Results Conference Call (1 February 2023) where "clicks-to messaging ads" are presented as one of Meta's fastest growing ads products (available at [https://s21.q4cdn.com/399680738/files/doc\\_financials/2022/q4/META-Q4-2022-Earnings-Call-Transcript.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2022/q4/META-Q4-2022-Earnings-Call-Transcript.pdf), last accessed on 30 August 2023); see also the speech by Meta's Chief Executive Officer at a company-wide meeting where he stated: "We talk a lot about the very long-term opportunities like the metaverse, but the reality is that business messaging is probably going to be the next major pillar of our business as we work to monetize WhatsApp and Messenger more" (available at <https://www.reuters.com/technology/zuckerberg-says-whatsapp-business-chat-will-drive-sales-sooner-than-metaverse-2022-11-18/>), last accessed on 29 August 2023).

<sup>196</sup> According to this recital, "*The fact that it is possible that an undertaking providing core platform services not only intermediates between business users and end users, but also between end users and end users, for example in the case of number-independent interpersonal communications services, should not preclude the conclusion that such an undertaking is or could be an important gateway for business users to reach end users.*"

<sup>197</sup> See Commission decision of 27 January 2022 in case M.10262 - META (Formerly Facebook)/Kustomer, paragraphs 257 to 258, which indicate that Messenger's penetration rate within the total EEA population was between 30% and 40% between 2018 and 2020, and that market participants confirmed that the importance of Meta's channels for B2C communications, including Messenger, is linked to their high penetration rates.

<sup>198</sup> See Section 5.4.2.2. above. The number of monthly active end users for WhatsApp is comprised between [confidential] and [confidential] millions for the three last fiscal years; while the number of yearly active business users can be estimated between [confidential] millions for the same period.

<sup>199</sup> Annex 2.1 to Meta's Form GD, paragraph 7(b).

- (227) Second, the fact that Meta provides a number of business-specific tools to enable business users to communicate with end users via Messenger, and that these tools are widely used, as the extrapolated data on the use of Messenger by business users demonstrates, reveals the significance of Messenger as a B2C channel, thus contradicting Meta’s assertion to the contrary.
- (228) Third, Meta’s comparison between the volume of communication via Messenger and other channels of communication, such as phone calls or SMSs, is misplaced, since it fails to properly consider the scale of Messenger within the relevant CPS category. Phone calls and SMSs are number-based interpersonal communication services,<sup>200</sup> not NIICS like Messenger, so that the comparison put forward by Meta does not properly reflect the importance of Messenger for B2C communication in relation to other NIICS, in particular messaging services. Recital (23) of the preamble to Regulation (EU) 2022/1925 specifies, in this regard, that for the purpose of rebutting the presumptions laid down in Article 3(2) of that Regulation, the importance of the undertaking’s CPS considering the overall scale of activities should be assessed with regard to the “respective core platform service”.
- (229) In the third place, the fact that business users and end users have a choice between different services to communicate, or the fact that multi-homing is allegedly prevalent amongst end users, do not manifestly call into question the finding that Messenger is an important gateway for business users to reach end users. Contrary to Meta’s assertion, while the absence of multi-homing may be a relevant element to assess the existence of a gateway position, the existence of multi-homing is not in itself an indication that a CPS does not constitute an important gateway for business users to reach end users within the meaning of Regulation (EU) 2022/1925. Indeed, the lack of multi-homing is just one of multiple elements referred to in recitals (2) and (3) of the preamble to Regulation (EU) 2022/1925 as characteristics that can be exploited by undertakings providing CPSs. Moreover, the relevance of the lack of multi-homing as a possible element to assess the existence of a gateway position may vary across different categories of CPSs and even within an individual category of CPS.
- (230) In this regard, recital (64) of the preamble to Regulation (EU) 2022/1925 emphasises that, with respect to NIICS, the circumstance that end users would multi-home is insufficient to prevent the existence of contestability issues: “*Furthermore, regardless of whether end users ‘multi-home’, gatekeepers often provide number-independent interpersonal communications services as part of their platform ecosystem, and this further exacerbates entry barriers for alternative providers of such services and increases costs for end users to switch [...].*” In that respect, and in light of the overall importance of Meta’s messaging services WhatsApp and Messenger,<sup>201</sup> the fact that many users may use both services would seem to reinforce, rather than mitigate, the contestability and fairness issues that have led to NIICS being included as one of the CPS categories in Regulation (EU) 2022/1925.

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<sup>200</sup> ‘Number-based interpersonal communication services’ are defined by Article 2(6) of the Directive (EU) 2018/1972 as interpersonal communications service “*which connects with publicly assigned numbering resources, namely, a number or numbers in national or international numbering plans, or which enables communication with a number or numbers in national or international numbering plans*”.

<sup>201</sup> The report by PPMI for the BEREC (cf. footnote 193) indicates that 84% of the users surveyed had selected WhatsApp or Messenger as their main messaging service.

- (231) In the fourth place, recitals (166) to (188) above set out in detail the reasons why the Commission considers Messenger as a self-standing NIICS CPS and not merely as the chat feature of the online social network CPS Facebook. Moreover, for the reasons set out in recitals (187) and (197) above, and contrary to what Meta claims, there is no basis in Regulation (EU) 2022/1925 to consider that the monthly active end users of Messenger which also are active end users of Facebook during the same period should not be taken into account to determine whether and to what extent Meta exceeds the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925 in relation to Messenger. In fact, as set out in recitals (187) and (197) above, the fact that Messenger’s monthly active end users are, in many cases, also monthly active users of Facebook is irrelevant for the present purposes and not surprising given that these two services are provided in an integrated way by Meta. Nothing in Regulation (EU) 2022/1925 precludes the possibility that such CPSs constitute individually gateways for business users to reach end users.
- (232) In light of the above, the Commission concludes that the arguments submitted by Meta are not sufficiently substantiated to manifestly call into question the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to the NIICS CPS Messenger. Consequently, the Commission rejects those arguments pursuant to Article 3(5), second paragraph, of Regulation (EU) 2022/1925, without applying the procedure laid down in Article 17(3) of that Regulation.

#### 5.5.4. *Conclusion for the NIICS Messenger*

- (233) For the reasons set out in recitals (165) and (166), (192) to (193), (197) to (204), (206) to (208), and (215) to (232) above, the Commission concludes that Messenger constitutes a NIICS CPS within the meaning of Article 2, point (2), subpoint (e), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently, Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to the NIICS CPS Messenger.

### 5.6. **Meta’s online intermediation service Marketplace**

#### 5.6.1. *CPS qualification and delineation*

##### 5.6.1.1. The Undertaking’s view

- (234) Meta submits that, in line with the definition of online social networking services laid down in Article 2, point (7), of Regulation (EU) 2022/1925,<sup>202</sup> Marketplace is simply one category of use of the online social networking service Facebook, since it is merely a feature allowing users to “*share content and discover other users and content [...] via recommendations.*”<sup>203</sup> Meta claims that Marketplace is not a plausible standalone online intermediation CPS, because it is not provided separately from Facebook.<sup>204</sup> Meta underpins that claim with the following arguments.
- (235) In the first place, Meta submits that Marketplace provides end users with the ability to share and discover items for sale on Facebook, which is consistent with the

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<sup>202</sup> Article 2, point (7), of Regulation (EU) 2022/1925 defines online social networking services as “*a platform that enables end users to connect and communicate with each other, share content and discover other users and content across multiple devices and, in particular, via chats, posts, videos and recommendations.*”

<sup>203</sup> Form GD, paragraph 181.

<sup>204</sup> Form GD, paragraph 180; Meta’s 3 August 2023 reply, paragraphs 4.5 to 4.10.



purpose of an online social networking service.<sup>205</sup> Meta outlines that Marketplace was developed in 2016 in response to existing end user behaviour of selling and buying items on Facebook, mainly in Facebook “Buy-Sell Groups”, and that Marketplace simply improved the user experience of such groups by providing a feature which Facebook users can use to carry out the same activity.<sup>206</sup> Meta adds that the development and organic evolution of Marketplace, as well as how end users use Marketplace as part of their social experience on Facebook, is an indication that Marketplace is simply one category of use of the online social networking service Facebook.<sup>207</sup> In this regard, Meta argues that the use of the terms “*sharing and discovering content*” in the definition of online social networking services in Article 2, point (7), of Regulation (EU) 2022/1925 covers discovering and purchasing products and services offered by other users.<sup>208</sup>

- (236) In the second place, Meta submits that a focus on community remains a core functionality of Marketplace, with users required to select a geographic local radius to share, or discover, items being sold by other Facebook users in their local community.<sup>209</sup>
- (237) In the third place, Meta submits that Marketplace is [confidential], which serves to enhance end users’ ability to share and discover items within their local communities.<sup>210</sup> More specifically, Meta argues that Marketplace enables end users to buy or sell goods only from other logged-in Facebook end users and that Marketplace uses the [confidential] to provide end users with a safe, secure, and valuable service.
- (238) In the fourth place, Meta claims that Marketplace is not an “*important gateway for business users to reach end users*”.<sup>211</sup> That claim is supported by the following arguments.
- (239) First, according to Meta, Marketplace functions in the EEA as a consumer-to-consumer (“C2C”) experience for end users to reach other end users.<sup>212</sup> Meta supports this claim by pointing to Facebook’s and Instagram’s EEA Commerce Products Disclosure terms,<sup>213</sup> which stipulate that “*only consumer sellers may list items for sale*” on Marketplace.<sup>214</sup> Meta further argues that, while Meta previously allowed businesses to list certain products in certain jurisdictions, Facebook business users no longer have the ability to create any listings on Marketplace from their Facebook business Page since 30 January 2023 (when Meta removed this functionality).<sup>215</sup> For these reasons, Meta considers that Marketplace falls outside the definition of an online intermediation service laid down in Article 2, point (2), of Regulation 2019/1150, to which Regulation (EU) 2022/1925 refers.<sup>216</sup> Meta adds that

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<sup>205</sup> Form GD, paragraphs 181 to 185 and 203 to 205.

<sup>206</sup> Meta’s 3 August 2023 reply, paragraph 4.9.

<sup>207</sup> Meta’s 3 August 2023 reply, paragraph 4.6.b.

<sup>208</sup> Meta’s 3 August 2023 reply, paragraphs 4.7 and 4.8.

<sup>209</sup> Form GD, paragraph 183.

<sup>210</sup> Form GD, paragraph 206.

<sup>211</sup> As required by Article 3(1)(b) of Regulation (EU) 2022/1925. Form GD, paragraphs 186 to 202.

<sup>212</sup> Form GD, paragraphs 186 to 192.

<sup>213</sup> [https://www.facebook.com/legal/EEA\\_Commerce\\_Products\\_Disclosure](https://www.facebook.com/legal/EEA_Commerce_Products_Disclosure), last accessed on 24 July 2023.

<sup>214</sup> Form GD, paragraph 189; Meta’s 3 August 2023 reply, paragraph 4.16.

<sup>215</sup> Form GD, paragraph 189. See also <https://www.facebook.com/business/help/492940666175475>, last accessed on 24 July 2023.

<sup>216</sup> Form GD, paragraphs 190 to 191.

viewing Marketplace as a business-to-consumer (“B2C”) service would be manifestly flawed and would effectively mean that any C2C marketplace would likely satisfy the definition of “online intermediation services”.<sup>217</sup>

- (240) Second, and building upon the preceding argument, Meta argues that the definition of “online intermediation services” in Article 2, point (5), of Regulation 2019/1150<sup>218</sup> is clearly intended to apply to those services which provide an important gateway for business users as part of the “normal and legitimate use of such services”.<sup>219</sup> According to Meta, the hypothetical existence of illegitimate business users has no bearing on the legal requirement for such users to be “allowed” to offer goods on the online intermediation service.<sup>220</sup>
- (241) Third, Meta adds that, in any event, and to better prevent the illegitimate business use of Marketplace, Meta is taking a further enforcement action to reinforce its EEA Commerce Products Disclosure terms, by limiting the number of listings that an end user is able to make in a given category in a calendar month on Marketplace.<sup>221</sup>
- (242) Fourth, Meta notes, in relation to the potential presence of illegitimate business users on Marketplace, that end users may legitimately generate a high number of listings within a category in the same month for genuine non-commercial reasons and that fewer than [0-5]% of sellers in the Union meet Meta’s legacy definition of a [confidential].<sup>222</sup>
- (243) Fifth, Meta underlines that, in addition to expressly prohibiting business users, Marketplace also does not provide any business-focused tools to facilitate the initiation of direct transactions between business users and end users in the Union.<sup>223</sup> In this regard, Meta notes the recent findings of the Bundeskartellamt against Amazon,<sup>224</sup> where Marketplace was not identified as being active in the provision of “online marketplace services for professional sellers” based on the absence of key “standard” characteristics.<sup>225</sup>
- (244) Sixth, Meta further argues that Marketplace is not provided to business users based on a contractual relationship, since Facebook business Pages cannot post listings on Marketplace and since business users are not allowed to list goods on Marketplace.<sup>226</sup> According to Meta, this is clear evidence that Marketplace has no intention to contract with business users, far less to bind itself to business users “in an

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<sup>217</sup> Meta’s 3 August 2023 reply, paragraphs 4.3.a and 4.18.

<sup>218</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57, 11.7.2019, p. 57.

<sup>219</sup> Meta’s 3 August 2023 reply, paragraph 4.17.a.

<sup>220</sup> Meta’s 3 August 2023 reply, paragraph 4.17.b.

<sup>221</sup> Form GD, paragraph 192; Meta’s 3 August 2023 reply, paragraph 4.17.c.

<sup>222</sup> Form GD, paragraph 191. In Meta’s internal systems, [confidential] (Meta’s Response to the European Commission’s Request for Information of 6 July 2023, point 1).

<sup>223</sup> Form GD, paragraph 193; Meta’s 3 August 2023 reply, paragraph 4.16.

<sup>224</sup> Bundeskartellamt, B2 – 55/21, *Amazon.com, Inc. and Amazon Deutschland Services GmbH*, English convenience translation available at [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2022/B2-55-21.pdf?__blob=publicationFile&v=2), paragraph 109.

<sup>225</sup> Form GD, footnote 112 (to paragraph 193).

<sup>226</sup> Form GD, paragraph 195; Meta’s 3 August 2023 reply, paragraph 4.20.a.

unequivocal manner”, as stated in recital (10) of the preamble to Regulation 2019/1150.<sup>227</sup>

- (245) Seventh, Meta claims that Marketplace does not “individually” comprise an “important gateway”, because users do not use it in a way that indicates it is an important gateway for business users to reach end users separately from any online social networking service CPS to which Facebook belongs.<sup>228</sup>
- (246) In the fifth place, Meta submits that designating Marketplace as a separate CPS from Facebook would [confidential].<sup>229</sup>

#### 5.6.1.2. The Commission’s assessment

- (247) Article 2, point (2), subpoint (a), of Regulation (EU) 2022/1925 lists online intermediation services as one of the categories of CPS within the meaning of that Regulation. Article 2, point (5), of Regulation (EU) 2022/1925 defines ‘online intermediation services’ by cross-referring to Article 2, point (2), of Regulation 2019/1150. According to Article 2, point (2), of Regulation 2019/1150, online intermediation services are services that meet all of the following requirements:
- (a) they constitute an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council;<sup>230</sup>
  - (b) they allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded;
  - (c) they are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers.
- (248) The Commission considers that Marketplace fulfils that definition of online intermediation services. First, Marketplace constitutes an information society service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535. Second, as explained in recitals (255) to (267) below, Marketplace allows business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded. Third, as explained in recital (264) below, Marketplace is provided to business users on the basis of contractual relationships between Meta and business users which offer goods or services to consumers. Consequently, Marketplace constitutes an online intermediation service within the meaning of Article 2, point (5), of Regulation (EU) 2022/1925 and thus a CPS within the meaning of Article 2, point (2), subpoint (a), of that Regulation.
- (249) In the first place, contrary to Meta’s submissions<sup>231</sup>, the Commission considers that the online intermediation CPS Marketplace, despite being integrated in Facebook, is

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<sup>227</sup> Meta’s 3 August 2023 reply, paragraph 4.20.b.

<sup>228</sup> Form GD, paragraphs 197 to 202.

<sup>229</sup> Form GD, paragraphs 207 to 211; Meta’s 3 August 2023 reply, paragraphs 2.9 and 2.10.

<sup>230</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241, 17.9.2015, p. 1.

<sup>231</sup> Recitals (234) to (246) above.

a distinct CPS from the online social networking CPS Facebook. This is the case for several reasons.

- (250) First, according to Section D(2)(c)(i) of the Annex to Regulation (EU) 2022/1925, CPSs which an undertaking offers in an integrated way should be considered distinct if they do not belong to the same CPS category. Consequently, even if the online intermediation CPS Marketplace is integrated into Meta’s online social networking CPS Facebook, those services do not belong to the same category of CPSs and should therefore be considered to constitute distinct CPSs.
- (251) Second, according to Section D(2)(b) of the Annex to Regulation (EU) 2022/1925, CPSs which are used for different purposes by either their end users or their business users, or both, shall be considered as distinct CPSs, even if their end users or business users may be the same. The purpose for which Marketplace is used by end users and business users differs from the purpose for which those users use Facebook. Facebook enables its end users to connect and communicate with each other, share content, and discover other users and content. In contrast, Marketplace allows users, including business users, to list goods or services to other users, with a view to facilitating the initiating of direct transactions between those users, irrespective of whether such transactions finally take place online or offline or take place at all. As acknowledged by Meta, Marketplace was developed as a separate service precisely with the intention to facilitate the initiation of such transactions, as evidenced by Meta’s explanation that Marketplace has been developed as a specific tab on the Facebook platform in response to users selling and buying on the Facebook platform, thus using it for a distinct purpose from the online social networking service.<sup>232</sup>
- (252) Moreover, users, including business users, do not use Marketplace mainly to share content as they would do on an online social networking service. They use that service primarily as a means of intermediation to list products or services to other users, for remuneration or for free. Similarly, end users do not use Marketplace primarily to discover other users and their content, but rather they primarily use it to find and, possibly, purchase products or services listed by other users. The mere fact that users of the online social networking CPS are able to find (or, as Meta puts it, “discover”) such products and services, as argued by Meta, is not the decisive criterion to determine the category of CPS to which Marketplace belongs or the purpose of that service, since finding or “discovering”, *inter alia*, content, products, websites, information or software applications is common to numerous services that clearly fall within very different categories of CPSs, many of which are not online social networking services pursuant to Article 2, point (7), of Regulation (EU) 2022/1925. Consequently, since Marketplace and Facebook are used for different purposes by end users and business users, they should be considered as distinct CPSs.
- (253) Third, contrary to what Meta claims,<sup>233</sup> the requirement for users to filter their searches of listed goods or services by geographical radius is not inconsistent with Marketplace being an online intermediation service within the meaning of Article 2, point (5), of Regulation (EU) 2022/1925, since such filtering is not uncommon for services of a similar nature and in any case does not prevent, but could rather

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<sup>232</sup> Form GD, paragraph 182.

<sup>233</sup> Recital (236) above.

contribute, to facilitate the initiation of transactions between business users and end users.

- (254) Fourth, contrary to Meta’s claim,<sup>234</sup> the fact that Facebook and Marketplace [confidential], or the fact that only logged-in Facebook users can use Marketplace, does not mean that the two services should be considered to be part of the same CPS under Regulation (EU) 2022/1925. This is all the more so since Facebook and Marketplace belong to different categories of CPSs under Article 2, point (2), of Regulation 2022/1925, and they are used for different purposes by end users or business users, as explained in recitals (251) and (252) above.
- (255) In the second place, contrary to Meta’s submissions,<sup>235</sup> the Commission considers that the online intermediation CPS Marketplace does have business users and therefore operates as a B2C platform, even if C2C transactions also take place through that service.<sup>236</sup>
- (256) As a preliminary matter, the Commission notes that, for the purpose of designation pursuant to Article 3 of Regulation (EU) 2022/1925, it must consider information from the last three financial years before designation takes place (i.e., 2020, 2021 and 2022). Consequently, the fact that Meta implemented changes in January 2023,<sup>237</sup> and [confidential], have no bearing on the finding that Marketplace is not an exclusively C2C platform, as alleged by Meta. In this regard, the Commission notes the following.
- (257) First, based on information provided by Meta, during 2020, 2021 and 2022, business users could, legitimately, list their products or services on Marketplace via their Facebook business Page. In fact, Meta’s announcement of 30 January 2023 implies that up until that date, Meta authorised Facebook business Pages to list offers on Marketplace. Indeed, Meta expressly confirms that Facebook business users were able to list certain products in the EEA until that date.<sup>238</sup> According to Meta, there were [0-5000] business users in 2020, [0-5000] business users in 2021 and [0-5000] business users in 2022 that listed at least one product or service on Marketplace.<sup>239</sup>
- (258) Moreover, during those same years, business users could also act in a commercial or professional capacity by listing products and services to end users on Marketplace through their personal Facebook profile. This option is currently still available to such users, as advertised by Meta itself.<sup>240</sup> Although there is no “official identification” of these users by Meta, a high frequency or amount of listings of the same kind<sup>241</sup> may indicate that a user is acting in a professional or commercial capacity and these users should also be considered as business users. Based on data provided by Meta, such users (i.e., personal Facebook profiles with a high frequency or large number of listings of the same kind) made up the majority of Marketplace

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<sup>234</sup> Recital (236) above.

<sup>235</sup> Recital (238) to (245) above.

<sup>236</sup> Recital (15) to the preamble of Regulation (EU) 2022/1925.

<sup>237</sup> See <https://www.facebook.com/business/help/492940666175475>, last accessed on 24 July 2023.

<sup>238</sup> Form GD, paragraph 189.

<sup>239</sup> Form GD, Annex 4.1.

<sup>240</sup> See <https://www.facebook.com/business/help/492940666175475>, last accessed on 24 July 2023.

<sup>241</sup> In its internal systems, Meta used the [confidential] categorisation, which are Marketplace users who: [confidential] (Meta’s reply to the Commission’s request for information of 6 July 2023, point 1).

business users and amounted to [>100 000] business users in 2020, [>100 000] business users in 2021, and [>100 000] business users in 2022.<sup>242</sup>

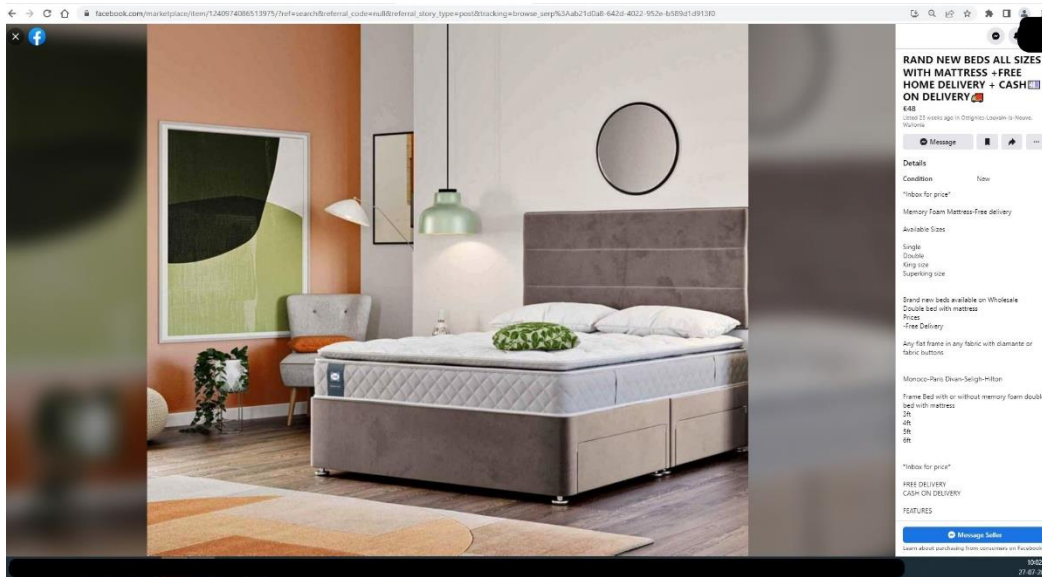
- (259) Second, contrary to what Meta claims,<sup>243</sup> it is irrelevant that end users may legitimately generate a high number of listings within a category in the same month for genuine non-commercial reasons, since this, in any event, does not exclude business users from using Marketplace with their personal profile to list goods or services for sale in a commercial or professional capacity. Although there is a possibility that some genuine end users may generate a high number of listings, data based on the [confidential] used by Meta identifies a number of users which exceeds by a large degree (by a factor of more than [5-10]) the yearly active business users threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925, and Meta did not provide any substantiated argument to rebut the conclusion, further discussed in recitals (275) to (280) below, that there were at least 10 000 users on Marketplace acting in a professional or commercial capacity using their personal profile, for each financial year between 2020 and 2022.
- (260) Consequently, the changes that Meta made to Marketplace as of January 2023 do not affect the fact that business users can still be active on Marketplace through their personal profile. This holds even if the changes resulted in a number of business users that used to list goods and services through a Facebook business Page leaving the platform altogether or currently listing their goods and services for sale through their personal profiles. In any event, and as outlined in recitals (257) to (259) above, the large majority of business users on Marketplace were already listing products using their personal profile.
- (261) Moreover, recent examples, among others, of such product listings on Marketplace by business users using a personal profile are provided in the screenshots in Figure 1. It is apparent from the description of the items offered for sale that the listing is made by a user acting in a commercial or professional capacity and thus by a business user (as follows, in particular, from the description pertaining to multiple goods, the choice among a variety of sizes, the mention of free home delivery and installation, the reference to showroom opening hours, etc.).

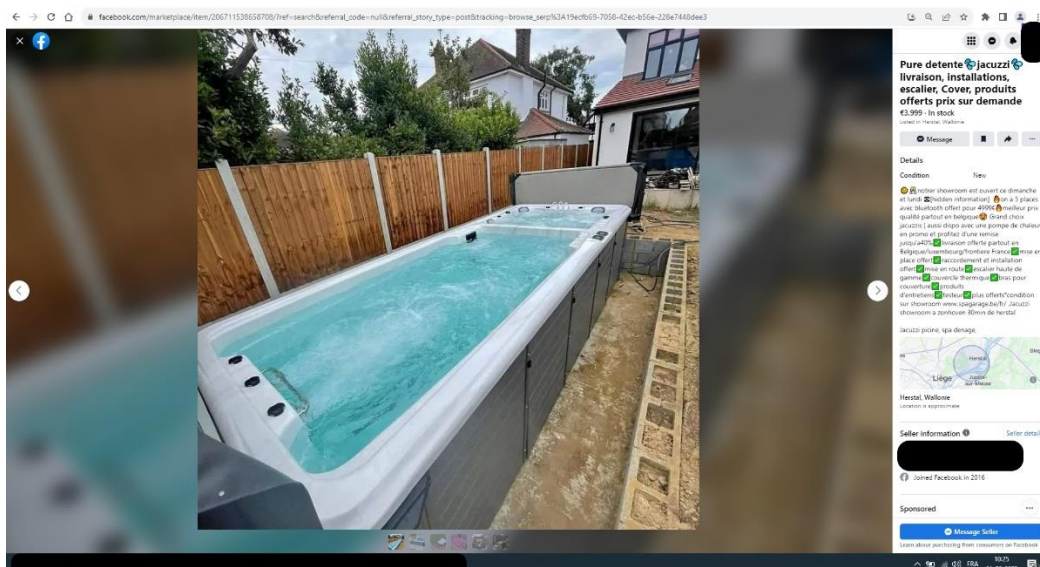
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<sup>242</sup> Meta's Response to the European Commission's Request for Information of 6 July 2023, point 8, Table 1.

<sup>243</sup> Recital (242) above.

Figure 1: Examples of listings on Marketplace by business users from a personal profile





Source: [www.facebook.com/marketplace](https://www.facebook.com/marketplace)

- (262) Contrary to what Meta claims,<sup>244</sup> whether a user should be considered a business user due to the number and frequency of listings it offers on Marketplace depends on the facts of each case. In this regard, the Commission observes that users creating 20 listings of furniture or 5 listings of properties for sale or rent per month, as per the future limitations that Meta is in the process of implementing,<sup>245</sup> could still be considered business users depending on the factual circumstances.
- (263) Third, contrary to what Meta claims,<sup>246</sup> whether an online platform offers specific tools for businesses to offer their goods and services for sale to end users is not part of the definition of online intermediation services laid down in Article 2, point (2), of Regulation 2019/1150 and is therefore not decisive for the determination of whether a specific service constitutes an online intermediation service under Regulation (EU) 2022/1925. Similarly, as explained in recital (18) above, market definitions that may have been used in decisions of competition authorities in the application of competition law to undertakings providing similar services have no bearing on the delineation of CPSs under Regulation (EU) 2022/1925, since these are different instruments relying on different legal definitions and pursuing different objectives.<sup>247</sup>
- (264) Fourth, Meta’s contention<sup>248</sup> that Article 2, point (2), subpoint (c), of Regulation (EU) 2019/1150 would require a contractual relationship between “Marketplace” and its business users does not find support in that Regulation. Rather, that provision requires a contractual relationship between the provider of the services in question and business users. In the present case, Meta is the provider of the service “Marketplace”, which it provides based on its terms and conditions and “Commerce Policies” to users.<sup>249</sup> The fact that any seller listing products on Meta’s platforms must comply with those policies, and that these policies are accepted by those sellers, expresses the intention of these parties to be bound in an unequivocal manner on a durable medium and therefore constitutes a contractual relationship within the

<sup>244</sup> Recital (241) above.

<sup>245</sup> Form GD, paragraph 192.

<sup>246</sup> Recital (243) above.

<sup>247</sup> Recital (11) to the preamble of Regulation (EU) 2022/1925.

<sup>248</sup> Recital (244) above.

<sup>249</sup> See [https://www.facebook.com/policies\\_center/commerce](https://www.facebook.com/policies_center/commerce), last accessed on 24 July 2023.



meaning of Article 2, point (2), subpoint (c), of Regulation (EU) 2019/1150. Indeed, as explained in recital (10) of the preamble to Regulation (EU) 2019/1150, the concept of “contractual relationship” should be read broadly, with no specific written agreement being required to prove the existence of such a relationship.<sup>250</sup> Finally, as regards Meta’s argument that there cannot be a contractual relationship with business users since Marketplace does not have business users, the Commission refers to its findings in recitals (255) to (262) above.

- (265) For the sake of completeness, the Commission adds that, although the assessment required by Article 3(2) of Regulation (EU) 2022/1925 is a backward looking exercise, focused on the last three financial years, users acting in a commercial or professional capacity still can and in fact do use Marketplace for the purpose of, or in the course of, providing goods or services to end users, notwithstanding the changes implemented by Meta in January 2023. For instance, they can create listings from their personal profile, as was explicitly indicated by Meta itself in the blog post announcing the above-mentioned changes.<sup>251</sup> This possibility is also evidenced by the example of listings given in recital (261) above.
- (266) Contrary to what Meta claims,<sup>252</sup> the term “allow” used in Article 2, point 2, subpoint (b), of Regulation (EU) 2019/1150, does not require that business users must be “allowed by terms and conditions” to list goods “as part of the normal and legitimate use of the service”. That term should be understood in a functional sense, as meaning that business users must be “enabled in practice” to list goods via the service. It is therefore irrelevant whether Meta explicitly permits business users to list offers on Marketplace in its terms and conditions, so long as business users are “enabled in practice” to list offers on Marketplace. In this regard, the fact that Meta indicated to business users that they could still create listings from their personal profile<sup>253</sup> demonstrates that business users are “enabled in practice” to list on Marketplace as it happened in the period 2020-2022.<sup>254</sup>
- (267) Finally, Meta’s claim<sup>255</sup> that [confidential] is not pertinent for the present assessment. That claim pertains to a potential re-organisation of the interaction between Marketplace and the Facebook platform to ensure compliance with the obligations and prohibitions laid down in Regulation (EU) 2022/1925 and therefore has no relevance for the assessment of whether Marketplace can be considered as an online intermediation CPS which is distinct from the online social networking CPS Facebook.

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<sup>250</sup> Recital (10) of the preamble to Regulation (EU) 2019/1150 states that “*a contractual relationship should be deemed to exist where both parties concerned express their intention to be bound in an unequivocal manner on a durable medium, without an express written agreement necessarily being required*”.

<sup>251</sup> “*While the ability to post vehicle, property and rental listings from Facebook business Pages will no longer be available on Marketplace, **you can continue reaching** vehicle and property **buyers** or property renters on Facebook **in other ways. Create Marketplace listings from your personal profile:** You can create Marketplace listings for vehicles, property sales and property rentals from your personal profile*” (emphasis added) (<https://www.facebook.com/business/help/492940666175475>, last accessed on 24 July 2023).

<sup>252</sup> Recital (240) above.

<sup>253</sup> See <https://www.facebook.com/business/help/492940666175475>, last accessed on 24 July 2023.

<sup>254</sup> Recital (265) above.

<sup>255</sup> Recital (246) above.

### 5.6.1.3. Conclusion

(268) For the reasons set out above, the Commission concludes that Marketplace constitutes an online intermediation service within the meaning of Article 2, point (5), of Regulation (EU) 2022/1925 and therefore a CPS within the meaning of Article 2, point (2), subpoint (a), of that Regulation which is distinct from its online social networking CPS Facebook.

### 5.6.2. *Thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925*

#### 5.6.2.1. Thresholds laid down in Article 3(2)(a) of Regulation (EU) 2022/1925

##### 5.6.2.1.1. The Undertaking's view

(269) Table 1 above sets out Meta's annual Union turnover and average market capitalisation, as submitted by Meta.<sup>256</sup> Meta did not specify in which countries it offers the Marketplace CPS.

##### 5.6.2.1.2. The Commission's assessment

(270) Based on the information provided by Meta,<sup>257</sup> the Commission considers that Meta meets the turnover threshold enshrined in Article 3(2)(a) of Regulation (EU) 2022/1925.

(271) Although Meta did not specify in which Member States it offers the online intermediation CPS Marketplace, the Commission considers that that CPS meets the requirement laid down in that provision of being offered in at least three Member States, since Marketplace is integrated into the Facebook platform which, according to the information provided by Meta,<sup>258</sup> is provided in all Member States.

#### 5.6.2.2. Thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925

##### 5.6.2.2.1. The Undertaking's view

(272) Meta indicates that Marketplace had over [ $>100$ ] million average monthly active end users established or located in the Union in the last financial year.<sup>259</sup> Marketplace thus meets the average monthly active end users threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.

(273) As regards Marketplace's yearly active business users, notwithstanding Meta's position that that service has no business users, Meta provided the Commission with information on the number of Facebook business Pages with one or more listing on Marketplace and indicated that that number did not meet the threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.<sup>260</sup> Following a request for information,<sup>261</sup> Meta provided data on the [confidential] category it has used in its internal systems.<sup>262</sup> According to Meta, [confidential].<sup>263</sup> However, Meta submits that these data do not relate to the business users of Marketplace, since it considers

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<sup>256</sup> Form GD, paragraphs 246 and 247.

<sup>257</sup> Form GD paragraphs 246 and 247.

<sup>258</sup> Form GD, paragraph 248.

<sup>259</sup> Form GD, paragraph 252 and Annex 4.1 to the Form GD.

<sup>260</sup> Form GD, paragraph 252 and Annex 4.1 to the Form GD.

<sup>261</sup> Commission Decision of 6 July 2023 relating to a proceeding pursuant to Article 21(3) and Article 31(1) of Regulation (EU) 2022/1925, C(2023) 4726 final.

<sup>262</sup> Meta's response to the Commission's Request for Information of 6 July 2023.

<sup>263</sup> Meta's Response to the European Commission's Request for Information of 6 July 2023, point 1.

that service to be a C2C experience for end users to reach other end users and that it therefore does not have business users.<sup>264</sup>

#### 5.6.2.2.2. The Commission's assessment

##### (i) Monthly active end users established or located in the Union

(274) Based on the information provided by Meta,<sup>265</sup> the Commission considers that the online intermediation CPS Marketplace meets the average monthly active end users threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.

##### (ii) Yearly active business users established in the Union

(275) The Commission considers that data provided by Meta on the number of Facebook business Pages with one or more listing on Marketplace is not fully representative of the actual number of business users of the online intermediation CPS Marketplace, since business users could also, and in fact do, list products for sale on Marketplace through their personal profile, as explained in recitals (255) to (262) above.

(276) In light of the data provided by Meta in response to the request for information, the Commission considers that the best approximation available of the number of yearly active business users of the online intermediation CPS Marketplace, within the meaning of Section A(1) of the Annex to Regulation (EU) 2022/1925, should also factor in data derived from the [confidential] category, which Meta indicated that it used in its internal system.<sup>266</sup> More specifically, the first two criteria used by Meta to identify [confidential], when taken together, represent a reasonable approximation of Marketplace's business users. Conversely, the third criterion used by Meta to identify [confidential] does not appear appropriate, insofar as Section E of the Annex to Regulation (EU) 2022/1925 only requires an active business user of an online intermediation service to be active at least once during the whole year and not in each of the four weeks covered by the 28-day period.<sup>267</sup>

(277) On this basis, it is appropriate to not only consider Facebook business Pages with one or more listing on Marketplace<sup>268</sup> as business users of the online intermediation CPS Marketplace, but also all users, established or located in the Union, which created 28 or more listings in at least one month of the financial year,<sup>269</sup> with 80% or more listings being made in the same category. Upon the request of the Commission,<sup>270</sup> Meta indicated that [>100 000] users, established or located in the Union, created 28 or more listings in a month, with 80% or more of these listings in the same category, in the financial year 2022.<sup>271</sup>

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<sup>264</sup> Annex 4.1 to the Form GD. Meta's response to the Commission's Request for Information of 6 July 2023, paragraph 6.

<sup>265</sup> Form GD, paragraph 252 and Annex 4.1 to the Form GD.

<sup>266</sup> Meta's Response to the European Commission's Request for Information of 6 July 2023, point 1.

<sup>267</sup> Annex to Regulation (EU) 2022/1925, Section E.

<sup>268</sup> According to Meta, there were [0-5000] Facebook business Pages with one or more listing on Marketplace in 2020, [0-5000] in 2021 and [0-5000] in 2022 (Form GD, Annex 4.1).

<sup>269</sup> As opposed to the [20-30]-days period used by Meta to identify [confidential], to remain coherent with the thresholds in Article 3(2)(b) of Regulation (EU) 2022/1925 that relate to monthly and yearly active users.

<sup>270</sup> Annex to Commission Decision of 6 July 2023 relating to a proceeding pursuant to Article 21(3) and Article 31(1) of Regulation (EU) 2022/1925, C(2023) 4726 final, questions 1 and 2.

<sup>271</sup> Meta's Response to the European Commission's Request for Information of 6 July 2023, point 8, Table 1.

- (278) It cannot be ruled out that this proxy fails to capture some business users, or conversely captures users that are not genuine business users (for example genuine private users having a one-off exceptional sale of goods in the same category). Nevertheless, this proxy identifies a number of business users which on its own largely exceeds (by a factor of more than [5-10]) the yearly active business user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925, even without factoring in the number of Facebook business Pages with one or more listings on Marketplace (as they are no longer allowed to list on Marketplace since January 2023).
- (279) Moreover, the fact remains that, in light of the information provided by Meta, this proxy is the best approximation available to establish the number of yearly active business users of the online intermediation CPS Marketplace. Indeed, Meta did not provide any credible counterarguments or analysis to dismiss the use of this proxy, despite having been informed of the Commission’s intention to rely on this proxy to establish the number of yearly active business users of Marketplace in the Commission’s Letter of 26 July 2023.<sup>272</sup>
- (280) Accordingly, the Commission concludes that, based on the available information, the online intermediation CPS Marketplace had over 10 000 business users in the financial year 2022 and that, therefore, Meta meets the yearly active business users’ threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in relation to that CPS.

#### 5.6.2.3. Thresholds laid down in Article 3(2)(c) of Regulation (EU) 2022/1925

##### 5.6.2.3.1. The Undertaking’s view

- (281) Meta indicates that it has met the average monthly active end user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in each of the last three financial years.<sup>273</sup>

**Table 8: Data on Marketplace’s average number of monthly active end users in the Union submitted by Meta (2020-2022)**

Year	Average number of monthly active end users in the Union (millions)
2020	>45
2021	>45
2022	>45

Source: Meta’s Form GD, paragraph 252; and Annex 4.1 to the Form GD.

- (282) As regards Marketplace’s yearly active business users, Meta provided the Commission with data on the [confidential] category it has used in its internal systems, but it submits that these data do not relate to the business users of

<sup>272</sup> European Commission’s letter, sent on 26 July 2023, concerning Meta’s notification under Article 3(3) of Regulation (EU) 2022/1925, paragraphs 54 to 58.

<sup>273</sup> Form GD, paragraph 252 and Annex 4.1 to the Form GD.

Marketplace, since Meta considers that Marketplace is a C2C experience for end users to reach other end users and that it therefore does not have business users.<sup>274</sup>

5.6.2.3.2. The Commission’s assessment

- (i) Monthly active end users established or located in the Union in the last three financial years
- (283) On the basis of the information provided by Meta,<sup>275</sup> the Commission considers that Meta’s online intermediation service CPS Marketplace met the average active monthly end user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.
- (ii) Yearly active business users established in the Union in the last three financial years
- (284) For the reasons set out in recitals (275) to (280) above, the Commission considers that the yearly active business users of the online intermediation CPS Marketplace can be identified by relying on the number of Facebook business pages with one or more listing on Marketplace, as well as on the first two criteria used by Meta to identify [confidential]. By relying on those criteria, Meta communicated to the Commission the data summarised in Table 10 on the number of users, established or located in the Union, that created 28 or more listings in a month, with 80% or more of these listings in the same category, in the last three financial years.<sup>276</sup>

**Table 9: Data on Marketplace’s users established or located in the Union creating 28 or more listings in a month, with 80% or more of these listings in the same category, submitted by Meta (2020-2022)**

Year	Users established or located in the Union creating 28 or more listings in a month, with 80% or more of these listings in the same category
2020	>10 000
2021	>10 000
2022	>10 000

Source: Meta’s Response to the European Commission’s Request for Information of 6 July 2023, point 8, table I.

- (285) On the basis of these data, the Commission considers that the online intermediation service CPS Marketplace met the active yearly business user threshold laid down in Article 3(2)(b) of Regulation (EU) 2022/1925 in the last three financial years as required by Article 3(2)(c) of that Regulation.
- (286) As regards the thresholds laid down in Article 3(2)(b) and (c) of Regulation (EU) 2022/1925, it is not necessary for the Commission to determine, beyond the assessment made above, whether Meta’s approach to identifying and estimating monthly active end users and yearly business users of the online intermediation CPS

<sup>274</sup> Recital (273) above.

<sup>275</sup> Form GD, paragraph 252 and Annex 4.1 to the Form GD.

<sup>276</sup> Meta’s Response to the European Commission’s Request for Information of 6 July 2023, point 8, Table1.

Marketplace is sufficiently inclusive in line with the relevant definition in Section E of the Annex to Regulation (EU) 2022/1925, since the Commission’s assessment of the information provided by Meta, as set out in recitals (275) to (280) and (284) to (285) above, indicates that the relevant thresholds are met.

### 5.6.3. Arguments pursuant to Article 3(5) of Regulation (EU) 2022/1925

#### 5.6.3.1. The Undertaking’s view

- (287) Meta presented arguments as part of its notification aimed at demonstrating that, even if it were to meet all of the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to Marketplace, it exceptionally would not satisfy the requirements listed in Article 3(1) of that Regulation, due to the circumstances in which Marketplace operates.<sup>277</sup>
- (288) First, Meta argues that Marketplace does not comprise a “gateway” between business and end users, since it is a C2C feature for users in the EEA and there are no identifiable business users of Marketplace.<sup>278</sup> The Commission is incapable of articulating who the alleged business users of Marketplace actually are (legitimate or otherwise), given that advertisers are not relevant business users according to the Annex to the Regulation (EU) 2022/1925.<sup>279</sup>
- (289) Second, Meta argues that Marketplace is not an “important” gateway because (i) it is subject to competition from numerous incumbent e-commerce providers, in a sector characterised by (ii) low market entry and low expansion barriers, (iii) no barriers to multi-homing or switching (no lock-in), and (iv) business users do not economically depend on Marketplace to reach end users.<sup>280</sup>
- (290) Third, Meta argues that the Commission must assess whether Marketplace is capable of “individually” comprising an important gateway, i.e., on the basis of its standalone functionality without considering Facebook, and that without Facebook, Marketplace would not “individually” comprise an important gateway.<sup>281</sup>
- (291) Finally, Meta argues that the Commission should conduct a market investigation to assess the above arguments, and that the appropriate legal standard of assessment should not be that of “*manifestly call[ing] into question the presumptions*” set out in Article 3(2)(b) of Regulation (EU) 2022/1925, since in its view this standard “*does not apply to an Article 3(9) and Article 17(1) DMA investigation*”.<sup>282</sup>

#### 5.6.3.2. The Commission’s assessment

- (292) The Commission considers that the arguments submitted by Meta in relation to the online intermediation CPS Marketplace pursuant to Article 3(5) of Regulation (EU) 2022/1925 are not sufficiently substantiated to manifestly call into question the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925.
- (293) In the first place, Meta’s argument<sup>283</sup> that the online intermediation CPS Marketplace does not comprise a gateway for business users to reach end users within the

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<sup>277</sup> Annex 2.2 to the Form GD; Meta’s 3 August 2023 reply, paragraphs 4.21 to 4.34.

<sup>278</sup> Annex 2.2 to the Form GD, paragraphs 5 to 7.

<sup>279</sup> Meta’s 3 August 2023 reply, paragraph 4.33.

<sup>280</sup> Annex 2.2 to the Form GD, paragraphs 8 to 11; Meta’s 3 August 2023 reply, paragraphs 4.21 to 4.32.

<sup>281</sup> Annex 2.2 to the Form GD, paragraphs 12 to 16.

<sup>282</sup> Meta’s 3 August 2023 reply, paragraphs 3.18 and 3.19 and 4.23 and 4.24.

<sup>283</sup> Recital (289) above.

meaning of Article 3(1)(b) of Regulation (EU) 2022/1925, because it has no identifiable business users, does not pertain to the circumstances in which that CPS operates, as required by Article 3(5) of that Regulation to support a rebuttal, but to the qualification and delineation of that service as a CPS. In any event, the Commission has already established that Marketplace fulfils the definition of an online intermediation service pursuant to Article 2, point (5), of Regulation (EU) 2022/1925 and that that service does, in fact, have business users within the meaning of Article 2, point (21), of that Regulation.<sup>284</sup>

- (294) In the second place, the Commission considers that Meta's argument<sup>285</sup> that Marketplace is not an important gateway for business users to reach end users within the meaning of Article 3(1)(b) of Regulation (EU) 2022/1925, because (i) it is subject to competition from numerous incumbent e-commerce providers in a sector characterised by (ii) low market entry and expansion barriers, (iii) no barriers to multi-homing or switching, and (iv) business users do not economically depend on Marketplace to reach end users is not sufficiently substantiated to manifestly call into question the presumption of Article 3(2)(b) of that Regulation for the following reasons.
- (295) First, the fact that there may be competition between providers of a particular CPS does not mean that a specific online intermediation CPSs cannot be an important gateway within the meaning of Article 3(1)(b) of Regulation (EU) 2022/1925.
- (296) In any event, Meta has not provided any conclusive data allowing the Commission to make a substantive assessment, in line with recital (23) of the preamble to Regulation (EU) 2022/1925, with respect to the importance of the online intermediation CPS Marketplace in light of the overall scale of activities of the respective CPS, be it in absolute terms to the relevant overall CPS category or in relative terms with respect to the largest providers in the CPS category in question. To the contrary, Marketplace's very large number of end users and large number of business users<sup>286</sup> rather speak in favour of presuming that that CPS is an important gateway.
- (297) Second, and related to the preceding argument, Regulation (EU) 2022/1925 does not require the presence of insurmountable barriers to entry and expansion for a CPS to constitute an important gateway. Regulation (EU) 2022/1925 recognises the possibility that there may be more than one gatekeeper operating in the same CPS category<sup>287</sup>.
- (298) By the same token, the existence of several undertakings or new entrants does not mean that barriers to entry and expansion are so low that a finding of an important gateway is excluded. Online intermediation services, such as Marketplace, that try to match very varied offers from business users with a large group of potential end users (and the other way around) are characterised by economies of scale and network effects, so that the larger the group of end users that an online intermediation service can offer, the larger the interest of business users. One of the most important barriers to entry for a provider of such a service is therefore to

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<sup>284</sup> Recitals (275) to (280) above.

<sup>285</sup> See recital (289) above.

<sup>286</sup> See recitals (272) to (280) above.

<sup>287</sup> For example, recital (32) of the preamble to Regulation (EU) 2022/1925 indicates: "*Contestability of the services in the digital sector can also be limited if there is more than one gatekeeper for a core platform service.*"

convince a sufficient number of end users to join its platform. Thanks to its connection to the Facebook online social networking service, Marketplace benefits from a large end user base and thus a large advantage. Other online marketplaces must overcome these barriers by creating such a base. Against this backdrop, the presumptive effect stemming from Marketplace's very large number of end users and large number of business users cannot be overcome by simply claiming that the presence of existing and the entry of new providers means that the barriers are so low that Marketplace cannot be an important gateway.

- (299) As regards specifically the merger decision by the UK Competition and Markets Authority to which Meta refers, as explained in recital (18) above, market definitions that have been used in decisions of competition authorities in the application of competition law have no bearing on the delineation of CPSs under Regulation (EU) 2022/1925, since these are different instruments relying on different legal definitions and pursuing different objectives. In any case, that decision provides at best evidence relating to the sector of "UK online classified vehicle advertising", which covers a significantly narrower segment (outside of the Union) compared to Marketplace's offering and thus is, on its own, insufficient to manifestly call into question the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925. Similarly, Meta's reference to [confidential] and its claims about the latter's market leadership, without any supporting data, falls short of the evidentiary standard required to support a rebuttal made pursuant to Article 3(5) of Regulation (EU) 2022/1925.
- (300) Third, the existence of multi-homing and switching does not mean that a CPS cannot be considered an important gateway. As explained in recital (229) above, while the absence of multi-homing may be a relevant element to assess the existence of a gateway position, the existence of multi-homing is not in itself an indication that a CPS does not constitute an important gateway for business users to reach end users.
- (301) Fourth, Meta has not submitted any evidence in support of its claim that business users are not economically dependent on Marketplace. To support that claim, Meta refers to the time when business listings via Facebook Pages were still allowed. According to Meta, during that time, Marketplace's business user numbers were significantly below the thresholds laid down in Article 3(2)(b) of Regulation (EU) 2022/1925.<sup>288</sup> In Meta's view, any alternative metrics based on C2C buying and selling interactions should be irrelevant for identifying business users. However, as explained in recitals (275) to (280) above, it is not relevant whether goods are listed via a Facebook business Page or from a personal profile for the purpose of determining the number of yearly active business users. Based on the approximation relied upon by the Commission,<sup>289</sup> [ $> 100\ 000$ ] users, established or located in the Union, created 28 or more listings in a month on the online intermediation CPS Marketplace, with 80% or more of those listings in the same category, in the financial year 2022.
- (302) In the third place, Meta's argument that, when assessing whether Marketplace is an important gateway within the meaning of Article 3(1)(b) of Regulation (EU) 2022/1925, the Commission must assess whether that service is capable of individually comprising an important gateway, i.e., on the basis of its standalone functionality without considering Facebook, is unfounded for the following reasons.

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<sup>288</sup> Form GD, Annex 4.1.

<sup>289</sup> See recital 284 above.



- (303) First, since the online intermediation CPS Marketplace satisfies the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 on its own, the Commission is not required to assess independently whether that CPS is an important gateway within the meaning of Article 3(1)(b) of that Regulation. It is for Meta to provide arguments manifestly calling into question the presumption laid down in Article 3(2) of Regulation (EU) 2022/1925.
- (304) Second, and in any event, as explained in detail in recitals (249) to (254) above, it follows from Section D(2)(c) of the Annex to Regulation (EU) 2022/1925 that the fact that the online intermediation CPS Marketplace is integrated in the online social networking CPS Facebook does not mean that it cannot be distinct service that could “individually” considered to be an important gateway.
- (305) Third, the importance of the online intermediation CPS Marketplace as a gateway is, in particular, underlined by the fact that Marketplace, while a distinct CPS, is accessible *inter alia* by all end users of the online social networking CPS Facebook and therefore also constitutes, in itself, an important means for these end users to be reached by the business users that display classified ads on Marketplace, which could not reach Facebook users in the absence of Marketplace. Pursuant to Article 3(5), subparagraph 1, of Regulation (EU) 2022/1925, account must be taken of the circumstances in which the relevant CPS operates, which may also include further services provided by the undertaking providing the CPS. Meta has not provided any further information as to why, in light of the other services it provides, Marketplace should not be considered an important gateway.<sup>290</sup> In this context, recital (3) of the preamble to Regulation (EU) 2022/1925 identifies as a common feature of platform ecosystems the ability to connect many business users with many end users through their services and to leverage the resulting advantage.
- (306) In the fourth place, Meta’s argument<sup>291</sup> that the appropriate standard of assessment to open a market investigation should not be that of “*manifestly call[ing] into question the presumptions*” set out in Article 3(2)(b) of Regulation (EU) 2022/1925 is misplaced for the reasons set out in recital (217) above.
- (307) In light of the above, the Commission concludes that the arguments submitted by Meta are not sufficiently substantiated to manifestly call into question the presumptions laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to the online intermediation CPS Marketplace. Consequently, the Commission rejects those arguments pursuant to Article 3(5), second paragraph, of Regulation (EU) 2022/1925, without applying the procedure laid down in Article 17(3) of that Regulation.

#### 5.6.4. Conclusion for the online intermediation service Marketplace

- (308) For the reasons set out in recitals (247) to (267), (274) to (280), (283) to (286) and (292) to (307) above, the Commission concludes that Marketplace constitutes an online intermediation CPS within the meaning of Article 2, point (2), subpoint (a), of Regulation (EU) 2022/1925 and that Meta meets the thresholds laid down in Article 3(2) of Regulation (EU) 2022/1925 in relation to that CPS. Consequently,

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<sup>290</sup> In Meta’s 3 August 2023 reply, paragraphs 4.33 to 34, Meta refers to the alleged lack of business users as argument in support of its claim that Marketplace is not individually an important gateway for business users to reach end users. This is based on an incorrect assessment of the actual business users on Marketplace, as explained in particular in recitals (275) to (280) above.

<sup>291</sup> Recital (291) above.

Meta is to be designated as a gatekeeper pursuant to Article 3(4) of Regulation (EU) 2022/1925 in relation to the online intermediation service CPS Marketplace.

## 6. CONCLUSION

(309) In light of the above, the Commission concludes, pursuant to Article 3 of Regulation (EU) 2022/1925, that Meta is to be designated as a gatekeeper and that the following CPSs of Meta are individually an important gateway for business users to reach end users: (i) its online social networking service Facebook; (ii) its online social networking service Instagram; (iii) its online advertising service Meta Ads; (iv) its NIICS WhatsApp; (v) its NIICS Messenger; and (vi) its online intermediation service Marketplace.

(310) The findings in this decision are based on the information available to the Commission at the time of its adoption. They are without prejudice to the possibility that the Commission may reconsider or amend this Decision, pursuant to Article 4(1) of Regulation (EU) 2022/1925, should there be any substantial change in any of the facts on which this Decision was based, or if this decision was based on incomplete, incorrect or misleading information.

HAS ADOPTED THIS DECISION:

### *Article 1*

Meta is designated as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925.

### *Article 2*

The following core platform services of Meta are an important gateway for business users to reach end users within the meaning of Article 3(1), point (b), of Regulation (EU) 2022/1925:

- (a) Meta's online social networking service Facebook;
- (b) Meta's online social networking service Instagram;
- (c) Meta's online advertising service Meta Ads;
- (d) Meta's number-independent interpersonal communication service WhatsApp;
- (e) Meta's number-independent interpersonal communication service Messenger; and
- (f) Meta's online intermediation service Marketplace.

### *Article 3*

This Decision is addressed to Meta Platforms, Inc., 1601 Willow Road, Menlo Park, California 94025, United States of America.

Done at Brussels, 5.9.2023

*For the Commission*

*Thierry BRETON*

*Member of the Commission*

