



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, sitting with five Judges)

3 June 2026*

(Digital services – Regulation EU 2022/1925 – Designation of gatekeepers – Concept of ‘core platform service’ – Online social networking service – Number-independent interpersonal communications service – Online intermediation service – Equal treatment – Article 3(2) and (5) of Regulation 2022/1925 – Important gateway for business users to reach end users – Presumptions – Rebuttal of the presumptions – Article 17(1) and (3) of Regulation 2022/1925 – Conditions for opening a market investigation – Rights of the defence – Obligation to state reasons)

In Case T-1078/23,

Meta Platforms, Inc., established in Menlo Park, California (United States), represented by D. Jowell, D. Bailey, Barristers, J. Aitken, S. Malhi, Solicitors, A. Pliego Selie, O. Brouwer, T. Janssens, T. Oeyen and T. Lübbig, lawyers,

applicant,

v

European Commission, represented by T. Franchoo, P.-J. Loewenthal, M. Mataija and I. Naglis, acting as Agents,

defendant,

supported by

French Republic, represented by T. Lechevallier, acting as Agent,

intervener,

THE GENERAL COURT (Eighth Chamber, sitting with five Judges),

composed, at the time of the deliberations, of M. van der Woude, President, G. De Baere, D. Petrлік, K. Kecsmár and S. Kingston (Rapporteur), Judges,

Registrar: A. Marghelis, Administrator,

* Language of the case: English.

having regard to the written part of the procedure, in particular:

- the Court’s written questions of 28 March 2025 to the applicant, the Commission and the French Republic and their replies, lodged at the Registry of the General Court on 23, 23 and 18 April 2025 respectively,
- the Court’s written question of 2 May 2025 to the applicant and the Commission and their replies, lodged at the Court Registry on 14 and 13 May 2025 respectively,

further to the hearing on 3 June 2025,

gives the following

Judgment

- 1 By its action under Article 263 TFEU, the applicant, Meta Platforms, Inc., seeks the annulment in part of Commission Decision C(2023) 6105 final of 5 September 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 (‘the contested decision’).

Background to the dispute

- 2 The applicant is an undertaking in the technology sector, founded in the United States in 2004, which operates, along with the companies that it controls directly or indirectly (taken together, ‘Meta’), the online social networks Facebook and Instagram as well as other services.
- 3 On 3 July 2023, the applicant submitted a notification to the European Commission in accordance with the first subparagraph of Article 3(3) of 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 (OJ 2022 L 265, p. 1; ‘the DMA’) (‘the notification’). The applicant stated in the notification that its single online social networking service supported by online advertising, comprising Facebook, Instagram, Meta Ads, Facebook Messenger (‘Messenger’), Facebook Marketplace (‘Marketplace’), Facebook Dating and Facebook Gaming Play, should be classified as an online social networking core platform service (‘CPS’) within the meaning of the DMA. In relation to Messenger and Marketplace, it maintained that the threshold laid down in Article 3(2)(b) of the DMA was not met such that it could not in any event be presumed to satisfy the requirements of Article 3(1) of the DMA to be designated as a gatekeeper for those services. It also submitted arguments and evidence under the first subparagraph of Article 3(5) of the DMA, seeking, as relevant, to rebut the presumptions provided for in Article 3(2) of the DMA as regards Messenger and Marketplace.
- 4 By letter of 26 July 2023, the Commission informed the applicant of its preliminary view on the possible designation of Meta as a gatekeeper, pursuant to Article 3(4) of the DMA, for, inter alia, the following CPSs: its online social networking service Facebook, its number-independent interpersonal communications service (‘NIICS’) Messenger and its online intermediation service (‘OIS’) Marketplace (‘the preliminary view’).
- 5 By letter of 3 August 2023, the applicant replied to the preliminary view.

- 6 On 5 September 2023, the Commission adopted the contested decision.
- 7 The Commission found in the contested decision, in the first place, that:
- Facebook was an online social networking service, within the meaning of Article 2, point (7) of the DMA and, consequently, a CPS for the purposes of Article 2, point (2)(c) of the DMA;
 - Messenger constituted a NIICS, within the meaning of Article 2, point (9) of the DMA, which was distinct from and independent of the online social networking service Facebook and thus a CPS for the purposes of Article 2, point (2)(e) of the DMA;
 - Marketplace constituted an OIS within the meaning of Article 2, point (5) of the DMA, which was distinct from the online social networking service Facebook, and, consequently, a CPS for the purposes of Article 2, point (2)(a) of the DMA.
- 8 In the second place, the Commission found, in essence, that Meta met all the thresholds laid down in Article 3(2) of the DMA in relation to the CPSs at issue, considered individually, such that it could be presumed that it satisfied all the requirements laid down in Article 3(1) of the DMA for being designated as a gatekeeper in relation to those services.
- 9 In the third place, the Commission considered that the arguments submitted by the applicant under the first subparagraph of Article 3(5) of the DMA were not sufficiently substantiated so as manifestly to call into question the presumptions set out in Article 3(2) of the DMA in relation to Messenger and Marketplace. Consequently, it rejected those arguments without opening a market investigation on the basis of Article 17(3) of the DMA.
- 10 Article 1 of the contested decision is worded as follows:
- ‘Meta is designated as a gatekeeper pursuant to Article 3 of [the DMA].’
- 11 Article 2 of the contested decision states as follows:
- ‘The following [CPSs] of Meta are an important gateway for business users to reach end users within the meaning of Article 3(1), point (b), of [the DMA]:
- (a) Meta’s online social networking service Facebook;
 - ...
 - (e) Meta’s [NIICS] Messenger; ...
 - (f) Meta’s [OIS] Marketplace.’

Forms of order sought

- 12 The applicant claims that the Court should:
- annul Article 2 of the contested decision in so far as it provides that the NIICS Messenger and the OIS Marketplace are important gateways for business users to reach end users (‘important

gateways’) within the meaning of Article 3(1)(b) of the DMA or, alternatively, annul Article 2(e) and (f) of the contested decision;

- annul Article 2 of the contested decision in so far as it provides that the online social networking service Facebook is an important gateway within the meaning of Article 3(1)(b) of the DMA or, alternatively, annul Article 2(a) of the contested decision, each at least in so far as that CPS excludes Messenger;
- order the Commission to pay the costs, including those of any interveners which do not bear their own costs.

13 The Commission, supported by the French Republic, contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

- 14 In support of its action, the applicant raises two pleas in law: the first alleges errors of law, manifest errors of assessment, inadequate reasoning and/or breach of an essential procedural requirement in relation to the classification of Messenger as a CPS that is an important gateway, under Article 3(9) of the DMA, while the second claims errors of law, manifest errors of assessment, inadequate reasoning and/or breach of an essential procedural requirement in relation to the classification of Marketplace as a CPS that is an important gateway, under Article 3(9) of the DMA.
- 15 Before examining the pleas raised by the applicant, the Court must first review the applicant’s request for the omission of certain data vis-à-vis the public, and also whether the applicant maintains a legal interest in bringing an action for annulment of the contested decision in so far as it classifies Marketplace as a CPS that is an important gateway.

The request for omission of data vis-à-vis the public

- 16 In the course of the proceedings before the General Court, the applicant, by separate documents, requested, in essence on the basis of Articles 66 and 66a of the Rules of Procedure of the General Court, the omission of certain data vis-à-vis the public, in particular certain information relating, first, to changes to Marketplace made on 31 July 2023, as described in paragraph 210 below and, second, to the concept of ‘power sellers’, as used by Meta in its internal system to identify users of Marketplace who post a high number of listings or who post frequently.
- 17 In that regard, it should be borne in mind that, in reconciling the need to make judicial decisions public, on the one hand, and the right to protection of personal data and of business secrets, on the other, the court must seek, in the circumstances of each case, to find a fair balance, having regard also to the public’s right of access, in accordance with the principles set out in Article 15 TFEU, to judicial decisions (see judgment of 27 April 2022, *Sieć Badawcza Łukasiewicz – Port Polski Ośrodek Rozwoju Technologii v Commission*, T-4/20, EU:T:2022:242, paragraph 29 and the case-law cited).

- 18 Furthermore, the confidential treatment of an item of information is not justified in the case, for example, of information which is already public or to which the general public or certain specialist circles have access, information featuring also in other passages or documents in the case file in respect of which the party seeking to preserve the confidential nature of the information in question neglected to make a request to that effect, information which is not sufficiently specific or precise to reveal confidential data, or information which is largely apparent or may be deduced from other information which is legitimately available to the interested parties (see order of 14 March 2022, *Bulgarian Energy Holding and Others v Commission*, T-136/19, EU:T:2022:149, paragraph 9 and the case-law cited).
- 19 In addition, information that was secret or confidential, but which is at least five years old, must as a rule be considered, on account of the passage of time, to be historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes an essential element of its commercial position or that of interested third parties (see judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 54 and the case-law cited).
- 20 Accordingly, the applicant's request must be granted as far as possible, to the extent that it is not contrary to the public's right of access to judicial decisions.
- 21 In the present case, the information relating to the changes made on 31 July 2023 does not need to be made confidential since, in the first place, the applicant has published the information relating to those changes on its own website, which is accessible to the general public; in the second place, that information was discussed at the hearing and may be inferred from recitals 241 and 262 of the public version of the contested decision; and, in the third place, reference to that information is justified by the need to provide an intelligible response to the parties' arguments.
- 22 As regards the omission request vis-à-vis the public with respect to the concept of 'power sellers' in relation to Marketplace, it is necessary to observe, first, that the data relating to that concept, as used in the applicant's internal system, are not disclosed in this judgment. It must therefore be held that the request for omission of that data vis-à-vis the public is devoid of purpose.
- 23 Second, as regards the expression 'power sellers' itself, in the first place, the applicant fails to explain why it considers that that expression should be treated as confidential vis-à-vis the public. The applicant merely submits in the present case, in general terms, that that expression refers to commercially sensitive data concerning the manner in which it internally assesses certain categories of users and that disclosure of that data would seriously harm its legitimate business interests. However, those reasons do not enable the Court to understand how disclosure of the expression 'power sellers' itself, which, moreover, according to the applicant, refers to a legacy concept that was no longer used by it internally well before the adoption of the contested decision, could seriously harm its legitimate business interests. In the second place, that expression was disclosed at the hearing. In the third place, the Court considers that disclosure of that expression is justified by the requirement to provide an intelligible response to the arguments of the parties.
- 24 Accordingly, the applicant's request to omit data vis-à-vis the public must be rejected as regards information relating to the description of the changes to Marketplace made on 31 July 2023 and to the expression 'power sellers'.

Whether the applicant continues to have a legal interest in bringing proceedings for annulment of the contested decision in so far as that decision classifies Marketplace as a CPS that is an important gateway

- 25 The Court must assess whether the applicant may still justifiably claim to have a legal interest in bringing proceedings for annulment of the contested decision in so far as the latter classifies Marketplace as a CPS that is an important gateway, given the Commission's adoption of Decision C(2025) 2547 of 23 April 2025, pursuant to Article 4(1) of the DMA (Case DMA.100044 – Meta – online intermediation services – marketplace), a summary of which was published in the *Official Journal of the European Union* (OJ C, C/2025/4223), by which the Commission repealed Article 2(f) of the contested decision classifying Marketplace as a CPS under Article 3(9) of the DMA ('the amending decision').
- 26 By the amending decision, the Commission found, in essence, that, having regard to the additional measures introduced by the applicant in December 2023 and January 2024, it had demonstrated that there had been a substantial change in the facts on which the contested decision was based, for the purposes of Article 4(1)(a) of the DMA. In particular, the Commission found, in essence, that the criterion relating to the threshold of 10 000 business users laid down in Article 3(2)(b) of the DMA was not satisfied and that, therefore, Marketplace was no longer an important gateway, within the meaning of Article 3(1)(b) of the DMA, without it being necessary for it to take a position on whether Marketplace still constituted an OIS, within the meaning of Article 2, point (5) of the DMA, when the amending decision was adopted.
- 27 In response to a measure of organisation of procedure of 2 May 2025 asking the main parties to take a position on the implications of the amending decision for the second plea, the applicant stated that it maintained the plea in full.
- 28 In its reply to the measure of organisation of procedure referred to in paragraph 27 above, the Commission did not dispute the applicant's legal interest in bringing proceedings. However, in accordance with the case-law (judgment of 15 July 2025, *ECB and Commission v Corneli*, C-777/22 P and C-789/22 P, EU:C:2025:580, paragraph 98), it is for the General Court, before ruling on the substance of the case brought before it, to ascertain, of its own motion as the case may be, if the applicant continues to have a legal interest in bringing proceedings.
- 29 In that regard, it should be observed that an applicant's interest in bringing proceedings does not necessarily disappear because the contested act has ceased to have effect in the course of the proceedings. The person concerned by that act may retain an interest in claiming its annulment in order to be restored to his or her original position or in order to induce the author of the contested act to make suitable amendments in the future, and thereby avoid the risk that the unlawfulness alleged in respect of that act will be repeated. Even where, because of the circumstances, it proves impossible to fulfil the obligation, owed by the institution whose act has been annulled, to take the necessary measures to comply with the judgment annulling the act, the application for annulment may retain an interest as the basis for possible proceedings for damages (see judgment of 30 June 2022, *Camerin v Commission*, C-63/21 P, not published, EU:C:2022:516, paragraph 48 and the case-law cited).
- 30 As regards, in particular, the repeal of a contested decision, or a part thereof, the applicant may continue to have an interest in securing the annulment of a measure which has been repealed, in so far as a repeal does not give rise to the same legal effects as annulment by the General Court. The repeal of a measure of an institution does not amount to recognition of its illegality and

takes effect *ex nunc*, whereas its annulment would take effect *ex tunc* (see judgment of 9 September 2011, *Dow AgroSciences and Others v Commission*, T-475/07, EU:T:2011:445, paragraph 68 and the case-law cited).

- 31 In the present case, the part of the contested decision relating to Marketplace, and in particular Article 2(f) of the operative part of that decision, was repealed rather than withdrawn by the amending decision. Accordingly, it produced legal effects on the applicant's situation with respect to the period running up to its repeal.
- 32 As the parties acknowledge, the applicant was required, as a result of the adoption of the contested decision, in accordance with Article 3(10) of the DMA, to comply with the relevant obligations of the DMA as regards Marketplace within six months of the decision being adopted, namely by 7 March 2024 at the latest.
- 33 It follows from the foregoing that the partial repeal of the contested decision with respect to Marketplace from 23 April 2025 has not restored the applicant to its original position, for the purposes of the case-law cited in paragraphs 29 and 30 above, such that it retains a legal interest in bringing an action for annulment of the contested decision in so far as it classifies Marketplace as a CPS that is an important gateway.

The first plea in law, concerning the classification of Messenger as a CPS that is an important gateway

- 34 The first plea in law is divided into four limbs, alleging:
- first, that the Commission failed to recognise that the Messenger service, given its characteristics, was the chat functionality of the Facebook online social networking CPS, being an integral part of that CPS;
 - second, that the Commission misapplied and misinterpreted the provisions of the DMA in designating Messenger as a standalone NIICS CPS that was distinct from the Facebook online social network;
 - third, that the Commission erred in finding that Messenger individually constituted an important gateway, rejecting the arguments and evidence submitted by the applicant during the administrative procedure under Article 3(5) of the DMA on the ground that they manifestly did not call into question the presumptions laid down in Article 3(2) of the DMA, without opening a market investigation under Article 17(1) or (3) of the DMA;
 - fourth, that the Commission introduced new evidence for the first time in the contested decision, in breach of an essential procedural requirement.

The first limb, concerning the assessment of Messenger in concreto and its classification as a NIICS CPS

- 35 In the first limb, the applicant disputes the assessment carried out by the Commission which resulted in its refusal to accept that Messenger was merely the chat functionality of the Facebook online social networking CPS, forming an integral part of that CPS. That limb is divided in essence into three complaints.

– *The first complaint, alleging that the Commission ignored, misinterpreted and/or distorted the evidence adduced by the applicant*

- 36 The applicant submits that the Commission ignored, misinterpreted and/or distorted the evidence which showed that Messenger was solely the chat functionality of the Facebook online social networking CPS, forming an integral part of that CPS. It contends that the Commission made an error of assessment in finding that the evidence available to it at the time of the adoption of the contested decision established that Messenger was a distinct service which end users could and did use separately from Facebook.
- 37 The Commission disputes the applicant's arguments.
- 38 Article 3(1) of the DMA provides that an undertaking is to be designated as a gatekeeper if it satisfies three cumulative conditions, including that of providing a CPS which is an important gateway, set out in Article 3(1)(b) of that regulation.
- 39 In accordance with Article 2, point (2) of the DMA, the term CPS means one of the services listed in that provision, which include online social networking services and NIICs.
- 40 The Commission concluded in the contested decision that, taking into account the characteristics of Messenger assessed *in concreto*, that service constituted a standalone NIIC CPS which could not be regarded as being merely the chat functionality of the Facebook online social networking CPS.
- 41 In that regard, the Commission found that Meta provided Messenger on the market as a service that was separate from Facebook and that, for the [confidential]¹ majority of users, the use of Messenger was not triggered by use of the Facebook online social network.
- 42 The Commission was fully entitled to reach that conclusion. In the first place, that finding is based on the fact that Meta has developed standalone applications for Messenger, in particular for mobile devices. As the Commission stated in recital 177 of the contested decision, there is a Messenger application for mobile devices, which is separate from Facebook, and which must be downloaded and opened by users to read or send messages. Since usage on mobile devices predominates in terms of the use of Messenger, as indicated in footnote 150 of the contested decision and as is not disputed by the applicant, that application for mobile devices, which is separate from the online social network Facebook, thus constitutes the entry point to Messenger for the [confidential] majority of users.
- 43 In the second place, as the Commission observed in recital 169 of the contested decision, users, after signing on by means of a Facebook ID, may use Messenger whether their Facebook account is activated or deactivated and whether or not they are active at the same time on the Facebook online social network, which is a factor that is relevant in assessing whether Messenger and Facebook are distinct services.
- 44 In the third place, the Commission also correctly bases its assessment on the fact that Meta provides and promotes tools that are specific to Messenger, which allow businesses to engage with an expansive user base, enabling them, for example, to engage in lead generation, customer

¹ Confidential information redacted.

service, and customer re-engagement. As observed in recital 181 of the contested decision, the existence of such tools shows that Meta conceives its Messenger service as a self-standing platform within its ecosystem.

- 45 Furthermore, the arguments put forward by the applicant set out in paragraph 46 et seq. below are not capable of calling into question the Commission's finding that the evidence that was available to it at the time of the adoption of the contested decision established that Messenger was a standalone NIICS CPS that was distinct from the Facebook online networking service CPS.
- 46 First, the applicant disputes the assertion that access to Messenger on mobile devices required a separate application at the time of the adoption of the contested decision, as stated in paragraph 42 above. It argues that Annex A.26 to the application contains screenshots of a number of key features used by Messenger and which users access directly from the Facebook application. It also states that users on mobile devices who did not use the Facebook application, but used the web version of Facebook, could access Messenger directly via Facebook, without going through the Messenger application.
- 47 In that regard, the Court does not need to determine whether the arguments referred to in paragraph 46 above had already been put forward by the applicant during the administrative procedure or whether, if it were found that they have been raised for the first time before the Court, they could be regarded as admissible, which the Commission disputes. Those arguments do not in any event invalidate the Commission's finding referred to in paragraph 42 above that the manner in which Messenger is offered results in a situation where the specific Messenger application for mobile devices is the entry point to Messenger for the [confidential] majority of users. More specifically, the two situations referred to by the applicant are only limited exceptions in relation to accessing Messenger by means of the dedicated application.
- 48 Indeed, as regards the applicant's argument that certain communications in Messenger may be powered by the Facebook application, without the Messenger application being open (in particular functions consisting of sharing a reel, that is, a short video, or a story, that is, a sequence of short videos or images), that argument refers only to those specific communications mentioned by the applicant, intended to aid the distribution of Facebook content through Messenger, and not to other standard functions, such as those that enable the writing, reading and answering of a message.
- 49 In addition, as regards the applicant's argument that users of the services at issue by means of mobile devices have always been able to access Messenger from the web version of Facebook, without going through the Messenger application, that argument refers to a situation that is marginal in comparison with that of the [confidential] majority of users, who access Messenger via the dedicated application for mobile devices, inasmuch as the use via mobile devices predominates as regards Messenger, which the applicant does not dispute (see paragraph 42 above).
- 50 Second, the applicant refers to the fact that 100% of communications on Facebook Messenger take place between Facebook users and that, (i), [80-100] % of Facebook Messenger's monthly active users in 2022 were also monthly active users of Facebook's other features, and (ii), [80-100] % of Messenger's daily active users also used Facebook's other features on the same day. However, those figures do not demonstrate that Messenger and Facebook must be viewed as being a single CPS for the purposes of the DMA, but merely show that the applicant has chosen to limit the use

of Messenger to users with a Facebook ID. The fact remains that, as indicated by the Commission in recital 182 of the contested decision, those users in fact can, and do, use Messenger independently of the Facebook online social network.

- 51 Third, the applicant criticises the Commission for dismissing, in recital 184 of the contested decision, the data which it had submitted concerning Messenger's weekly active users without analysing them properly. The Commission should have assessed those data, concerning the correlation of the use of Messenger and Facebook, alongside the data on monthly active users and daily active users referred to in paragraph 50 above. At the very least, the Commission should have explained why it ignored those figures.
- 52 However, the fact that the Commission did not specifically refer in the contested decision to the data concerning Messenger's monthly and daily active users produced by the applicant during the administrative procedure, or explicitly relate those data to the figures concerning Messenger's weekly active users analysed in recital 184 of the contested decision, does not mean that it did not take all of those data into account in its assessment.
- 53 In that regard, it is settled case-law that the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review, but that it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 29 July 2024, *Ryanair and Laudamotion v Commission*, C-591/21 P, not published, EU:C:2024:635, paragraph 166 and the case-law cited).
- 54 In the present case, the contested decision refers to the reasons why the Commission did not consider the evidence relating to the correlation between the use of Messenger and that of Facebook to be conclusive. Accordingly, the Commission stated in recital 182 of the contested decision that the fact that all communications by means of Messenger took place between users who have Facebook accounts was merely the consequence of the design of that service at the time of the adoption of that decision. In addition, the Commission observed in recital 187 of that decision that the partial overlap between monthly active end users of Messenger and Facebook was not surprising, given Meta's choice of using the Facebook ID as an identifier for the use of Messenger, which did not call into question its conclusion on the standalone use of Messenger by users.
- 55 Fourth, the applicant is not entitled to complain that the Commission failed to take proper account of the survey filed as Annex A.27 to the application, which, according to the applicant, confirms that European users of online social networking services designated by the Commission consistently view the chat functionality of an online social network as a fundamental part of the user experience of that social network. While it is not necessary to rule on the admissibility of that annex, the Commission cannot be criticised for having ignored the results of that survey since it was carried out after the adoption of the contested decision. In any event, the facts that most users of online social networks view the integration of social networking and direct messaging

functions to be very important for their use of those social networks, and that they may be disappointed if those functions are separated, do not give any insight into how the Messenger service is provided to users.

- 56 Fifth, the applicant submits that the Commission distorted the data it submitted, which was referred to in recital 185 of the contested decision. According to the applicant, it had shown that, if the first session of the day were taken into consideration, approximately [10-20] million users on mobile devices entered the Messenger mobile device application through an entry point on Facebook, which corresponded to [0-30]% of Messenger's daily user base. The Commission had inferred from that information that [70-100]% of the daily usage of Messenger was not triggered by the use of Facebook. However, the applicant states that the data it provided concerned only users' first session of the day, that being, moreover, only on a mobile device. Accordingly, those data do not capture the totality of the daily uses of Messenger triggered by the use of Facebook.
- 57 In that regard, even in the event that the Commission had made a factual error as regards the percentage of the daily use of Messenger on mobile devices which is not triggered by the use of Facebook, the applicant's argument does not invalidate the Commission's statement, set out in recital 185 of the contested decision, that, for the [confidential] majority of the users of the Messenger mobile application, the first use of Messenger during the day was not made by clicking on a link within the Facebook application, but by opening the Messenger application directly. In addition, when the Commission asked the applicant during the administrative procedure to provide it with more detailed data in that regard, in particular a breakdown, for the period 2020 to 2022, of users who started their Messenger session via the Facebook webpage, the Facebook application, the Messenger application for mobile devices, or the Facebook Messenger Chat Plugin, the applicant replied that such data were not available.
- 58 Sixth, the applicant submits that the Commission misinterpreted or distorted Meta's public marketing materials, its communications to investors and users, and its financial reports, in finding that those documents showed that Messenger was not the chat functionality of Facebook, forming an integral part of the Facebook online social networking CPS.
- 59 However, the Commission correctly inferred from the documents referred to in paragraph 58 above that Meta designed, presented, and positioned Messenger as an autonomous service, going beyond a mere chat functionality of Facebook. Accordingly, as the Commission stated in recital 180 of the contested decision, referring to Form 10-K of Meta Platforms for the fiscal year ending on 31 December 2022, Meta's financial reporting distinguishes the following four services within its 'Family of App Products': Facebook, Instagram, Messenger and WhatsApp. In other communications to investors, such as that referred to by the Commission in footnote 158 of recital 180 of the contested decision, which cites a transcript of a conference call of 26 October 2022 on Meta's third-quarter results of 2022, Meta refers to the monetisation of Messenger as such and states that messaging, provided through WhatsApp and Messenger, constitutes a 'major monetisation opportunity' through the development of products such as 'click-to-message' adverts and paid messaging.
- 60 It is true that the issue of whether Messenger is a NIICS CPS or a functionality forming an integral part of the Facebook online social networking CPS must be assessed from the objective point of view of end users. However, the types of document such as those at issue are not entirely irrelevant to such an assessment, since they may provide information, along with other consistent

evidence, such as the findings in the present case in paragraphs 42 to 44 above, on the manner in which the service provider configures its services for the users in question and, therefore, on the manner in which those services will then be used by such users.

61 The arguments put forward by the applicant must therefore be rejected, as must, accordingly, the first complaint in its entirety.

– *The second complaint, alleging that the assessment of Messenger was discriminatory and arbitrary*

62 The applicant claims that there are manifest inconsistencies in the way in which the Commission has assessed the chat functionality of the social networking services of other undertakings designated as gatekeepers, which renders the contested decision arbitrary and discriminatory.

63 The Commission disputes the applicant's arguments.

64 It is appropriate to observe that the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other undertakings or other CPSs (judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraphs 68 and 375).

65 Furthermore, according to settled case-law, the principle of equal treatment, which is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 16 June 2022, *Sony Optiarc and Sony Optiarc America v Commission*, C-698/19 P, EU:C:2022:480, paragraph 153 and the case-law cited).

66 In that regard, the applicant refers, in the first place, to Commission Decision C(2023) 6100 final of 5 September 2023 designating Apple as a gatekeeper pursuant to Article 3 of the DMA (Cases DMA.100013 Apple – online intermediation services – app stores, DMA.100025 Apple – operating systems and DMA.100027 Apple – web browsers), a summary of which has been published in the *Official Journal of the European Union* (OJ C, C/2023/548) ('the Apple designation decision'), in which the Commission found that the App Store was a single OIS CPS, irrespective of the type of device from which that service was accessible. However, the Commission's approach to Messenger does not conflict with that adopted in the Apple designation decision. Indeed, the Commission did not divide Messenger into different NIICS CPSs depending on the type of device used to access that service, but classified Messenger as a single NIICS CPS, irrespective of the way in which users had access to it.

67 As regards Apple's iMessage service, referred to in the second place by the applicant, it should be observed that that service is not provided in connection with an online social networking CPS. Accordingly, the question of the delineation of NIICSs and online social networks did not arise in the Apple designation decision, such that that decision does not appear to have any relevance in that respect.

68 As regards the chat functionalities of TikTok and LinkedIn, cited in the third place by the applicant, it should be observed that they did not have the same characteristics as Messenger and, in particular, that they did not have key features such as those that led the Commission to find that Messenger constituted a distinct, standalone NIICS CPS, namely, first, the fact that

Messenger could be used outside the Facebook online social network, in particular by means of a dedicated application, and, second, the fact that Messenger could also be used with a deactivated Facebook account.

- 69 In addition, in its answers to the Court’s written questions of 28 March 2025, the applicant submits that the Commission took a different approach in Decision C(2024) 3176 final of 13 May 2024 relating to a decision pursuant to Article 3 of the DMA (Case DMA.100019 – BOOKING - ONLINE INTERMEDIATION SERVICES – VERTICALS), a summary of which has been published in the *Official Journal of the European Union* (OJ C, C/2024/4360), by which it designated Booking Holdings Inc. as a gatekeeper, while accepting that the Booking.com and RentalCars.com services were a single CPS for the purposes of the DMA, regardless of the fact that there were separate applications and websites, since those services could be accessed via a single account, as is the case for Facebook and Messenger.
- 70 However, in contrast to the facts of the present case, it is apparent from Decision C(2024) 3176 final that users could access all the services at issue, including those for the hire of vehicles, without going through a separate, dedicated application. In the present case, as stated in paragraph 42 above, the Commission correctly found that Meta had developed standalone applications for Messenger and that, as regards the application used on mobile devices, that application was the entry point to Messenger for the [*confidential*] majority of users.
- 71 The second complaint must therefore be rejected.

– *The third complaint, alleging infringement of the annex to the DMA*

- 72 The applicant complains that the Commission relied on the annex to the DMA in order to find that Messenger was a distinct, standalone NIICS CPS from the Facebook online social networking CPS. In that regard, the applicant submits that, assuming that the annex to the DMA is relevant for delineating CPSs, which it disputes, the contested decision misapplies that annex. In fact, section D(2) of that annex shows that Messenger should be regarded as part of the Facebook online social networking CPS since it is used for the same purposes as that online social network, namely to enable Facebook users to connect and communicate with each other, to share content and to discover other users and content.
- 73 The Commission disputes the applicant’s arguments.
- 74 As regards, first of all, the relevance of the annex to the DMA for delineating CPSs offered in an integrated way, it should be observed that that annex has the same legal value as the DMA itself and forms an integral part of that regulation (see, to that effect and by analogy, judgment of 24 November 2010, *Commission v Council*, C-40/10, EU:C:2010:713, paragraph 61).
- 75 According to Section A(1) of the annex to the DMA, the purpose of that annex is ‘specifying the methodology for identifying and calculating the “active end users” and the “active business users” for each [CPS] listed in Article 2, point (2) [of the DMA]’, in order to enable undertakings to assess whether their CPSs meet the quantitative thresholds set out in Article 3(2)(b) of the DMA and are therefore presumed to meet the requirement in Article 3(1)(b) of the DMA.
- 76 Since the annex to the DMA is intended to enable undertakings to identify the active end users and active business users of each CPS listed in Article 2, point (2) of the DMA, it must be found that it contains information that is relevant for the delineation of CPSs offered by an undertaking

in an integrated way. If the Commission were to use criteria for the delineation of CPSs that are different from those applied by undertakings for the calculation of the active end users and active business users of their CPSs, in order to assess whether the thresholds laid down in Article 3(2)(b) of the DMA are met, undertakings would not be able to benefit from the legal certainty that the annex to the DMA is to provide them, as foreseen in recital 20 of the regulation.

- 77 In those circumstances, it is also necessary, when assessing and delineating CPSs under the DMA, to take account of the guidance in the annex to the DMA on the situations in which the services provided by an undertaking are to be considered as distinct CPSs, in particular where they are offered in an integrated way.
- 78 Accordingly, it is necessary, more specifically, to take Section D(2) of the annex to the DMA into account for the purpose of assessing the circumstances in which CPSs provided by undertakings are to be considered as a single service or as distinct services.
- 79 Section D(2) of the annex to the DMA provides, for the purpose of calculating the number of ‘active end users’ and ‘active business users’, as follows:

‘(c) The undertaking providing [CPS(s)] shall consider as distinct [CPSs] those services which the relevant undertaking offers in an integrated way, but which:

- (i) do not belong to the same category of [CPS] pursuant to Article 2, point (2) or
- (ii) are used for different purposes by either their end users or their business users, or both, even if their end users and business users may be the same and even if they belong to the same category of [CPS] pursuant to Article 2, point (2).’

- 80 Accordingly, Section D(2)(c)(i) of the annex to the DMA confirms the Commission’s assessment in recital 172 of the contested decision that Messenger, as a NIICS CPS, must be distinguished from the Facebook online social networking CPS with which it is integrated, since those services do not belong to the same CPS category.
- 81 That finding is not invalidated by the applicant’s argument that Section D(2)(c)(ii) of the Annex to the DMA states that the CPSs concerned may be regarded as distinct CPSs if they are used for different purposes, whereas Messenger and Facebook are used for the same purposes. In fact, the wording of Section D(2)(c) of the annex to the DMA shows that the criterion related to the purpose for which the services at issue are used is an alternative to the criterion which was applied in the present case, such that the applicant cannot derive any argument from that provision.
- 82 The third complaint must therefore be rejected as must, accordingly, the first limb of the first plea.

The second limb, concerning the applicable legal criteria for classifying a service such as Messenger as a NIICS CPS

- 83 The applicant claims that the Commission misinterpreted and misapplied Article 2, points (7) and (9) and Article 3(1)(b) and (9) of the DMA by designating Messenger as a NIICS CPS. More specifically, the applicant does not dispute that Messenger meets the definition of a NIICS under Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code (OJ 2018 L 321, p. 36; ‘the Electronic Communications Code’). However, it alleges that the Commission erred in law in finding that a service meeting the NIICS definition laid down in that code had necessarily to be

classified as a NIICS CPS for the purposes of the DMA. According to the applicant, a service such as Messenger, which is merely the chat functionality of an online social network, may *a priori* fall within two different CPS categories, namely that of a NIICS CPS and an online social networking CPS of which that service forms part. It is therefore necessary to carry out an evidence-based assessment of that service *in concreto* in order to establish the CPS category which best fits such a service.

- 84 In support of its line of argument, in the first place, the applicant submits that the approach adopted by the Commission in the contested decision disregards the definition of an online social networking CPS in Article 2, point (7) of the DMA, which expressly requires that the chat functionality of an online social network should be included within the scope of an online social networking CPS.
- 85 In the second place, the applicant claims that to consider, as the Commission did in the contested decision, that a service cannot be part of an online social networking CPS if it already meets the definition of a NIICS amounts to ignoring the autonomous nature of the definition of an online social network set out in the DMA, since that definition is not subordinate to the definition of a NIICS CPS in the Electronic Communications Code or to that of a NIICS in Article 2, point (9) of the DMA.
- 86 In the third place, the applicant submits that the Commission has been inconsistent and discriminatory in its approach since it made a different assessment of the chat functionalities of other online social networks, such as TikTok. It argues that in Decision C(2023) 6102 final of 5 September 2023 relating to a decision pursuant to Article 3 of the DMA (Case DMA.100040 – BYTEDANCE – ONLINE SOCIAL NETWORKING SERVICE), a summary of which was published in the *Official Journal of the European Union* (OJ C, C/2023/552), which designates ByteDance as a gatekeeper, the Commission accepted that that a service could *a priori* meet the definition of several CPSs and, in particular, it duly assessed whether TikTok corresponded more to a video-sharing platform service or to an online social networking service.
- 87 The Commission, supported by the French Republic, disputes the applicant's arguments.
- 88 As observed in paragraph 39 above, Article 2, point (2) of the DMA provides that the term 'CPS' means any of the services listed in that provision, including online social networking services and NIICSs.
- 89 Article 2, point (9) of the DMA specifies that, under that regulation, the term NIICS means 'a [NIICS] as defined in Article 2, point (7) [of the Electronic Communications Code]'.
- 90 Article 2, point (7) of the Electronic Communications Code defines a NIICS as '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 ...'
- 91 The concept of a NIICS in the Electronic Communications Code should also be understood taking account of the definition of 'interpersonal communications service' in Article 2, point (5) of that code, which refers to '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’.

- 92 In the first place, the Court observes that, in the present case, the Commission, in recitals 165 and 166 of the contested decision, assessed whether Messenger met the definition of a NIICS laid down in the DMA and concluded that that was the case, applying the criteria set out in the Electronic Communications Code to which the DMA refers.
- 93 In recital 166 of the contested decision, the Commission stated that Messenger fulfilled the definitions of an interpersonal communications service and a NIICS laid down in Article 2, points (5) and (7) of the Electronic Communications Code since that service enabled the interpersonal and interactive exchange of information between a finite number of persons and did not connect with publicly assigned numbering resources.
- 94 As the Commission observed in recital 167 of the contested decision, the applicant, moreover, did not dispute during the administrative procedure that Messenger met the definitions laid down in Article 2, points (5) and (7) of the Electronic Communications Code, a position which it reiterated in its written pleadings and at the hearing, in response to a question from the Court.
- 95 In the second place, it should be observed that the Commission was correct to state, in recitals 169 and 172 of the contested decision, that the fact that Messenger could be considered as being provided in an integrated way with the Facebook online social networking CPS, since it was the chat functionality of that online social network, did not prevent that service from being regarded as a NIICS CPS that was separate from that online social network.
- 96 First of all, as stated in paragraph 79 above, Section D(2)(c)(i) of the annex to the DMA provides that an undertaking providing one or more CPSs must consider as distinct the services which it offers in an integrated way but which do not belong to the same category of CPS pursuant to Article 2, point (2) of the DMA.
- 97 Furthermore, the fact that a NIICS such as Messenger may be regarded as a separate CPS, although it is provided to some extent in an integrated way with other CPSs, does not conflict with the DMA.
- 98 In that regard, it should be observed that the EU legislature specifically envisaged that type of configuration. Recital 64 of the DMA states that gatekeepers often provide NIICSs as part of their platform ecosystem, which further exacerbates entry barriers for alternative providers of such services and increases switching costs for end users. Accordingly, the EU legislature was fully aware of the complexity of the composition of certain platform ecosystems that include, inter alia, complementary services which could overlap or be interconnected and, more specifically, that NIICSs, such as Messenger, were often supplied within such ecosystems.
- 99 Consequently, the Commission was fully entitled to take the view that the fact that Messenger may be regarded as being provided in an integrated way with the Facebook online networking service CPS, in so far as it constituted the chat functionality of that CPS, did not prevent it from being considered as a NIICS CPS that was distinct from that online social network.

- 100 Nevertheless, the applicant submits that the contested decision is vitiated by an error of law in that the Commission disregarded the fact that a service meeting the definition of a NIICS under the Electronic Communications Code could simultaneously meet the definition of a NIICS CPS and that of an online networking service CPS by being an integral part of that social network, and that it was necessary to carry out an assessment *in concreto* of the conditions in which that NIICS was provided in order to determine the CPS to which it corresponds most closely. If the Commission had correctly interpreted the legal criteria provided for in the DMA for delineating CPSs, it would have carried out such an assessment with respect to Messenger.
- 101 However, it is apparent from the contested decision that, in the present case, the Commission did not merely rely on its finding that Messenger met the definition of a NIICS within the meaning of the Electronic Communications Code in order to conclude that that service should be classified as a NIICS CPS for the purposes of the DMA. In fact, after it found in recital 166 of the contested decision that Messenger fulfilled the definition of a NIICS under the Communications Code and setting out, in that context, in recitals 167 to 169 of the contested decision, the reasons why Messenger could not fall under the exception provided for services which enable interpersonal and interactive communication merely as a minor ancillary feature that is intrinsically linked to another service, the Commission continued its assessment by carrying out, in particular in recitals 176 to 190 of the contested decision, a specific analysis of the conditions and circumstances in which Messenger was provided.
- 102 Accordingly, first of all, the Commission stated in recital 177 of the contested decision that it was apparent from the way in which Messenger was provided and, in particular, from the fact that Meta had developed a separate and self-standing application for that service for mobile devices, which constituted the entry point to Messenger for the [confidential] majority of users, as stated in paragraph 42 above, that that service had evolved in order to offer the user a separate experience from that of Facebook and become a standalone NIICS. Further, the Commission found in recitals 177 to 180 of the contested decision that Meta's communications with its investors, public marketing communications, communications to users and financial reports confirmed that Meta itself viewed Messenger as a standalone service, as stated in paragraph 59 above. Lastly, the Commission found in recital 181 of the contested decision that, by providing and promoting specific tools to enable undertakings to engage with users on Messenger, Meta conceived of Messenger as a self-standing platform within its ecosystem, as stated in paragraph 44 above.
- 103 The Commission concluded that Messenger was a distinct service which consumers could and did use separately, such that it had to be classified as a standalone NIICS CPS that is distinct from the Facebook online social network.
- 104 In those circumstances, it must be held in the present case that, even if the applicant's line of argument presented in paragraph 100 above were to be considered to be well founded, it could not result in the annulment of the contested decision in the present action since the Commission in any event carried out a specific analysis of the conditions and circumstances in which Messenger was provided.
- 105 Moreover, it is that assessment *in concreto* of the conditions in which Messenger was provided to users that is disputed by the applicant in the first limb of the first plea.
- 106 Accordingly, the applicant's main line of argument presented in paragraph 100 above and the arguments made to support it must be regarded as ineffective.

107 In the light of the foregoing considerations, the second limb of the first plea must be rejected as in part unfounded and in part ineffective.

The third limb, related to the calling into question of the presumption that Messenger was an important gateway

108 The applicant submits that, even if the Commission did not err in classifying Messenger as a NIICS CPS, it misinterpreted and misapplied Article 3(1)(b) and (9) of the DMA by concluding that that service was individually an important gateway.

109 The third limb is divided into three complaints.

– *The first complaint, concerning the rebuttal of the presumption laid down in Article 3(2)(b) of the DMA*

110 The applicant argues that the Commission failed to demonstrate in the contested decision that Messenger was an important gateway within the meaning of Article 3(1)(b) of the DMA. In that regard, it claims, inter alia, that the Commission erred in ignoring or rejecting the evidence it had submitted to rebut the presumption laid down in Article 3(2)(b) of the DMA.

111 The Commission, supported by the French Republic, disputes the applicant's arguments.

112 As observed in paragraph 38 above, Article 3(1) of the DMA states that an undertaking is to be designated as a gatekeeper where it satisfies three cumulative conditions, including that of providing a CPS which is an important gateway.

113 Article 3(2)(b) of the DMA provides that an undertaking is to be presumed to satisfy the condition related to providing a CPS that is an important gateway, for it to be designated as a gatekeeper, where the CPS at issue has in the last financial year had at least 45 million monthly active end users established or located in the European Union and at least 10 000 yearly active business users established in the European Union.

114 Article 3(5) of the DMA provides that the presumptions referred to in Article 3(2) thereof may be rebutted when an undertaking presents 'with its notification, sufficiently substantiated arguments to demonstrate that, exceptionally, although it meets all the thresholds in paragraph 2, due to the circumstances in which the relevant [CPS] operates, it does not satisfy the requirements listed in paragraph 1 [of Article 3 of the DMA]'.

115 In the present case, the Court must examine whether, as the applicant submits, the Commission erred in finding that the arguments that the applicant presented were not sufficiently substantiated, within the meaning of Article 3(5) of the DMA, manifestly to call into question the presumption set out in Article 3(2)(b) of the DMA.

116 In the first place, the applicant states that it showed during the administrative procedure that Messenger represented only [0-5]% of the traffic for business-to-consumer communications ('B2C') in the European Economic Area (EEA), with the primary means for business users to reach end users being by telephone and email. It argues that the assessment of that evidence in the contested decision is manifestly erroneous and lacks sufficient reasoning.

- 117 In that regard, first, it should be observed that Article 3(5) of the DMA does not provide an exhaustive list of elements which may be produced in order to rebut the presumptions referred to in Article 3(2), but merely refers to ‘the circumstances in which the relevant [CPS] operates’ (see, to that effect, judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 50). Furthermore, recital 23 of the DMA states that ‘in its assessment of the evidence and arguments produced [under the first subparagraph of Article 3(5) of the DMA], the Commission should take into account only those elements which directly relate to the quantitative criteria, namely the impact of the undertaking providing [CPSs] on the internal market beyond revenue or market cap, such as its size in absolute terms, and the number of Member States in which it is present; by how much the actual business user and end user numbers exceed the thresholds and the importance of the undertaking’s [CPS] considering the overall scale of activities of the respective [CPS]; and the number of years for which the thresholds have been met’. The list of elements that may be taken into account, referred to in that recital, is not exhaustive (see, to that effect, judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 49).
- 118 Second, it is apparent from recital 23 of the DMA that there is a requirement that, in order to be taken into account, the arguments and the evidence produced by the undertaking concerned must ‘directly relate to the quantitative criteria’, bearing in mind that the term ‘quantitative criteria’ refers to the quantitative thresholds laid down in Article 3(2) of the DMA (judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 47). Such arguments and evidence directly relate to those quantitative thresholds when they are intended to rebut concretely and specifically one of the three presumptions laid down in Article 3(2) of the DMA (see, to that effect, judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 326).
- 119 Accordingly, it cannot automatically be excluded that evidence relating to Messenger’s significance within the entirety of B2C communications may be relevant for substantiating the circumstances in which that CPS operates, provided that those elements ‘directly relate’, within the meaning of recital 23 of the DMA, to the quantitative thresholds laid down in Article 3(2)(b) of that regulation.
- 120 However, it must be found that the Commission examined the applicant’s arguments related to Messenger’s purported lack of significance within the entirety of B2C communications in the EEA and came to the conclusion, correctly, that those arguments were not sufficiently substantiated in order manifestly to call into question the presumption in Article 3(2)(b) of the DMA.
- 121 In that regard, the standard of proof required to call into question the presumptions laid down in Article 3(2) of the DMA has been determined by the EU legislature itself, which has required the undertaking concerned, on which the burden of proof lies, to submit sufficiently substantiated arguments, manifestly calling into question those presumptions (judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 61). It is indisputably apparent from the terms ‘exceptionally’ and ‘manifestly’, in Article 3(5) of the DMA, that the standard of proof required of the undertaking concerned is high, in the sense that the arguments presented by that undertaking must be capable of showing, with a high degree of plausibility, that the presumptions laid down in Article 3(2) of the DMA are called into question (judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 71).

- 122 In the present case, the Commission found that the arguments put forward by the applicant during the administrative procedure were not conclusive in that the figure relied on by the applicant, as referred to in paragraph 116 above, was based on a calculation method which the Commission uses in the field of competition law, without any explanation being given as to its relevance for the rebuttal of the presumption at issue. Accordingly, the Commission did not err in its assessment when it stated in recital 226 of the contested decision that the applicant had failed to present any data or explanations to support its arguments in that regard.
- 123 Furthermore, the Commission pointed out correctly in recital 227 of the contested decision that the arguments referred to in paragraph 116 above were undermined by the fact that the applicant provided tools that are widely used by business users in order to contact end users via Messenger, which revealed the significance of Messenger as a B2C communication channel.
- 124 In addition, it should be observed, as the Commission did in recital 220 of the contested decision, that Messenger significantly exceeded the threshold related to business users laid down in Article 3(2)(b) of the DMA, since the number of undertakings using that service was greater than [confidential] million in each year from 2020 to 2022, whereas the threshold in question was set at 10 000. In accordance with recital 23 of the DMA, the extent to which the number of business users exceeds that threshold is a relevant factor in analysing an undertaking's arguments seeking to call into question the presumption under Article 3(2)(b) of the DMA.
- 125 Lastly, as regards the application's allegation of a failure to state reasons in that context, it must be held that recitals 226 to 228 of the contested decision include explanations which disclose in a clear and unequivocal fashion the reasoning of the Commission in relation to the rejection of the arguments made by the applicant. Accordingly, the statement of reasons in question satisfies the requirements arising from Article 296 TFEU, as referred to in paragraph 53 above.
- 126 In the second place, the applicant maintains that the Commission failed to take sufficient account of the fact that, even in the narrower category of 'online messaging services', there was a wide range of services other than Messenger, such as social networking services (TikTok, X and Snapchat), remote conference services (Microsoft Teams, Zoom) and NIICs (WhatsApp, Signal and Telegram). It also emphasises multi-homing, since 73% of end users use more than one online messaging service. If the Commission's approach were followed, which involves taking account only of services within the relevant CPS category, namely, in the present case, the NIICs category, no consideration would be given to the fact that Messenger's services are dwarfed by those of email, bearing in mind that, taking 2020 as an example, 67 million B2C conversations took place by email each day, but only [0-5] million B2C conversations were carried out through Messenger.
- 127 In that regard, it must be observed that the burden of proof in rebutting the presumptions laid down in Article 3(2) of the DMA lies with the applicant. However, the arguments and evidence which it submitted merely concerned the existence of other services and of multi-homing in general. In particular, those arguments were not substantiated by specific data relating to the usage of those various services and to the precise and concrete features of multi-homing, namely, in particular, its intensity, that is to say, the time spent by a user on each of the services concerned. As regards the figure relating to multi-homing cited by the applicant, namely the fact that 73% of end users use more than one online messaging service, the Commission was entitled to find that it was not sufficiently substantiated manifestly to call into question the presumption laid down in

Article 3(2)(b) of the DMA since that figure only concerned users in Germany in a particular year, 2021, and therefore did not suffice in assessing the situation in the European Union as a whole.

- 128 Furthermore, as regards the relevance of the levels of the use of email services, such as Microsoft Outlook and Gmail, to which the applicant refers, its arguments in that regard are not sufficient to call the differences between those services and Messenger into question. In particular, the applicant's NIICS does not allow business or end users to communicate freely with the users of other services, in contrast to email, which enables messages to be sent and received from other providers of that service.
- 129 In the third place, the applicant submits that Messenger is overwhelmingly used in the consumer-to-consumer context ('C2C'), which calls into question the presumption that it is an important gateway.
- 130 In that regard, it is apparent from recital 15 of the DMA that the fact that it is possible that an undertaking providing CPSs not only intermediates between business users and end users, but also between end users and end users, for example in the case of NIICS, does not preclude the conclusion that such an undertaking is or could be an important gateway.
- 131 Consequently, the mere fact that a CPS has C2C features in addition to its B2C characteristics, as in the present case, does not mean it can avoid classification as an important gateway.
- 132 In the fourth place, the applicant argues that B2C communications on Messenger can be initiated only by end users, such that business users cannot use Messenger as an important gateway to reach those latter users.
- 133 It should be observed that the applicant relies in that regard on Annex A.28 to the application in order to argue that end users must give their consent to receive messages from business users. However, as the applicant confirmed at the hearing, that annex was produced for the first time in the application and was not provided to the Commission during the administrative procedure. In this regard, the undertaking concerned cannot submit, for the first time before the Court, arguments or evidence, under Article 3(5) of the DMA, which it had not submitted during the administrative procedure in rebuttal of the presumptions laid down in Article 3(2) of the DMA (judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 234) Accordingly, Annex A.28 to the application is inadmissible.
- 134 In any event, the possibility 'to reach end users' referred to in Article 3(1)(b) of the DMA does not mean that business users must necessarily be able to initiate contact with those users. Neither Article 3 of the DMA nor the definition of active business users in Section E of the annex to the DMA, which refers to business users 'who used a business account or otherwise initiated or participated in any way in a communication through the [NIICS] to communicate directly with an end user at least once during the year', require that there be such a possibility.
- 135 That is all the more so in the present case since, as the Commission observed in recital 222 of the contested decision, Messenger provides the option of launching a conversation in response to an advert by means of the 'click-to-message' function, which makes it possible to 'send people to a Messenger conversation', such a method being likely to encourage end users to contact business users.

- 136 In the fifth place, the applicant refers to the fact that the Draft Report on the *ex ante* regulation of digital gatekeepers, drawn up by the Body of European Regulators for Electronic Communications (BEREC), dated 11 March 2021, suggested that NIICSs should not yet be regarded as CPSs provided by gatekeepers.
- 137 However, that document does not deal with the specific case of Meta and the services concerned, such that it does not call into question the individual assessment of Meta and those services in the contested decision. In any event, the final version of the report in question no longer expresses any reservations as to the classification of NIICSs as important gateways.
- 138 In the sixth place, the applicant challenges various additional arguments put forward by the Commission in recitals 222 and 227 of the contested decision concerning, in essence, the relevance of add-on connection tools made available to business users in order to communicate with end users through Messenger.
- 139 In that regard, it should be observed that it is apparent from recital 222 of the contested decision that the fact that an undertaking provides such additional tools was not regarded by the Commission as decisive in itself, but was merely an argument that supported the rejection, in recitals 220 to 223 of the contested decision, of the arguments and evidence submitted by the applicant in the context of rebutting the presumption laid down in Article 3(2)(b) of the DMA.
- 140 In addition, the applicant does not dispute that Meta offers the abovementioned tools to business users. On the one hand, it merely maintains that those undertakings are not able to initiate a communication on Messenger. That argument has already been rejected in paragraphs 133 to 135 above. On the other hand, it submits that other social networking services commonly provide such tools for their chat functionalities. However, the applicant fails to explain how the mere fact that other undertakings provide similar tools would serve to rebut the presumption laid down in Article 3(2)(b) of the DMA.
- 141 In the seventh place, the applicant argues that the Commission's approach results in discriminatory treatment of Messenger when compared with that of other undertakings and their services which have also been the subject of the DMA procedures, namely Samsung's internet browser service and Apple's iMessage service, since the Commission accepted arguments for those services that were similar to those made by the applicant. As regards the Gmail service of Alphabet and Microsoft's Outlook, the applicant argues that the Commission's approach is inconsistent since it found that sufficiently substantiated arguments had been submitted in respect of those services so as to rebut the presumption laid down in Article 3(2)(b) of the DMA, despite the fact that those services had several million business and end users.
- 142 However, first, the applicant fails to explain how its situation as regards Messenger is comparable to that of undertakings operating another type of CPS, such as Samsung with respect to its internet browser.
- 143 Second, as regards Apple's iMessage, Alphabet's Gmail and Microsoft's Outlook, the applicant has failed to show that, apart from the fact that they were the same type of CPS, their situation was comparable to that of Messenger. In addition, the applicant's comparison with Alphabet's Gmail and Microsoft's Outlook services is based solely on the fact that those services have a particular number of business and end users, with no consideration being given to the circumstances in which those services operated as a whole.

144 In the light of the foregoing, the arguments put forward by the applicant to rebut the presumption laid down in Article 3(2)(b) of the DMA must be rejected.

145 Consequently, the first complaint of the third limb of the first plea in law must be rejected as unfounded.

– *The second complaint, relating to the requirement that Messenger should ‘individually’ be an important gateway*

146 The applicant submits that the term ‘individually’ in Article 3(9) of the DMA means that each CPS must undergo a separate and distinct assessment, including as regards the calculation of the number of end-users for the purpose of assessing the thresholds laid down in Article 3(2)(b) of the DMA. It submits, in essence, that the Commission was thus required to use a method to calculate the end users of Messenger that took account only of end users who used that service in a manner that was distinct from its use as the chat functionality of the Facebook online social networking service. The Commission’s adoption of a different approach in the contested decision leads to the inclusion of the users of another CPS and thus to the double counting of users.

147 Furthermore, as regards the number of active business users, the Commission could not rely only on data relating to one week of 2020.

148 The Commission, supported by the French Republic, disputes the applicant’s arguments.

149 As observed in paragraph 113 above, Article 3(2)(b) of the DMA states that an undertaking is to be presumed to satisfy the condition of providing a CPS which is an important gateway if that CPS has in the last financial year at least 45 million monthly active end users established or located in the European Union and at least 10 000 yearly active business users established in the European Union.

150 Article 3(9) of the DMA states that ‘For each undertaking designated as a gatekeeper pursuant to paragraph 4 or 8, the Commission shall list in the designation decision the relevant [CPSs] that are provided within that undertaking and which individually are an important gateway for business users to reach end users as referred to in paragraph 1, point (b)’.

151 In the first place, it should be observed that the term ‘individually’ in Article 3(9) of the DMA does not imply that the Commission was obliged to use a method to calculate the end users of Messenger that took account only of end users who used that service in a manner that was distinct from its use as the chat functionality of the Facebook online social networking service.

152 Article 2, point (20) of the DMA provides that ‘end user’ means ‘any natural or legal person using [CPSs] other than as a business user’. Point (21) of that article states that a business user is ‘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’.

153 Recital 20 of the DMA provides:

‘... Active end users and business users should be identified and calculated in such a way as to adequately represent the role and reach of the specific [CPS] in question. In order to provide legal certainty for gatekeepers, the elements to determine the number of active end users and business users per [CPS] should be set out in an Annex to this Regulation. ...’

- 154 As regards the active end users of a NIICS, the table in Section E of the annex to the DMA, entitled ‘Specific definitions’, states that such users are those ‘who initiated or participated in any way in a communication through the [NIICS] at least once in the month’.
- 155 Consequently, in accordance with the definition of an ‘end user’ of a NIICS set out in the annex to the DMA, the act of using Messenger, namely to initiate or participate in a communication by means of Messenger once in the month, notwithstanding the use of any other service or CPS, is sufficient to be regarded as an active end user for the purposes of Article 3(2)(b) of the DMA. If, as the applicant proposes, account were only taken of some of those users, in particular those with a deactivated Facebook account or those who have used ‘Messenger only’, it would not be possible to ‘adequately represent the role and reach’ of Messenger, as required by recital 20 of the DMA.
- 156 In the second place, it is apparent from recital 197 of the contested decision that the Commission took account of the number of monthly active end users of Messenger. The Commission thus took into account users who made use of Messenger and the fact that they also used another service, in particular the Facebook online social network, had no bearing.
- 157 In that regard, as stated in paragraph 98 above, recital 64 of the DMA explicitly refers to the fact that gatekeepers often provide NIICSs as part of a platform ecosystem. It may thus be the case that a NIICS will be provided in an integrated way with an online social networking CPS and that, in such a configuration, some end users will use both CPSs. Notwithstanding that configuration, Section D(2)(c)(i) of the annex to the DMA requires undertakings providing one or more CPSs to consider the services which they offer in an integrated way, but which do not belong to the same category of CPS pursuant to Article 2, point (2) of the DMA as distinct CPSs (see paragraph 79 above). In addition, Section A(3) of the annex to the DMA states that ‘the same natural or legal person can simultaneously constitute an “active end user” or an “active business user” for different [CPSs]’. Accordingly, the Commission applied those provisions correctly by counting the active end users of Messenger without giving consideration to whether or not those users also used the Facebook online social networking CPS.
- 158 In the third place, as regards the applicant’s argument that the Commission could not, for the purpose of calculating the number of Messenger’s business users, rely merely on the number of business users of that service during a single week of 2020, it should be observed that it is for the undertaking concerned to identify and calculate the number of active end users and active business users, as is apparent from Section A(1) of the annex to the DMA. As set out in Sections 4.1 and 4.2 of Annex I to Commission Implementing Regulation (EU) 2023/814 of 14 April 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the [DMA] (OJ 2023 L 102, p. 6), those data should have been included in the notification. In addition, while it is thus primarily for the undertaking concerned to arrive at the best possible estimate with respect to the calculation of the number of business and end users, there is nothing to prevent the Commission from requiring the undertaking providing CPSs to transmit all the information necessary in order to identify the number of active business users or active end users and calculate them.
- 159 In the present case, it was the applicant itself which provided the data at issue relating to September 2020 with its notification, which data were extrapolated for the years 2020 to 2022, at the Commission’s request. Furthermore, the Commission noted in recital 199 of the contested decision that the applicant had not submitted any other estimate or data on which such an estimate could be based.

160 In the light of the foregoing, the Commission was entitled to find in recital 202 of the contested decision that the calculation of the number of Messenger’s active business users was based on the best possible estimate and to find, on that basis, that the threshold laid down in Article 3(2)(b) of the DMA had been met as regards business users.

161 In the fourth place, the applicant’s argument relating to alleged technological deterrence must be rejected. In that regard, the applicant submits that the method used by the Commission to calculate the number of active end users of Messenger discourages the development of additional standalone features within a service since those features may be classified as separate CPSs that are subject to the obligations of the DMA. However, the applicant fails to explain to the requisite legal standard why such deterrence, assuming it exists, should be taken into account in the process of designating an undertaking as a gatekeeper within the meaning of the DMA. In that regard, it is true that, as is apparent in particular from recital 107 of the DMA, the objective of the DMA is to ensure a contestable and fair digital sector in general and CPSs in particular, with a view to promoting, among other things, innovation. However, it must be stated that Article 3 of the DMA, related to the designation of gatekeepers, does not provide for consideration to be given to technological innovation among the criteria for that designation.

162 Consequently, the second complaint of the third limb of the first plea must be rejected as unfounded.

– The third complaint, alleging that the Commission erred by failing to open a market investigation

163 The applicant submits that the Commission could not find that Messenger was an important gateway without opening a market investigation, pursuant to Article 17(1) or (3) of the DMA. The applicant states that since it had put forward sufficiently substantiated arguments to show that Messenger did not individually constitute an important gateway, the Commission was required, by virtue of the DMA and the principle of sound administration, to carry out a more detailed examination of all the relevant aspects. In addition, it argues that the Commission erred in law and made an error of assessment in suggesting that Article 17(1) of the DMA referred to the opening of a market investigation only when a CPS did not meet the quantitative thresholds in Article 3(2) of the DMA.

164 The Commission, supported by the French Republic, disputes the applicant’s arguments.

165 According to Article 17(1) of the DMA, the Commission ‘may conduct a market investigation for the purpose of examining whether an undertaking providing [CPSs] should be designated as a gatekeeper pursuant to Article 3(8), or in order to identify the [CPSs] to be listed in the designation decision pursuant to Article 3(9)’ and ‘[it] shall endeavour to conclude its market investigation within 12 months from the date [of the opening of the market investigation]’.

166 In accordance with Article 17(3) of the DMA, ‘Where the undertaking providing [CPSs] satisfies the thresholds set out in Article 3(2), but has presented sufficiently substantiated arguments in accordance with Article 3(5) that have manifestly called into question the presumption in Article 3(2), the Commission shall endeavour to conclude the market investigation within 5 months from the date [of the opening of the market investigation].’

167 It follows from the wording of the provisions referred to in paragraphs 165 and 166 above respectively that those provisions concern different situations.

- 168 In the situation referred to in Article 17(1) of the DMA, it is necessary to examine whether an undertaking should be designated pursuant to Article 3(8) of the DMA or to identify the CPSs to be listed in the designation decision pursuant to Article 3(9) of the DMA, despite the fact that the undertaking or the CPSs in question do not satisfy the thresholds set out in Article 3(2) of the DMA. The reference to Article 3(9) of the DMA in Article 17(1) of that regulation thus refers to situations where some of an undertaking's CPSs meet those thresholds, while others do not. In those cases, the Commission has the power to open a market investigation on the basis of Article 17(1) of the DMA in order to assess whether those services meet the requirements of Article 3(1) thereof.
- 169 By contrast, the situation referred to in Article 17(3) DMA applies to undertakings providing CPSs that satisfy the thresholds set out in Article 3(2) of the DMA. In that situation, it is necessary to examine whether the undertaking has presented sufficiently substantiated arguments in accordance with Article 3(5) of the DMA, namely arguments to demonstrate that, exceptionally, although it meets all the thresholds set out in the provision at issue, due to the circumstances in which the CPS operates, it does not satisfy the requirements listed in Article 3(1) of the DMA.
- 170 Consequently, undertakings providing CPSs that satisfy the thresholds laid down in Article 3(2) DMA, as is the case of the applicant with respect to Messenger, do not come within the scope of Article 17(1) of the DMA.
- 171 As regards the argument that the Commission should have opened a market investigation under Article 17(3) of the DMA, it must be observed that the examination of the first and second complaints of the third limb of the first plea has shown that the Commission was fully entitled to find that the applicant had not put forward sufficiently substantiated arguments to demonstrate that, exceptionally, although it met all the thresholds in Article 3(2) of the DMA, due to the circumstances in which Messenger operated, it did not satisfy the requirements listed in Article 3(1) of the DMA. Accordingly, the conditions laid down in Article 17(3) of the DMA for opening a market investigation were not satisfied in any event and the applicant's argument must therefore be rejected.
- 172 As regards the alleged failure to state reasons in the contested decision, because the Commission did not explain why it had decided not to open a market investigation, it should be observed, as regards the application of Article 17(1) of the DMA, that the Commission explained in recitals 215 to 218 of the contested decision why it was not required to open a market investigation on the basis of that provision, which did not cover Messenger's situation, as is confirmed in paragraph 170 above. As regards the statement of reasons for the Commission's decision not to open a market investigation pursuant to Article 17(3) of the DMA, the Commission, in recitals 215 to 232 of the contested decision, as observed in paragraphs 115 to 144 above, assessed the applicant's arguments submitted under Article 3(5) of the DMA and concluded that those arguments were not sufficiently substantiated to manifestly call into question the presumptions laid down in Article 3(2) of the DMA and that they could therefore be rejected without a market investigation being opened under Article 17(3) of the DMA. Since those explanations are clear and unequivocal, in accordance with the case-law cited in paragraph 53 above, the applicant's arguments must be rejected.
- 173 In addition, it is necessary to reject the applicant's arguments alleging discriminatory treatment in comparison with Microsoft's Bing, Edge and Microsoft Advertising services and Apple's iMessage service in the decisions to open a market investigation in their respect pursuant to Article 17(3) of the DMA.

- 174 As observed in paragraphs 64 and 65 above, first, the Commission is required to carry out an individual appraisal of the circumstances of each case, without being bound by previous decisions concerning other economic operators or other CPSs, and, second, the general principle of equal treatment applies to comparable situations.
- 175 In the present case, first of all, it is apparent from the wording of Article 3(5) of the DMA that the Commission ‘may’ open a market investigation in the circumstances provided for in Article 17(3) of the DMA, which means that it has discretion in that regard.
- 176 Next, as regards the Bing, Edge and Microsoft Advertising services, which, moreover, do not belong to the same CPS category as Messenger, the applicant has not explained why those services are in a comparable situation to that of Messenger.
- 177 Lastly, as regards the iMessage service, it should be stated that the Commission decided to open a market investigation into that service after finding that Apple had submitted sufficiently substantiated arguments, manifestly calling into question the presumptions laid down in Article 3(2) of the DMA. However, as pointed out in paragraphs 115 to 144 above, the applicant did not put forward such arguments.
- 178 Accordingly, the third complaint and, therefore, the third limb of the first plea must be rejected.

The fourth limb, alleging infringement of the rights of the defence

- 179 The applicant submits that the Commission infringed its rights of defence by introducing new evidence, on which it relied in the contested decision, without giving it the ability to comment on that evidence during the administrative procedure.
- 180 The Commission, supported by the French Republic, disputes the applicant’s arguments.
- 181 Despite the fact that decisions adopted under the second subparagraph of Article 3(5) of the DMA, such as the contested decision, are not referred to in Article 34(1) of the DMA, entitled ‘Right to be heard and right of access to the file’, the EU Courts must guarantee all the rights of defence of gatekeepers, including their right to be heard (see, to that effect, judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraphs 340 to 343).
- 182 The right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely (see judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 344 and the case-law cited).
- 183 Accordingly, the Commission cannot claim that, by including ‘the main points of potential disagreement on certain key issues included in the notification’ and ‘the main arguments on the basis of which [its] preliminary view diverged from those put forward by [the applicant] in its notification’ in the preliminary view, it went beyond the level of protection of the right to be heard set out in the DMA. Since the right to be heard extends to all the matters of fact and law which form the basis of the decision-making act, the Commission was in fact obliged to hear the applicant on those points.

- 184 While the right to be heard extends to all the matters of fact and of law which form the basis of the decision-making act, it does not extend to the final position which the administration intends to adopt (see judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 349 and the case-law cited).
- 185 In the present case, it is apparent from the file that the applicant was heard on several occasions before the adoption of the contested decision. Accordingly, first of all, there were at least six meetings between the applicant and the Commission before the notification, on 26 October and on 8 and 15 December 2022, and on 9 January, 16 May and 6 June 2023. In addition, it is apparent from the file that at least seven requests for information were sent to the applicant during the period preceding that notification. Subsequently, after the notification was submitted on 3 July 2023, the Commission sent the applicant the preliminary view on 26 July 2023 and gave it the opportunity to set out its position, which the applicant did by two letters, dated 3 and 13 August 2023 respectively.
- 186 However, the applicant submits that, despite the exchanges referred to in paragraph 185 above, it did not have the possibility to submit observations on the arguments and evidence set out in footnotes 144 to 148, 151, 154, 158 and 193 to 195 of the contested decision, which provide a basis for recitals 177, 179, 180, 221 and 222 thereof.
- 187 In the first place, the Commission referred in footnotes 144 to 148 and 151 of the contested decision, set out in recital 177 thereof, to arguments and evidence intended to support its position that Messenger had evolved into a NIICS that was distinct from the Facebook online social networking CPS. Accordingly, the Commission observed in those footnotes that standalone Messenger applications had been developed for mobile devices using the iOS and Android operating systems (footnote 144), for Windows and iMac (footnote 145), for iPads (footnote 146), for the applicant's virtual reality devices (footnote 147), and that the applicant had a dedicated website for Messenger (footnote 148). Furthermore, in footnote 151, the Commission cited a public statement by the applicant's chief executive officer (CEO), in which he used Messenger as an example to illustrate his argument that some of Facebook's functionalities had developed to become 'standalone experiences'.
- 188 Recital 177 of the contested decision is part of the Commission's assessment related to Messenger being a NIICS CPS, and not merely the chat functionality of the Facebook online social networking CPS. More specifically, the Commission found in that recital that Messenger had evolved to become a NIICS that was distinct from the Facebook online social networking CPS.
- 189 However, the issue of the evolution of Messenger into a distinct NIICS CPS was discussed during the administrative procedure. In particular, the arguments set out in recital 177 of the contested decision were included in point 39(d) of the preliminary view. The applicant replied to those arguments, in particular in paragraph 3.9(a)(ii) of its letter of 3 August 2023. Accordingly, the applicant was given the possibility to submit its observations on the Commission's position that was supported, inter alia, by the evidence in footnotes 144 to 148 and 151, according to which Messenger had in fact evolved to become a distinct CPS.
- 190 In any event, the footnotes at issue were supplementary in nature to the evidence intended to show that Messenger had evolved into a distinct CPS. Indeed, the Commission asserted in recitals 176 to 182 of the contested decision that Messenger was a distinct CPS by relying on

other arguments and evidence in respect of which the applicant does not claim that it was denied the possibility to submit its observations, in particular those referred to in footnotes 149, 150, 152, 153, 155 to 157 and 160 of the contested decision and in recitals 176 to 182 thereof.

- 191 In the second place, footnote 154 of the contested decision, which appears in recital 179 thereof, contains a reference by the Commission, used as one of its arguments, to a page from the Facebook website concerning the possibility of using Messenger as a communication channel on Instagram, instead of the Instagram Direct function.
- 192 Recital 179 of the contested decision is part of the Commission's assessment that Meta, in its own marketing communications and in communications to investors and users, conceived, presented and positioned Messenger as a distinct CPS. More specifically, the Commission found in that recital, *inter alia*, that it was apparent from those communications that the alleged intrinsic nature of the link between Messenger and the online social network Facebook was not as important as the applicant argued, given the existence of similar links between that NIICS and other Meta services, in particular between Messenger and Instagram.
- 193 In that regard, first, it should be observed that the link between Messenger and Facebook was discussed during the administrative procedure. The Commission, in paragraph 39(d), *in fine*, of the preliminary view, questioned the applicant's claim concerning that link. In addition, by requests for information of 9 March and 30 May 2023, the Commission put questions to the applicant concerning the possibility of using Messenger on Instagram. Accordingly, the applicant had the opportunity to submit its observations on the findings of fact in recital 179 of the contested decision, related to the possibility to use Messenger to communicate on Instagram, and to the conclusions that could be drawn therefrom as regards the link between Messenger and Facebook.
- 194 Second, the Commission's conclusion in recital 179 that the link between Facebook and Messenger was not as important as the applicant claimed was based on other arguments and evidence in respect of which the applicant does not claim that it has been denied the opportunity to submit its observations, in particular those set out in footnotes 152, 153, 155 and 156 of the contested decision.
- 195 Third, as is apparent from paragraph 23 of its reply to the request for information of 9 March 2023 and from paragraph 23(c) of its reply to the request for information of 30 May 2023, the applicant did not dispute in the course of the administrative procedure that it was possible to use Messenger as a communication channel on Instagram instead of the Instagram Direct functionality.
- 196 In the third place, the Commission, in footnote 158 of the contested decision, appearing in recital 180 thereof, referred as evidence to a public statement by the applicant, from an earnings call, which mentions that Messenger is a major monetisation opportunity.
- 197 Recital 180 of the contested decision also appears within the Commission's assessment that Meta, in its own marketing communications and in communications intended for investors and users, designed, presented and positioned Messenger as a distinct CPS. More specifically, the Commission found *inter alia* in that recital that, in communications to investors, the applicant highlighted the monetisation possibilities of the Messenger service as such, referring to the advertising tools 'click-to-message' and 'paid messaging'.

- 198 In that regard, first, the question of the strategy of positioning Messenger as a standalone service, which was apparent, *inter alia*, from Meta's communications to investors, was discussed during the administrative procedure. The Commission stated in paragraph 39(d) of the preliminary view that Meta had developed a strategy to position Messenger as an autonomous service, referring to its commercial and financial communications to users and investors. Accordingly, in footnote 59 of the preliminary view, the Commission cited an example of such a communication, namely the Form 10-K for the financial year which ended on 31 December 2022, which is also referred to in footnote 157 of the contested decision. The applicant replied to that argument, in particular in paragraph 3.9 of its letter of 3 August 2023.
- 199 Second, the Commission indicated in recital 180 of the contested decision that Meta's strategy was to position Messenger as a distinct CPS, relying on the evidence referred to in footnote 157 of the contested decision, in respect of which the applicant does not claim that it had been denied the opportunity to present its observations.
- 200 Third, as is apparent from paragraph 3.9 of the applicant's letter of 3 August 2023, the applicant did not dispute in the administrative procedure that Meta had developed a strategy to position Messenger as a standalone service, but merely questioned the relevance of taking that strategy into account for the classification of Messenger as a NIICS for the purposes of the DMA.
- 201 In the fourth place, the Commission, in footnote 193 of the contested decision, appearing in recital 221 thereof, cited as evidence the Statista survey and a report by BEREC on EU consumer perceptions and behaviour on digital platforms for communication. As regards the Statista survey, the applicant submits that the Commission used that evidence to show that Messenger exceeded the quantitative thresholds for designation as an important gateway by 'a very large margin', without giving it the opportunity to submit its observations.
- 202 Recital 221 of the contested decision is part of the analysis of the rebuttal of the presumption in Article 3(2)(b) of the DMA, it being noted that the Commission found that Messenger was one of the most widely used online communication services in the European Union.
- 203 In that regard, first, the issue of Messenger's position in relation to other communication services was discussed during the administrative procedure. The Commission in fact observed in paragraph 47(b) of the preliminary view that public reports and other publicly available sources indicated that Meta was one of the most widely used communications services providers in the European Union. Furthermore, the Commission cited the BEREC report, referred to in footnote 193 of the contested decision, in footnote 77 of the preliminary view. The applicant submitted observations on that evidence, in particular in paragraph 3.17 of its letter of 3 August 2023.
- 204 Second, the fact that Messenger exceeded the quantitative thresholds by 'a very large margin' is established by the data concerning the business and end users of that service, communicated to the Commission by the applicant, with the Statista report serving only to confirm those items of evidence. Furthermore, the Commission's rejection of the applicant's argument that Messenger was not an important gateway is not based solely on the fact that that service greatly exceeded the applicable thresholds, but also on arguments and evidence in respect of which the applicant does not claim that it did not have the opportunity to submit its observations, in particular the BEREC report, which shows that Messenger is the second most widely used communication application after WhatsApp in the countries surveyed, and on Messenger's high penetration rate among end users in the European Union.

- 205 In the fifth place, as regards recital 222 of the contested decision, which is based on the items of evidence in footnotes 194 and 195 of that decision, it should be noted that this is also part of the analysis of the rebuttal of the presumption laid down in Article 3(2)(b) of the DMA. In particular, the Commission found that Messenger offered tools for business users so that they could communicate with end users. In footnote 194, the Commission referred to Meta's website, which confirmed that the tools in question were being offered. The Commission also found that Meta offered advertising tools to undertakings aimed at ensuring that users were sent to a Messenger conversation and that such campaigns constituted an important source of revenue for Meta. In order to support the finding that the 'click-to-message' advertising tools on Messenger were an important source of revenue for Meta, the Commission, in footnote 195, cited a public statement from a results conference call and remarks by the applicant's CEO in a news article.
- 206 In that regard, first, the issue of the tools that Meta offered to business users on Messenger was discussed during the administrative procedure. The Commission had in fact already noted in paragraph 47(a) and (b) of the preliminary view that the applicant offered tools for business users on Messenger. The applicant replied to that observation, in particular in paragraph 3.16(d) of its letter of 3 August 2023.
- 207 Second, the applicant does not claim that it did not have the opportunity to comment on the content of recital 222 of the contested decision, according to which it offered additional tools for connecting to a messaging service.
- 208 Third, as is apparent from paragraph 3.16(d) of its letter of 3 August 2023, the applicant disputed in the administrative procedure only the relevance of taking into account the fact that it offered tools for business users on Messenger, and not that fact itself.
- 209 In the light of the foregoing, it must be held that the applicant's right to be heard has not been infringed. Consequently, the fourth limb of the first plea must be rejected as unfounded and, accordingly, the first plea must be dismissed in its entirety.

The second plea, concerning the classification of Marketplace as a CPS that is an important gateway

- 210 The second plea is divided into five limbs, alleging:
- first, that the Commission misinterpreted and misapplied Article 2, point (5) of the DMA by designating Marketplace as an OIS CPS, having regard in particular to the legal test for the assessment of the definition of an OIS set out by the Commission in recital 266 of the contested decision, according to which undertakings had to have been 'enabled in practice' to offer goods or services to consumers in order to meet that definition;
 - second, that even if the Court were to consider in the context of the first limb that the legal test set out in recital 266 of the contested decision was correct, that decision fails to establish that Marketplace met that test, in particular because the Commission erred by failing to take account of the changes made on 30 January 2023, by which Meta removed the possibility offered to undertakings in France and Germany to use their Facebook business page to list certain categories of items, namely vehicles and property, on Marketplace;
 - third, that the Commission failed to take into account the changes made on 31 July 2023, according to which Marketplace users could not publish more than 20 listings in total in each

‘items’ category during one month, and not more than 5 listings in each of the ‘Vehicles’, ‘Auto parts’ and ‘Properties for sale or rent’ categories (‘the changes of 31 July 2023’), of which the Commission was informed by the applicant before the adoption of the contested decision;

- fourth, that the Commission erred in finding that Marketplace was individually an important gateway, by rejecting the arguments and evidence submitted by the applicant during the administrative procedure under Article 3(5) of the DMA as manifestly not calling into question the presumptions laid down in Article 3(2) thereof, without opening a market investigation under Article 17(1) or (3) of that regulation;
- fifth, that the Commission introduced new evidence for the first time in the contested decision, in breach of an essential procedural requirement.

211 The Court considers it appropriate to begin by analysing the arguments made in relation to the time frame which the Commission took into account in the contested decision in order to classify Marketplace as an OIS and those in relation to whether the statement of reasons as regards the changes of 31 July 2023 in the contested decision is insufficient.

212 The applicant claims in the second and third limbs of the second plea, *inter alia*, that by failing to take into consideration relevant facts concerning Marketplace which arose between January 2023 and the adoption of the contested decision, in particular the changes made on 30 January and on 31 July 2023, or, at the very least, by failing to give them sufficient weight, the contested decision is vitiated by errors of law and manifest errors of assessment.

213 In particular, it argues that the Commission erred in considering that it was not required to take into account the changes to Marketplace implemented in 2023, prior to the adoption of the contested decision, in determining whether Marketplace could be designated as an OIS CPS. The applicant argues that the Commission, by taking that approach, erred in law since Article 2, points (2) and (5) of the DMA must be interpreted as meaning that the application of those provisions must be based on all the evidence that exists at the time of designation. In addition, the Commission infringed its obligation to conduct a diligent and impartial examination in order to have at its disposal, when adopting its decision, the most complete and reliable information.

214 Furthermore, the applicant claims that the contested decision lacks sufficient reasoning as regards the designation of Marketplace as an OIS CPS. In addition, it submits that the Commission, by failing to take into account the changes of 31 July 2023, breached its duty of good administration. In response to the measure of organisation of procedure of 28 March 2025, by which the Court asked the parties to state their views on whether the contested decision is sufficiently reasoned as regards the changes of 31 July 2023, the applicant added that the contested decision contained no meaningful reasoning to explain why the Commission had found, following the changes of 31 July 2023, that there could still be a material number of business users on Marketplace, let alone why and how the number of those businesses justified considering that service as an important gateway for those users.

215 In addition, the applicant submits that the effect of the changes of 31 July 2023 was that no Marketplace user could be classified as a power seller in the sense used in the contested decision to identify business users on Marketplace, that is to say, in the sense of a user established or located in the European Union which has created at least 28 listings in any month of the financial year and of which at least 80% of the listings fall into the same category (‘a power seller’). Those changes in fact limited the number of listings to 20 in the same category and to 5 in each of the

‘Vehicles’, ‘Auto parts’ and ‘Properties for sale or rent’ categories in the same month. Hence, Marketplace no longer had business users on the date of the adoption of the contested decision according to the approach used by the Commission based on the power sellers proxy, upon which it itself had chosen to rely. Consequently, the reasoning in the contested decision does not meet the requisite legal standard as regards the B2C use of Marketplace following those changes.

- 216 As regards the time frame applied in order to classify Marketplace as an OIS, in the defence, the Commission maintained the position set out in recital 256 of the contested decision, in section 5.6.1 thereof on the qualification and delineation of Marketplace, which states that, for the purpose of designation under Article 3 of the DMA, it had to consider information from the last three financial years before the designation at issue, namely information from 2020 to 2022. Consequently, according to that recital, the fact that Meta had implemented changes in January 2023 and was planning to implement further changes, all of which sought to restrict the possibility of Marketplace being used by business users, had no bearing on the Commission’s finding that Marketplace was not an exclusively C2C platform.
- 217 In addition, the Commission stated that it had in fact considered all the evidence available to it when the contested decision was adopted, including the changes of 31 July 2023, in determining whether Marketplace constituted an OIS under Article 2, point (5) of the DMA. Accordingly, it argues that the applicant’s argument relating to the relevant time frame for assessing the classification of a CPS is ineffective.
- 218 As regards the statement of reasons for the contested decision concerning the changes of 31 July 2023, the Commission maintains that it provided sufficient reasoning in the contested decision to justify its position. In particular, in response to the measure of organisation of procedure of 28 March 2025, the Commission submitted that recitals 256 to 262 of that decision explained the reasons why the changes of 31 July 2023 had not altered its assessment that Meta enabled business users to use Marketplace to offer items to consumers, and thus that Marketplace was an OIS.
- 219 Article 3(1) of the DMA provides that an undertaking is to be designated as a gatekeeper where it meets the following three cumulative requirements:
- ‘(a) it has a significant impact on the internal market;
 - (b) it provides a core platform service which is an important gateway ...
 - (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.’
- 220 Article 3(2)(b) of the DMA provides that an undertaking is to be presumed to satisfy the requirement laid down in paragraph 1, point (b) of that article where it provides a CPS that in the last financial year has at least 45 million monthly active end users established or located in the European Union and at least 10 000 yearly active business users established in the European Union, identified and calculated in accordance with the methodology and indicators set out in the annex to the DMA.
- 221 Article 3(2)(c) of the DMA provides that an undertaking is to be presumed to satisfy the requirement laid down in paragraph 1, point (c) of that article where the thresholds referred to in paragraph 1, point (b) thereof have been met in each of the last three financial years.

- 222 In the light of the abovementioned provisions, it is true, as the Commission observes, in essence, in recital 265 of the contested decision, that the question of whether an undertaking meets the thresholds laid down in Article 3(2)(c) of the DMA requires a retrospective examination that covers the last three financial years preceding designation.
- 223 In that regard, it should be observed that the DMA lays down an *ex ante* regulatory system according to which business users and end users of CPSs provided by gatekeepers designated as such by the Commission should be afforded certain regulatory safeguards (see, to that effect, recital 7 of the DMA). Consequently, according to Article 3(10) of the DMA, an undertaking designated as a gatekeeper must comply with the obligations laid down in Articles 5 to 7 of that regulation within six months of a CPS being listed in the designation decision.
- 224 However, the issue of the classification of a CPS for the purposes of Article 2, point (2) of the DMA, which involves a qualitative assessment linked to the nature of the CPS, differs from that of whether an undertaking satisfies the quantitative thresholds laid down in Article 3(2) of the DMA as regards that service, which, assuming they are met, gives rise to the presumption that the requirements laid down in paragraph 1 of that article are satisfied.
- 225 In particular, in contrast to what is foreseen for the assessment of whether the quantitative thresholds set out in Article 3(2) of the DMA are met, the EU legislature has not provided that the assessment of the classification of a CPS service under Article 2, point (2) of the DMA must be carried out on the basis of information relating to a period preceding the year of designation.
- 226 Absent such a time limitation for the purposes of classifying a service, it should be observed that the legality of an EU act must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see judgments of 18 July 2013, *Schindler Holding and Others v Commission*, C-501/11 P, EU:C:2013:522, paragraph 31 and the case-law cited, and of 4 October 2024, *García Fernández and Others v Commission and SRB*, C-541/22 P, EU:C:2024:820, paragraph 327 and the case-law cited). Furthermore, the Commission is required, in the interests of sound administration, to conduct its examination diligently and impartially, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (see, to that effect and by analogy, judgments of 14 May 2020, *Agrobet CZ*, C-446/18, EU:C:2020:369, paragraphs 43 and 44 and the case-law cited, and of 10 November 2022, *Commission v Valencia Club de Fútbol*, C-211/20 P, EU:C:2022:862, paragraph 78 and the case-law cited).
- 227 In response to the questions put by the Court in that regard at the hearing, the Commission stated that, in its view, the changes made to Marketplace from January 2023 up to the adoption of the contested decision were indeed relevant to the question of whether Marketplace was an OIS. Accordingly, it indicated that it no longer maintained the position, summarised in paragraph 216 above, relating to the relevant time frame for assessing the classification of a CPS service set out in recital 256 of the contested decision.
- 228 It should be added that the Commission's initial position set out in recital 256 of the contested decision is, moreover, not compatible with Article 3(3) of Implementing Regulation 2023/814, which lays down, inter alia, an obligation for a notifying undertaking, while the notification is under review, to communicate without undue delay any material changes in the facts presented in the notification to the Commission.

- 229 In those circumstances, it must be concluded, first, that the Commission applied an incorrect legal time frame in assessing whether Marketplace should be classified as an OIS CPS insofar as its position expressed in recital 256 of the contested decision confuses the time frame relevant for examining whether the threshold in Article 3(2)(c) of the DMA is met, which is restricted to the last three financial years preceding designation, with the time frame relevant for assessing the classification of a CPS service, in accordance with Article 2, point (2) of the DMA, for which the EU legislature has not provided for any such retrospective examination.
- 230 Second, it is necessary to examine the impact of that error of law on the lawfulness of the contested decision, since the Commission submits in the alternative that it in any event took account of the changes of 31 July 2023 when finding that Marketplace, at the time of the adoption of the contested decision, was an OIS CPS within the meaning of Article 2, point (2) of the DMA.
- 231 According to the case-law, an error in the reasoning of the contested act does not lead to the annulment of that act if, in the particular circumstances of the case, that error could not have had a decisive effect on the outcome (see judgment of 17 July 2024, *Bytedance v Commission*, T-1077/23, under appeal, EU:T:2024:478, paragraph 112 and the case-law cited).
- 232 In that regard, it is necessary to examine whether the statement of reasons in the contested decision relating to the changes of 31 July 2023 is sufficient, a question which is raised in the third limb of the second plea (see paragraphs 214 and 215 above).
- 233 The Commission observed in recital 247 of the contested decision that Article 2, point (5) of the DMA defines OISs as online intermediation services within the meaning of Article 2, point (2) of 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 2019 L 186, p. 57). According to the latter provision, in order to satisfy the definition of an OIS, a service must, among other conditions, 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 ('the second condition of the definition of an OIS').
- 234 The Commission, in classifying Marketplace as an OIS within the meaning of Article 2, point (5) of the DMA, used the power sellers proxy to identify business users on Marketplace.
- 235 The Commission thus explained in recital 258 of the contested decision that, on the date of adoption of that decision, business users could act in a commercial or professional capacity by listing products and services intended for consumers on Marketplace through their personal Facebook profile. Although there was no 'official identification' of those users by the applicant, the Commission found that a high number of listings of the same kind could indicate that a user was acting in a professional or commercial capacity and that those users should also be considered as business users. In that regard, the Commission observed that the applicant, for internal purposes, used a similar proxy related to power sellers in order to identify users with a high number or frequency of listings and stated that, using the power sellers proxy, the number of those business users, according to the figures provided by the applicant, was [$>100\,000$] in 2020, [$>100\,000$] in 2021 and [$>100\,000$] in 2022.

- 236 In recital 259 of the contested decision, the Commission found that the applicant's argument that end users could legitimately generate a high number of listings within a category in the same month for non-commercial reasons was irrelevant since that did not, in any event, exclude business users from using Marketplace with their personal profile to publish listings in a commercial or professional capacity. The Commission found that, even if some end users may be able to generate a high number of listings for non-commercial reasons, the data based on the proxy used in the applicant's internal systems identified a number of users which exceeded by a large degree the yearly active business users threshold laid down in Article 3(2)(b) of the DMA.
- 237 The Commission stated in recital 260 of the contested decision that, consequently, the changes that the applicant had made to Marketplace as of January 2023 did not affect the fact that business users could still be active on Marketplace through their personal profile. According to the Commission, that finding held even if the changes had resulted in a number of business users who published listings through their Facebook business page leaving the platform or listing through their personal profiles. In any event, according to the Commission, the large majority of business users on Marketplace were already listing products using their personal profile.
- 238 In addition, in recital 261 of the contested decision, the Commission reproduced three screenshots which it identified as recent examples, among others, of listings on Marketplace by business users through their personal profile.
- 239 In recital 262 of the contested decision, the Commission stated that whether a user should be considered a business user due to the number and frequency of listings on Marketplace depended on the facts of each case. The Commission observed in that regard that users creating 20 listings of furniture or 5 listings of properties for sale or rent per month, in accordance with the future limitations that Meta was in the process of implementing, could still be considered business users depending on the factual circumstances.
- 240 As stated in paragraph 53 above, according to settled case-law, the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the court having jurisdiction to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and all the legal rules governing the matter in question.
- 241 It is also apparent from the case-law that the statement of reasons for a decision adopted by an EU institution or body must, inter alia, not contain contradictions so that the addressees are able to know the real reasons for that decision, with a view to defending their rights before the court with jurisdiction, and so that the court can exercise its power of review (see judgment of 22 January 2025, *Norddeutsche Landesbank – Girozentrale v SRB (Contributions ex ante 2022)*, T-407/22, not published, EU:T:2025:56, paragraph 193 and the case-law cited).

- 242 It is in the light of those considerations that the Court must examine whether the statement of reasons in the contested decision relating to the changes of 31 July 2023 is sufficient.
- 243 In the first place, it should be observed that the changes of 31 July 2023 are treated at most in a marginal fashion in the contested decision.
- 244 First, the reasoning in recital 262 of the contested decision is vague and hypothetical. After referring to the future limitations that Meta was in the process of implementing as regards the possibility for Facebook users to use their personal profile for business purposes – which the Commission contends should be understood as a reference to the changes of 31 July 2023 – the Commission notes that such users ‘could still be considered business users depending on the factual circumstances’.
- 245 However, in recital 262 of the contested decision the Commission does not provide any specific analysis of the changes of 31 July 2023 in order to support its finding that, despite the implementation of those changes, Marketplace satisfied the second condition of the definition of an OIS.
- 246 In addition, recital 262 of the contested decision states that the question of whether a user should be considered as a business user due to the number and frequency of its listings ‘depends on the facts of each case’. However, the Commission failed to specify the circumstances which it considered to be relevant in the present case in order to discount the impact of the changes of 31 July 2023, such that its statement of reasons is incomplete.
- 247 Second, in its response of 3 August 2023 to the preliminary view and in its pleadings before the Court, the applicant stated, without being contradicted on that point by the Commission, that the changes of 31 July 2023 meant that there were no longer any business users of Marketplace as identified on the basis of the power sellers proxy used by the Commission.
- 248 As observed in paragraph 215 above, the changes of 31 July 2023 provided for a limitation on the number of listings a user could publish, namely a maximum of 20 listings in the same listing category in one month, that maximum number of listings being below the threshold for considering a user as a power seller.
- 249 As noted in paragraph 234 above, it was the Commission itself that chose to rely on the power seller proxy in order to identify business users of Marketplace.
- 250 Accordingly, recital 262 of the contested decision does not make it possible to understand, in a clear and unequivocal manner, the reasons why the Commission concluded that the second condition of the definition of an OIS, relating to the use of the service by business users, was satisfied on the date on which the contested decision was adopted.
- 251 Third, again according to recital 262 of the contested decision, the Commission described the changes of 31 July 2023 as ‘future limitations that Meta is in the process of implementing’.
- 252 In that regard, it is apparent from the file that the applicant duly informed the Commission, during the administrative phase, of the nature and scope of the changes of 31 July 2023 and of their impact on the proxy on which the Commission had chosen to rely in order to identify business users on Marketplace.

- 253 Indeed, in its notification of 3 July 2023, the applicant informed the Commission that it was currently in the process of implementing the decision to limit the number of listings that an end user was able to make on Marketplace per month to a maximum of 20 listings in the ‘Items’ category and to 5 listings in the ‘Vehicles’ and ‘Properties for sale or rent’ categories. Accordingly, it stated that once those changes had been made, there would no longer be any power sellers on Marketplace.
- 254 Subsequently, in its reply of 3 August 2023 to the preliminary view, the applicant informed the Commission of the nature and exact scope of the changes which it had just implemented on 31 July 2023.
- 255 Consequently, when the contested decision was adopted, the Commission had been informed that the changes of 31 July 2023 were not future limitations that Meta was in the process of implementing, but limitations that Meta had already implemented, after having announced them in its notification. As established in paragraphs 219 to 229 above, the Commission was required to take them into account.
- 256 However, the contested decision does not contain any reasoning to explain why, notwithstanding that information, the Commission treated those amendments in recital 262 of that decision as ‘future limitations that Meta is in the process of implementing’.
- 257 For all of those reasons, recital 262 of the contested decision does not disclose in a clear and unequivocal fashion the reasons why, following the changes of 31 July 2023, the Commission found that Marketplace fulfilled the second condition of the definition of an OIS.
- 258 In the second place, contrary to what the Commission claims in response to the measure of organisation of procedure of 28 March 2025, the other recitals of the contested decision cannot remedy that insufficient reasoning.
- 259 In its response to the measure of organisation of procedure of 28 March 2025, the Commission submits that recitals 256 to 261 of the contested decision explain why the changes of 31 July 2023 did not alter its view that Meta enabled business users to use Marketplace to offer items to consumers, and thus that Marketplace met the second condition of the definition of an OIS.
- 260 However, the mere assertion that a user may act for commercial purposes by publishing listings on Marketplace through its personal Facebook profile, even when accompanied by two screenshots that post-dated the changes of 31 July 2023, does not make it possible to understand, in a clear and unequivocal manner, why the Commission found that Marketplace fulfilled the second condition of the definition of an OIS following the changes of 31 July 2023.
- 261 Furthermore, the argument made by the Commission, that it had already communicated to the applicant, in its preliminary view, its position concerning the changes of 31 July 2023, when they had not yet been implemented, cannot succeed. In that view, the Commission stated that the future changes that Meta was planning to implement to prevent Marketplace from being used by business users did not seem capable of changing the classification of Marketplace as an OIS since they did ‘not prevent users from using their personal profile in a commercial or professional capacity for the purpose of, or in the course of, providing goods or services to end users’. It should be observed that, for the same reasons underlying the finding in paragraph 260 above, the

ground set out in that preliminary view is not a clear and unequivocal statement of reasons enabling the applicant and the Court to understand why, after the changes of 31 July 2023, the second condition of the definition of an OIS was satisfied.

262 Accordingly, it must be concluded that the applicant is not in a position to ascertain the justification for classifying Marketplace as an OIS following the changes of 31 July 2023 and that it is impossible for the Courts of the European Union to exercise their power of review in that regard, with the result that the statement of reasons for the contested decision on that point does not satisfy the requirements of the case-law referred to in paragraphs 240 and 241 above.

263 The Commission's other arguments do not invalidate that conclusion.

264 First, the Commission submits that a user could be regarded as a business user depending on the circumstances, since it could, while complying with the limitation on the number of listings imposed by the changes of 31 July 2023, publish 240 new listings a year in the same category. Moreover, a single listing could concern the sale of several items or of several varieties of items.

265 However, neither the claim that it may be possible for a user to publish 240 listings a year in the same category, nor the hypothetical assertion that a user could, depending on the circumstances, be a business user by publishing a single listing for the sale of a large number of items, are mentioned in the contested decision. In any event, as observed in paragraph 247 above, the applicant stated, without being contradicted in that regard by the Commission, that the effect of the changes of 31 July 2023 was that Marketplace no longer included any business users on the basis of the power sellers proxy that the Commission had itself chosen to apply in order to identify them. Accordingly, that argument is not capable of calling into question the finding in paragraph 262 above that the statement of reasons for the contested decision, as regards consideration of the changes of 31 July 2023, does not satisfy the case-law requirements referred to in paragraphs 240 and 241 above.

266 Second, while it is true, as the Commission maintains, that a mere formal change to the terms and conditions applicable to business users is not as a rule sufficient to preclude the possibility that a service constitutes an OIS, that fact does not relieve the Commission of the obligation to provide appropriate and sufficient reasons to explain how it took such a change into account, particularly since, as observed in paragraph 247 above, according to the applicant, which was not contradicted in that regard by the Commission, the effect of those changes was that Marketplace no longer had any business users on the basis of the power sellers proxy used by the Commission to identify them in the contested decision.

267 Third, the Commission submits that the threshold of 10 000 business users laid down in Article 3(2)(b) of the DMA was exceeded by a large margin in each of the last three financial years preceding designation. Consequently, according to the Commission, it is unclear how simply limiting users to 20 listings a month in each 'items' category, with no more than 5 listings in each of the 'Vehicles', 'Auto parts' and 'Properties for sale or rent' categories could eliminate enough business users on Marketplace so that their number no longer exceeds that 10 000 threshold.

268 However, the Commission was obliged to explain in the contested decision how Marketplace could be regarded, following the changes of 31 July 2023, as a service which satisfied the second condition of the definition of an OIS. Nevertheless, as pointed out in paragraphs 244 and 245 above, it is not apparent from the contested decision that the Commission carried out a specific analysis of those changes. In addition, as has been held in paragraphs 219 to 229 above, the

Commission could not, in the context of the classification of Marketplace as an OIS CPS, limit itself to information relating to the last three financial years preceding designation. Accordingly, the fact that the threshold at issue was exceeded by a large margin in those financial years is not a sufficient ground for finding that Marketplace satisfied the second condition for the definition of an OIS at the time of the contested decision.

269 Accordingly, the Commission's additional arguments must be rejected.

270 In the light of all of the foregoing, it is necessary to uphold, (i), the second and third limbs of the second plea in law, in that the Commission erred in law when determining the applicable time frame for classifying Marketplace as an OIS, in so far as it found that it was required to take into consideration only the information from the last three financial years preceding the designation and, (ii), the third limb of the second plea, in that the Commission infringed its obligation to state reasons relating to the justification for classifying Marketplace as an OIS despite the changes of 31 July 2023.

271 Accordingly, Article 2(f) of the contested decision must be annulled, without there being any need to examine the other arguments relied on by the applicant in support of the second plea, and the action must be dismissed as to the remainder.

Costs

272 Article 134(3) of the Rules of Procedure state that where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

273 In the present case, since each of the main parties has been unsuccessful in part, the Court considers that it will be fair in the circumstances of the case to order each of them to bear its own costs.

274 In addition, under Article 138(1) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. Accordingly, the French Republic is to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, sitting with five Judges)

hereby:

- 1. Annuls Article 2(f) of Commission Decision C(2023) 6105 final of 5 September 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;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders Meta Platforms, Inc., the European Commission and the French Republic to bear their own respective costs.**

Van der Woude

De Baere

Petrлік

Kecsmár

Kingston

Delivered in open court in Luxembourg on 3 June 2026.

V. Di Bucci
Registrar

M. van der Woude
President

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