



Assessing the Digital Markets Act's Effectiveness: Article 5(2), Behavioural Advertising, and the “Hidden Costs of Compliance”

Beatrice Lupacchini*

SUMMARY: 1. Introduction. – 2. The rationale behind Article 5(2). – 3. The prohibitions under Article 5(2). – 4. Exemption conditions: “specific choice”, the “less personalised but equivalent alternative” and the “DMA-Compliant” consent. – 5. *Meta/Bundeskartellamt*: ex ante codification under the DMA and the “if necessary for an appropriate fee”. – 6. Meta: “Consent or Pay” and non-compliance decision. – 7. The law and economics of the “less personalised” alternative: envisioning the future of behavioural advertising. – 8. The 2026 advertising landscape: the Meta offer. – 9. Is the DMA delivering on its promises? The hidden costs of compliance.

1. Introduction

Is the Digital Markets Act (hereafter the DMA)¹ delivering on its promises?

* Ph.D. in European Union Law, Competition Law, University of Macerata, Italy.

¹ Regulation (EU) 2022/1925 of the European Parliament and of the Council, of 14 September 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

The DMA embodies an unprecedented ambition: to overcome the structural limits of *ex post* antitrust enforcement, built on case-by-case assessments of individual conduct,² in order to guarantee «fairness and contestability»³ in European digital markets. To achieve those objectives, it provides an *ex-ante* regime for gatekeepers⁴ – a set of obligations and prohibitions⁵ – designed to reshape the structural conditions of access and intermediation before market outcomes become entrenched, closed, difficult to challenge, and capable of self-reinforcing over time.⁶

Nearly two years after its entry into force, the DMA calls for a first evaluation. The benchmark is not the legislative aspiration, but its effectiveness: whether the regime can generate substantive and verifiable, rather than merely formal, improvements in market contestability and in the benefits accruing to European SMEs and end users.⁷ This effectiveness inquiry bears directly on the legitimacy of the *ex-ante* model. If compliance can be achieved only through formal adjustments or design choices that preserve the underlying advantages the DMA seeks to curb, the regime risks falling short of its rationale. Conversely, if the obligations operate as effective constraints in

² *Ivi*, Recital No. 70; V. H. S. E. ROBERTSON, *The complementary nature of the Digital Markets Act and the EU antitrust rules*, in *Journal of Antitrust Enforcement*, 2024, p. 325 ff.

³ Digital Markets Act, Art. 1, the objective is to ensure «contestable and fair markets in the digital sector across the Union where gatekeepers are present, to the benefit of business users and end users».

⁴ *Ivi*, Art. 3, «gatekeeper» refers to undertakings providing core platform services that meet the qualitative and quantitative criteria for designation.

⁵ *Ivi*. The Digital Markets Act contains 19 “do’s and don’ts”, set out in Art. 5 (self-executing obligations), Article 6 (which may be subject to specification under Article 8), and the interoperability obligations laid down in Article 7.

⁶ See: A. FLETCHER, J. CRÉMER, P. HEIDHUES, G. KIMMELMAN, G. MONTI, R. PODSZUN, M. SCHNITZER, F. SCOTT MORTON, A. DE STREEL, *The Effective Use of Economics in the EU Digital Markets Act*, in *Journal of Competition Law & Economics*, 2024, p. 14 ff.

⁷ The DMA is built around expressly outcome-oriented objectives: ensuring contestable and fair digital markets by addressing structural distortions generated by gatekeepers’ position and delivering tangible benefits for business users, especially SMEs, and end users. On this view, the regulation’s ultimate justification can only be assessed in terms of effectiveness, understood as the capacity of the rules and their enforcement to produce real changes in market practices and to render those benefits verifiable. See: G. COLANGELO, A. RIBERA MARTÍNEZ, *The Metrics of the DMA’s Success*, in *EJRR*, 2025, p. 1 ff.

practice, the compliance burdens imposed on gatekeepers can be justified as proportionate to the objectives pursued. In this sense, the evaluation must account not only for direct compliance costs,⁸ but also for potential “hidden costs of compliance” that may materialise downstream, across market participants and business users, as firms adapt to new constraints.⁹

In order to reply to the opening question, the article assesses the DMA’s effectiveness through the lens of Article 5(2) point (a)-(c),¹⁰ a paradigmatic provision that lays bare the DMA’s “hybrid” nature: a market rule designed to neutralise the competitive advantages generated by data flows within gatekeepers’ ecosystems, yet implemented through tools drawn from Regulation (EU) 2016/679 (hereafter the GDPR).¹¹ In particular, Article 5(2) subjects, under specific conditions, commercial data-processing practices – personalised advertising, data combination, and cross-use – by removing their default status as a condition of access to “free” services.

⁸ See: M. BARCZENTEWICZ, *The Digital Markets Act as an EU Digital Tax: When Compliance Costs Dwarf Regulatory Estimates*, in *Truth on the Markets*, 2025, www.truthonthemarket.com/2025/07/08/the-digital-markets-act-as-an-eu-digital-tax-when-compliance-costs-dwarf-regulatory-estimates/.

⁹ In the present context, the question is whether the *ex-ante* model entails indirect – potential or actual – adverse effects on undertakings that depend on gatekeepers for their economic activity, or whether such effects should rather be understood as a regulatory cost that is offset by the regulation’s significantly positive outcomes, so that the intervention remains proportionate overall. This must necessarily be assessed in light of the EU law principle of proportionality (Article 5(4) TEU, principle of proportionality). Under that principle, Union measures must be suitable and necessary to attain the objective pursued and must not impose an excessive burden on those concerned relative to that objective (proportionality *stricto sensu*).

¹⁰ Digital Markets Act, Art. 5(2)(a)-(c). Moreover, the provision includes a further point (d), which prohibits conditioning access on registration with other gatekeeper services. While relevant to ecosystem lock-in, it is ancillary to the advertising-focused analysis developed here. For the purposes of this article, the effectiveness assessment focuses primarily on points (a)-(c), which directly structure the adtech-related data flows and behavioural advertising incentives.

¹¹ Regulation (EU) 2016/679 of the European Parliament and of the Council, of 27 April 2016, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). On the interplay between competitive dynamics and personal data protection, see: F. COSTA-CABRAL, O. LYNSKEY, *Family ties: the intersection between data protection and competition*, in *EU Law*, in *Common Market Law Review*, 2017.

The analysis runs on three strands. First, it maps the content of Article 5(2) and breaks down its core design features, namely the “specific choice”, the “less personalised but equivalent alternative”, and “DMA-compliant” consents. Second, it situates Article 5(2) in its historical and systemic backdrop by tracing its roots to the Court of Justice’s *Meta* judgment (Case C-252/21).¹² Third, it assesses compliance and enforcement in practice, using *Meta* as a case study, charting the evolution from its (“*Want to subscribe or continue using our Products for free with ads?*”)¹³ to the first non-compliance decision,¹⁴ and the compliance options announced for 2026.

Against this backdrop, the article explores the monetisation and advertising pathways compatible with full compliance with Article 5(2) and identifies the variables that will shape the first meaningful assessment window in 2026. These include the distribution of compliance burdens (the “hidden costs of compliance”), the gatekeepers’ adaptation strategies and the unresolved legal questions that Article 5(2) continues to raise.

The article submits that a first, legally salient indication of the DMA’s effectiveness lies in the Commission’s prompt intervention, which – on the basis of a substantive appraisal of *Meta*’s implementation – has already influenced the gatekeeper’s alignment with Article 5(2). At the same time, the article maintains that the DMA’s effectiveness – understood as its capacity to deliver concrete outcomes in terms of fairness and contestability – can only be reliably assessed over the medium term, with 2026 likely to represent the first credible stress test. Against this backdrop, the analysis highlights early signals that may point to limits in the provision’s practical effectiveness, notably the emergence of “hidden” compliance costs and unanticipated externalities that are displaced onto downstream markets, particularly advertising and European SMEs. Such frictions, the article suggests,

¹² Court of Justice, Judgment of 4 July 2023, Case C-252/21, *Meta Platforms*.

¹³ See: www.about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/.

¹⁴ Commission implementing decision, of 23 April 2025 pursuant to Articles 29(1), point (a), 30(1), point (a), and 31(1), point (h), of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, Case DMA.100055 – *Meta* – Article 5(2).

risk undermining the perceived legitimacy of the EU intervention and, more broadly, the policy shift towards an *ex ante* regulatory model.

2. *The rationale behind Article 5(2)*

Article 5(2) is among the most emblematic provisions of the DMA's regulatory architecture.¹⁵ This provision captures, in sharp relief, the idea that contestability and fairness in digital markets depend not only on “orthodox” anticompetitive conduct (exclusion, tying, discrimination), but also on the architecture through which gatekeepers collect, combine, and exploit users' data across an ecosystem of services. Article 5(2) can therefore be interpreted as a “regulatory hybrid”, emphasising the structural link between market contestability and the protection of personal data.¹⁶ Subject to narrowly defined conditions, it prohibits gatekeepers from using third-party activity to profile users for behavioural advertising, and from combining or cross-using users' personal data.

Its “competition” character is apparent in the provision's core aim: to dismantle cumulative, difficult-to-replicate advantages that undermine the contestability of digital services.¹⁷ The «data driven-

¹⁵ For a reconstruction of the meaning and scope of the obligations laid down in the Regulation, including Article 5(2), see the contribution by: P. MANZINI, *Unraveling the proposal of Digital Market Act. La proposta di legge sui mercati digitali: una prima mappatura*, in *Orizzonti del Diritto Commerciale*, 2021. See also: S. VEZZOSO, *The Proposed Digital Markets Act: What Kind of (Regulatory) Animal Is It?*, in *Wavesblog*, 2021, www.competitionwave.blogspot.com/2021/05/the-proposed-dma-what-kind-of.html.

¹⁶ This nexus has been crystallised in *Meta Platforms*, C-252/21, cited above and discussed further below. See also: Recitals No. 12 and 72 of the DMA. Beyond Article 5(2), the interplay between the DMA and the GDPR is also apparent in Article 6(10), which further specifies the right to data portability already laid down in Article 20 GDPR. On the interaction between the GDPR and the DMA, see: European Data Protection Board (EDPB), *Joint Guidelines on the Interplay between the Digital Markets Act and the General Data Protection Regulation*, draft, 2025; D. GERADIN, K. BANIA, T. KARANIKIOTI, *The interplay between the Digital Markets Act and the General Data Protection Regulation*, in *SSRN*, 2022; F. BATTAGLIA, *What “Data” really are in the Digital Market. Some reflections on their relevance and value under Eu Law*, in *OIDU*, 2024, pp. 217-236.

¹⁷ Digital Markets Act, Recital No. 32, provides the definition of “contestability” that is the ability of undertakings to overcome the entry and expansion barriers typical of digital markets (economies of scale, economies of scope, lack of interoperability, data

advantages»¹⁸ are widely seen as a principal mechanism through which gatekeepers entrench and consolidate their position by limiting rivals’ ability to compete on the merits in the absence of equivalent inputs.¹⁹ The accumulation – and especially the cross-service combination – of datasets produces significant economies of scope.²⁰ The platform does not merely obtain “more data”; it obtains qualitatively different, cross-service data that captures the user across services – which improves profiling accuracy²¹ – thereby strengthening advertising targeting, supporting product optimisation, and enabling the ecosystem’s expansion into new services.²² Crucially, the ability to process and combine personal data across multiple services is central to “behavioural” or “personalised” advertising²³ – the delivery of ads based on user profiling built through tracking, inference and, above all, the integration of information across services – which constitutes the primary monetisation lever for services offered at a zero-price.²⁴ Relatedly, gatekeepers often operate as intermediaries in digital

advantages), so as to «challenge the gatekeeper on the merits of their products and services». Optimally, the regulation should deliver (1) diversification and (2) scalability for undertakings.

¹⁸ *Ivi*, Recital No. 2.

¹⁹ *Ivi*, Recital No. 72, in addressing the advantages associated with gatekeepers’ control over personal data and their capacity to engage in profiling, states that the «potential entrants or start-ups cannot access data to the same extent and depth, and at a similar scale». See also: OECD, *The intersection between competition and data privacy*, in *OECD Roundtables on Competition Policy Papers*, in *OECD Publishing*, Paris, 2024.

²⁰ Digital Markets Act, Recital No. 13.

²¹ General Data Protection Regulation, Art. 4(4).

²² For a discussion of the competitive value of personal data and its uses in digital markets, see: J. CRÉMER, Y-A. DE MONTJOYE, H. SCHWEITZER, *Competition Policy for the Digital Era*, in *European Commission Report*, 2019, p. 4 ff.

²³ Article 29 Data Protection Working Party, Opinion 2/2010 on online behavioural advertising, 2010, p. 4 ff., «Behavioural advertising is advertising that is based on the observation of the behaviour of individuals over time. Behavioural advertising seeks to study the characteristics of this behaviour through their actions (repeated site visits, interactions, keywords, online content production, etc.) in order to develop a specific profile and thus provide data subjects with advertisements tailored to match their inferred interests».

²⁴ Digital Markets Act, Recital No. 36 «The processing, for the purpose of providing online advertising services, of personal data from third parties using core platform services gives gatekeepers potential advantages in terms of accumulation of data, thereby raising barriers to entry. This is because gatekeepers process personal data from a significantly larger number of third parties than other undertakings». See also:

advertising, through services such as Meta Ads²⁵ or Google Ads, running networks that connect advertisers and publishers and coordinating ad delivery and measurement. This infrastructural role enables the large-scale collection and cross-ecosystem/third party combination of users' personal data.²⁶

The result has been a marked lack of contestability, affecting ostensibly “free” social networking services, which are largely ad-funded, and the associated advertising services.

Article 5(2) reveals its “hybrid” nature in its very design. It advances contestability as a regulatory objective, but operationalises it through the grammar of data protection: practices of collecting, combining and cross-using personal data, otherwise prohibited under the DMA, are made conditional on the provision of an effective choice and on valid consent.²⁷ The logic lies in the asymmetric allocation of power in digital markets. Gatekeepers can translate both market power and superior bargaining power vis-à-vis users into an architecture of choice in which extensive data-processing – especially profiling for the commercial exploitation of personal data – is embedded as the default condition for access to zero-price services.²⁸ Indeed, when users do not accept the

CMA, Competition and Markets Authority, *Online platforms and digital advertising – Market study final report*, 2020.

²⁵ Meta Ads (i.e., Meta's online advertising CPS) is the infrastructure through which Meta intermediates online advertising on its platforms: it enables advertisers to create and manage campaigns, runs the auction and delivers ads across Meta's properties (primarily Facebook and Instagram), and provides measurement tools, including through advertiser-side integrations (e.g., Meta Pixel, SDKs and the Conversions API).

²⁶ *Ivi*. Behavioural advertising involves the following roles: (a) Advertising networks providers, who connect publishers with advertisers; (b) Advertisers who want to promote a product or service to a specific audience; and (c) Publishers who are the website owners looking for revenues by selling space to display ads on their website(s). Behavioural advertising may also be delivered through on-site ads. Here, the advertiser defines the target audience using criteria that can go beyond basic demographics (age, gender, country). The publisher then delivers the ads to that audience, managing the targeting technology as well as ad placement and distribution. See: OECD, *Competition in digital advertising markets*, 2020.

²⁷ See *infra* section 4. See also: A. S. D'AMICO, *The DMA's Consent Moment and its Relationship with the GDPR*, in *EJRR*, 2025; R. PODSZUN, *Should Gatekeepers Be Allowed to Combine Data? - Ideas for Art. 5(a) of the Draft Digital Markets Act*, in *SSRN*, 2021, p. 3 ff.

²⁸ See: R. PODSZUN, *The Consumer As A Market Player: Competition Law, Consumer Choice And Data Protection In The German Facebook Decision*, in *Grur*, 2020 p. 13.

proposed processing, access to the service is foreclosed (the so-called take-it-or-leave-it)²⁹, and the contractual terms and interface design steer users towards acceptance, turning consent into a *quasi*-compulsory act for access to services that increasingly display traits of indispensability.³⁰

The effect is to undermine informational self-determination³¹ and, in turn, to render the GDPR’s consent difficult to satisfy in practice.³²

It is precisely on this terrain, where the exploitation of users’ personal data and competitive advantages are strictly connected, that Article 5(2) intervenes.

3. *The prohibitions under Article 5(2)*

The provision’s architecture is built around core platform services (CPS) provided by a gatekeeper, *inter alia*, social networking services, search engines, operating systems and online advertising services.³³ The prohibitions in Article 5(2) follow a three-pronged structure.

²⁹ The concept refers to the effect of platforms’ terms-of-use which structures the user’s options as a binary: (i) accept the unilaterally imposed data processing (“take it”), or (ii) refuse and be denied access to the service (“leave it”). The resulting “choice” is therefore largely induced in practice. See: F. ZUIDERVEEN BORGESIU, S. KRUIKEMEIER, S. BOERMAN, N. HELBERGER, *Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the ePrivacy Regulation*, in *European Data Protection Law Review*, 2018, p. 353 ff.

³⁰ Bundesgerichtshof (BGH), decision of 23 June 2020, Case KVR 69/19, *Facebook*, para. 98 ff. The Federal Court of Justice considered that Facebook (now Meta) plays an essential role in enabling users to participate in social life and to exercise freedom of expression.

³¹ Article 29 Data Protection Working Party, *Opinion 15/2011 on the definition of consent*, adopted on 13 July 2011, p. 9 ff., «Consent is related to the concept of informational self-determination. The autonomy of the data subject is both a precondition and a consequence of consent: it gives the data subject influence over the processing of data. However, as explored in the next chapter, this principle has limits, and there are cases where the data subject is not in a position to take a real decision».

³² European Data Protection Board (EDPB), *Preliminary Opinion, Privacy and Competitiveness in the Age of Big Data: The Interplay between Data Protection, Competition Law and Consumer Protection in the Digital Economy*, 2014, p. 35, «(w)here there is a limited number of operators or when one operator is dominant, the concept of consent becomes more and more illusory».

³³ Digital Markets Act, Art. 2(2), which lists the DMA’s core platform services (CPS); the list is non-exhaustive and may be expanded, including in the 2026 review (potentially to cover AI services). See: European Commission, *Consultation on the*

Point (a)³⁴ prohibits the gatekeeper from processing, for the purposes of providing online advertising services, the personal data of end users who use third-party services that rely on the gatekeeper's CPS.³⁵ The rationale is to prevent the gatekeeper, leveraging the centrality of its core platform services, from collecting users' data as they browse third-party websites or use third-party apps that embed the gatekeeper's tools (for instance, pixels, SDKs or plug-ins linked to its CPS) and from using such data for behavioural advertising. The prohibition thus seeks to ensure that this "vertical" data collection does not become a mandatory condition for accessing the digital service, leaving the user with no real alternative to extensive profiling for personalised advertising; at the same time, it aims to prevent those data flows from crystallising into a competitive and economic advantage in the online advertising market.³⁶

Point (b)³⁷ prohibits the combination of personal data – which is a central feature in the digital economy – from the relevant CPS with personal data from any other CPS or any other service provided by the gatekeeper, as well as with personal data from third-party services. Unlike point (a), it is not advertising-specific: it extends to any cross-service "combined" use of personal data, including for service improvement, product development, and AI training and optimisation, as well as for behavioural advertising.

Point (c)³⁸ targets intra-services data circulation: it prohibits the cross-use of personal data collected in a CPS in other services provided separately by the gatekeeper (including other CPS), and vice versa. The notion of "cross-use" – which raises interpretative questions vis-à-vis "combination" – covers the reuse of data across services without necessarily merging it into a single dataset (e.g., behavioural data from

first review of the Digital Markets Act, 2025, www.digital-markets-act.ec.europa.eu/consultation-first-review-digital-markets-act_en.

³⁴ *Ivi*, Art. 5(2)(a).

³⁵ *Ivi*, Recital No. 37. Where an end user interacts directly with a third-party website, service, or software application that relies on the gatekeeper's CPS, the nature of the obligation under Article 5(2)(a) DMA requires the gatekeeper to obtain the end user's consent through that third-party website, service, or software application. This is in line with the judgment of the Court of Justice, of 29 July 2019, *Fashion ID*, para. 102.

³⁶ OECD, *Competition in digital advertising markets*, cit.

³⁷ Digital Markets Act, Art. 5(2)(b).

³⁸ *Ivi*, Art. 5(2)(c).

a social network informing ad delivery in an advertising CPS, or shaping recommendations in a marketplace).³⁹ The EU legislator thus recognises that technical distinctions between “combination” and “cross-use” do not preclude functional equivalence: even absent any dataset merging, cross-use may raise the same competitive concerns.

4. Exemption conditions: “specific choice”, the “less personalised but the equivalent alternative” and the “DMA-compliant consent”

The prohibitions in Article 5(2) are not absolute. The EU legislator does not mandate a rigidly “data-siloed” model (an approach that would, moreover, risk producing a chilling effect on data-combination-driven innovation), nor does it impose a general ban on personalisation, whether of services or advertising. Rather, Article 5(2) establishes a conditional regime: the practices in points (a)–(c) are allowed only if cumulative conditions are met.⁴⁰

The first condition requires the gatekeeper to present the end user with a «specific choice» as to whether to accept the practices in question. Read together with Article 13 DMA,⁴¹ this operates as a “design mandate”. In practice, the gatekeeper must structure a decision flow (user interface) that enables the data subject to make an active and informed choice, through options presented in a clear, specific and intelligible manner, without pre-selection, artificial friction, or misleading pathways that, while formally compliant, undermine the user’s freedom of choice in substance.⁴²

Although articulated in the Recitals, the regulation gives the “specific choice” architecture concrete form. Where the user refuses the

³⁹ *Ibidem*. The provision does not require gatekeepers to obtain consent for the cross-use of personal data between a CPS and gatekeeper services provided together with, or in support of, a CPS, nor for cross-use involving third-party services; the processing must nonetheless rest on an appropriate legal basis under the GDPR. By way of example, consent is required for a one-off use, in another gatekeeper service, of end-user information or observed behaviour within a CPS (e.g., “likes”, content viewed, session duration). Whether the consent exemption in Article 5(2)(c) DMA applies depends on whether the services concerned are provided together or separately.

⁴⁰ *Ivi*, Art. 5.

⁴¹ Digital Markets Act, Art. 13(6).

⁴² *Ivi*, Recital No. 70, and, where applicable, the sign-in enabling such combination under point (d).

processing under points (a)–(c), the gatekeeper must provide a «less personalised but equivalent alternative»⁴³ version of the service. The requirement has two limbs. The first concerns (functional) “equivalence”, which presents relatively limited interpretative uncertainty. Recital No. 37 clarifies that the less personalised alternative «should not be different or of degraded quality» compared to the version offered to users who consent, unless any deterioration is the «direct consequence» of the gatekeeper being precluded from processing personal data; in all other respects, «the core platform service will remain unchanged and that no functionalities will be suppressed».⁴⁴ The upshot is a sharp regulatory baseline: the two versions must remain functionally equivalent, with personalisation as the sole variable, thereby precluding any deliberate qualitative downgrading intended to make refusal of consent practically disadvantageous.⁴⁵ The second limb concerns what “less personalised” entails, an aspect in respect of which interpretative difficulties are more likely to arise. The modifier “less” may be misleading. It does not entail a mere reduction in the “intensity” of personalisation. The “less personalised but equivalent” version offered to non-consenting users must *not* include processing operations that would require consent under Article 5(2) DMA⁴⁶ thus excluding the personalisation related specifically and *limited to* the processing of user’s personal data collected from third party for behavioural ad, the combination and cross-use. In that sense, with respect to the Article 5(2) operations, the alternative should be non-personalised rather than merely “less” personalised.

Article 5(2)’s second condition requires that the end user has provided valid consent, as defined in Articles 4(11) and 7 GDPR, for each of the relevant processing operations provided in the point (a)–(c).⁴⁷ While facially straightforward, this cross-reference produces

⁴³ *Ivi*, Art. 5.

⁴⁴ *Ibidem*.

⁴⁵ See: EDPB, *Joint Guidelines on the Interplay between the Digital Markets Act and the General Data Protection Regulation*, draft, cit.

⁴⁶ Digital Markets Act, Recital No. 37.

⁴⁷ *Ivi*, Art. 5, «unless the end user has been presented with the specific choice and has given consent within the meaning of Article 4, point (11), and Article 7 of Regulation (EU) 2016/679».

operational innovations for the consent architecture in digital ecosystems. In practical terms, the provision generates a category of “DMA-compliant” consents. The formal cross-reference to the GDPR establishes a minimum baseline, yet validity is also anchored in the supplementary constraints embedded in Article 5(2). Moreover, these consents are distinct from, and additional to, the consent that platforms must obtain under the GDPR in order to carry out the processing operations covered by Article 5(2).

From an operational standpoint, the sequence is as follows.

As a first step, any processing of personal data within the relevant CPS must be grounded in a valid lawful basis under the GDPR; where that basis is consent (Article 6(1)(a)), consent continues to be required under the standard GDPR regime.⁴⁸

Second, where the gatekeeper seeks to go beyond “internal” collection and enable data flows across services, the processing is lawful only if it obtains separate consents for (a) the use of third-party data for advertising, (b) data combination, and (c) cross-use, each of which must comply with (i) the GDPR requirements expressly referenced (Articles 4(11) and 7) and (ii) the additional conditions laid down in Article 5(2) DMA.

Under the GDPR, Art. 4(11),⁴⁹ consent is valid only if it is «freely given, specific, informed and unambiguous». “Freely given” requires a genuine choice, so that refusal does not entail pressure or disproportionate consequences, such as loss of access to the service.⁵⁰ “Specific” requires that consent be tied to one or more clearly defined purposes, thereby excluding blanket or all-encompassing consents. Consistently, Article 5(2) entails a proliferation of distinct consents corresponding to each of the operations it covers. This may increase user awareness when consenting, but it also makes access *less* seamless and immediate. “Informed” entails that the user is provided with sufficient information to understand, at least in substance, who processes the data, which data are involved and for which

⁴⁸ General Data Protection Regulation, Art. 6(a), 4(11), 5, e 7.

⁴⁹ *Ivi*, Art. 4(11).

⁵⁰ *Ibidem*, read in conjunction with Recital No. 42 «Consent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment».

purposes. Finally, “unambiguous” requires a clear affirmative act, and cannot be inferred from silence, inactivity or interface design that nudges assent by default.⁵¹ In turn, Article 7,⁵² imposes accountability obligations on the controller (here, the gatekeeper) as it must be able to prove that the data subject has given the consent and, crucially, the user must be able to withdraw consent at any time with the same ease with which it was given.⁵³

In addition to these GDPR-specific requirements, Article 5(2) DMA superimposes further conditions, giving rise to what can be described as a “DMA-compliant” consent: (i) a “specific choice” between a service version conditioned on consenting to the processing operations covered by Article 5(2) and (ii) in case of refusal, the availability of “a less personalised but equivalent alternative”, as discussed above.⁵⁴

It is precisely through the analysis of those exemption conditions that the intersection between competition law and personal data protection emerges in paradigmatic terms: the lawfulness of data cross-collection and cross-use practices is made contingent on the user’s choice and on consent, which the DMA reframes as a safeguard that also operates as a competitive constraint. By placing the user’s decision at the core of the regulatory design, the provision strengthens informational self-determination and the freedom of consent, thereby counterbalancing the power asymmetries inherent in gatekeeper ecosystems.

The DMA strengthens the requirement of “freely given” consent by making it operationally verifiable through the “specific choice” and the “less personalised but equivalent alternative”. In the absence of an option that is genuinely less personalised and functionally equivalent, the freedom of consent risks becoming merely nominal and, therefore,

⁵¹ Court of Justice, Judgment of 1^o October 2019, Case 673/17, *Planet49*.

⁵² General Data Protection Regulation, Art. 7.

⁵³ This is a cross-reference to Recital No. 37 of the Digital Markets Act.

⁵⁴ The provision further clarifies that, where consent is refused or withdrawn, the gatekeeper may not request it again for the same purpose more than once within a year. It also specifies that the prohibition is without prejudice to the gatekeeper relying on alternative lawful bases under Article 6 GDPR, legal obligations (point (c)), vital interests (point (d)), or tasks carried out in the public interest (point (e)).

invalid.⁵⁵ The cumulative nature of the GDPR and DMA requirements is technically deliberate: it reflects the DMA’s logic of using consent not only to legitimise processing, but also to curb a competitive advantage,⁵⁶ making the less personalised alternative the “operational benchmark” for the contestability of the platform services the DMA seeks to ensure.

This architecture, however, directly affects data-driven business models, particularly advertising-funded (ad-supported) services.⁵⁷ Where users do not consent, the gatekeeper is precluded from engaging in the very set of processing operations that underpin personalised advertising at scale. Accordingly, since the DMA does not prohibit advertising as such, a natural question arises: which concrete alternatives can ensure the sustainability of ad-supported services once behavioural advertising can no longer operate as the default condition?⁵⁸

5. Meta/Bundeskartellamt: *ex ante* codification under the DMA and the “if necessary for an appropriate fee”

The genesis of Article 5(2) DMA, in particular the point (a), lies in the Meta/Bundeskartellamt saga and, more broadly, in the German antitrust experiment,⁵⁹ subsequently tested in a preliminary reference

⁵⁵ User rationality in consenting, however, is a different matter. See: A. GIANNACCARI, “The Brussels effect”: il “Digital Markets Act” alla prova dei fatti, nei confronti di Meta e Apple, in *MCR*, 2025, p. 195. See also *infra*, section 9.

⁵⁶ Digital Markets Act, Recital No. 72. Indeed, the requirement to ensure an adequate level of transparency as regards gatekeepers’ profiling practices – including, illustratively, profiling within the meaning of Article 4(4) of Regulation (EU) 2016/679 – «facilitates contestability of core platform services».

⁵⁷ On the scale of revenues generated by this model, see: Meta, *Meta Report Fourth Quarter and Full Year 2024*, www.investor.atmeta.com/investor-news/press-release-details/2025/Meta-Reports-Fourth-Quarter-and-Full-Year-2024-Results/; Statista, *Advertising revenue of Google from 2001 to 2024 (in billion U.S. dollars)*, www.statista.com/statistics/266249/advertising-revenue-of-google/.

⁵⁸ See: *infra*, section 7.

⁵⁹ Bundeskartellamt, decision of 6 February 2019, B6-22/16, *Facebook*; appealed and upheld by the Oberlandesgericht Düsseldorf (OLG), order of 26 August 2019, VI-Kart 1/19 (V); subsequently reversed by the Bundesgerichtshof (BGH), decision of 23 June 2020, KVR 69/19, *Facebook*, which ultimately confirmed the Bundeskartellamt’s reasoning.

before the CJEU,⁶⁰ in which non-compliance with the GDPR's requirement of "freely given" consent was conceptualised as part of the competitive harm assessed under Article 102 TFEU (as a form of exploitative abuse of dominance⁶¹). At the heart of the dispute were Facebook's terms of use: access to the service was conditioned on accepting data collection and combination that went beyond "*on-Facebook*" activity to encompass "*off-Facebook*" sources, including other group services (such as Instagram and WhatsApp) and third-party websites and apps embedding Meta tools (pixels, plug-ins, analytics) for the purpose of providing personalised advertising. According to the Bundeskartellamt, this arrangement exploited the parties' power imbalance, turning consent into a largely adhesive precondition, while enabling Meta to strengthen a competitive advantage grounded in data combination.

The case reached the Court of Justice by way of a preliminary reference (Case C-252/21). The Court held that the consent given by users for the extensive processing should not be regarded as freely given within the meaning of Articles 4(11) and 7 GDPR.⁶² It follows that the platform's dominance translates into a power imbalance⁶³ that constrains the data subject's freedom of choice, potentially preventing refusal or withdrawal of consent without detriment, including denial of access to the service.⁶⁴

This gives rise to the principle at stake. The Court ruled that, for consent to be "freely given" – when the platform is dominant – users must be able to accept or refuse the collection, combination and use of data (including cross-service data) for personalised advertising without being denied access to the service.⁶⁵ In this case, for non-consenting users, «an equivalent alternative not accompanied by such data processing operations» must be offered.⁶⁶ In other words, the Court

⁶⁰ *Meta Platforms*, cited above.

⁶¹ For an analysis of exploitative abuses in EU competition law, see: P. MANZINI, *Figli di un Dio minore: gli abusi di sfruttamento nel diritto antitrust europeo*, in *DCI*, 2022.

⁶² *Meta Platforms*, cited above, para.140 ff.

⁶³ *Ivi*, para. 149 which further refers to Recital No. 42 of the General Data Protection Regulation.

⁶⁴ *Ivi*, para. 148.

⁶⁵ *Ivi*, para. 151.

⁶⁶ *Ivi*, para. 150.

maintains that the platform should provide access to an “alternative” version of the social network that does not entail the processing of personal data for personalised advertising, thereby enabling users to make a genuine choice between the two modes of access and use of the service. The EU legislator therefore transposed into the DMA the prohibition (and the regulatory hybrid) articulated in *Meta*.⁶⁷

The judgment also matters for an additional reason. The Court indicated that, for non-consenting users, the equivalent alternative not accompanied by such processing operations may be offered «if necessary for an appropriate fee».⁶⁸ The Court’s brief reference to “remuneration”, articulated in obiter dictum, has generated interpretative spillovers that were difficult to foresee at the time of the judgment, projecting well beyond the immediate reach of the decism. This provides an early lens on the controversy that later surfaced in the Meta-DMA context: whether, and to what extent, the reference to the possibility of an “appropriate fee” can be reconciled with the DMA standard of an “equivalent but less personalised” alternative under Article 5(2).

6. *Meta: “Consent or Pay” and non-compliance decision*

Designated as a gatekeeper in September 2023, Meta was, as of 7 March 2024 – when the DMA’s substantive obligations became applicable – required to align its ecosystem with the cumulative conditions in Article 5(2), across its CPS (Meta, Instagram, WhatsApp,

⁶⁷ The trajectory from the case to Article 5(2) clarifies why the dispute’s logic was translated into an *ex-ante* rule: practice under Article 102 TFEU (and its national iterations) exposed the limits of case-by-case enforcement when advantage is produced by cumulative data infrastructures and choice architectures deployed at scale⁶⁷. Establishing an abuse requires complex reconstructions (market power, conduct, exploitation, and a causal link to competitive distortion), while lock-in and data leverage emerge cumulatively and in self-reinforcing dynamic. The DMA adopts a different technique: rather than waiting for an abuse to be proved, it effectively presumes that certain structural barriers and practices function as levers of gatekeeper entrenchment and subjects them to an *ex-ante* prohibition that can be displaced only under stringent conditions.

⁶⁸ *Meta Platforms*, cited above, para. 150.

Meta Ads), its separately provided services (Dating, Gaming Play), and relevant third-party services.⁶⁹

After an intense dialogue with the DG Competition, Meta proposed, for the compliance of Article 5(2) the “Consent or Pay” model,⁷⁰ framing it as the “less personalised but equivalent” alternative required by the DMA.⁷¹

Meta’s offer is structured as a binary option between (i) access to the service conditional on consent to the processing operations covered by Article 5(2), points (a)-(c), and (ii) access to the service subject to the payment of a fee, through a subscription-based version without cross-service data collection and without personalised ads, thus operationalising the less personalised alternative “for an appropriate fee”, as indicated by the Court.

The rollout of this offer triggered a swift EU response. The Commission immediately opened an investigation against Meta, expressing doubts as to whether the model is compliant with Article 5(2).⁷² Shortly thereafter, reflecting concerns about the monetisation of refusal, the European Data Protection Board (EDPB) issued a dedicated opinion on the “Consent or Pay” model.⁷³ The Board sets out conditions

⁶⁹ European Commission, Decision 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. Meta’s “Marketplace” was also designated as a CPS on the same date. However, on 23 April 2025, the Commission subsequently “undesigned” the service, on the ground that it did not meet the thresholds set out in Article 3 DMA. See: European Commission, *Commission finds Apple and Meta in breach of the Digital Markets Act*, Press Release, April 23, 2025, www.ec.europa.eu/commission/presscorner/detail/en/ip_25_1085.

⁷⁰ Meta, *Non-Confidential Public Summary of Meta’s Compliance Report*, 6 March 2024.

⁷¹ M. FRANK, E. LEWIS, *The European Commission’s Challenge to Consent or Pay: Demystifying the Digital Markets Act?*, in *World Competition*, 2024, p. 427 ff; Q. B. SCHÄFER, K. WIEDEMANN, *Article 5(2) of the Digital Markets Act and the ‘pay-or-consent’ business model at the intersection of public and private autonomy*, in *Cambridge Journal of International Law*, 2025, pp. 141-157.

⁷² European Commission, Case DMA.100055 – Meta – Article 5(2), Commission decision opening proceedings pursuant to Article 20(1), of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, C (2024) 2052final, March 25, 2024.

⁷³ European Data Protection Board (EDPB), *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*, April 17, 2024.

that are instructive for assessing the model’s validity.⁷⁴ While the practice is not prohibited *per se*, conditions its lawfulness – and thus DMA compliance – on strict cumulative criteria, such that it becomes not merely advisable that «in order to ensure genuine choice and to avoid presenting users with a binary choice between paying a fee and consenting to processing for behavioural advertising purposes, controllers should consider also offering a further alternative free of charge».⁷⁵

The investigation concluded, consistently, with the Commission’s non-compliance decision of 23 April 2025, imposing a €200 million fine,⁷⁶ the first full-scale sanction under the DMA for a breach of Article 5(2).⁷⁷

The Commission’s reasoning rests on two intertwined and compelling pillars.

First, it found that, for a gatekeeper, a binary “Consent or Pay” model cannot meet the GDPR requirement that consent be “freely given” within the meaning of Articles 4(11) and 7.⁷⁸ The Commission’s view was that the alternative option was not genuinely practicable: refusal of behavioural advertising was effectively “priced” through a fee, while the ecosystem’s features (network effects, lock-in, and usage dependency) make leaving the service a socially and functionally non-neutral cost. In those conditions, the user’s decision is structurally exposed to pressure, because the choice is not between two equivalent

⁷⁴ *Ibidem*. The EDPB accepts, in principle, the legitimacy of “consent or pay” models, but stresses that they are compatible with the GDPR only if the consent requirements are strictly met, taking into account both data-protection considerations (freely given and valid consent) and competition-law factors (dominance as a relevant indicator of power imbalance). Similar reasoning has also been adopted by certain national competition authorities, see: CNIL – Commission Nationale de l’Informatique et des Libertés, *Cookie walls: la CNIL publie des premiers critères d’évaluation*, 2022, www.cnil.fr/fr/cookie-walls-la-cnil-publie-des-premiers-criteres-devaluation.

⁷⁵ EDPB, *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*, *op. cit.* para. 74. Similarly, EDPB, *Joint Guidelines on the Interplay between the Digital Markets Act and the General Data Protection Regulation*, draft, *op. cit.*

⁷⁶ Commission implementing decision, of 23.4.2025, Case DMA.100055 – Meta – Article 5(2), cited above.

⁷⁷ A. GIANNACCARI, *op. cit.*, p. 187 ff.

⁷⁸ Commission implementing decision, of 23 April 2025, Case DMA.100055 – Meta – Article 5(2), cited above, para. 176 ff.

modes of access, but between accepting extensive processing or incurring a material detriment (paying or forgoing the service). It is precisely this “detriment” read by the Commission through the lens of Article 7(4) GDPR and Recitals No. 42 and 43 on imbalance between the data subject and the controller, that is capable of depriving consent of its substantive freedom, turning it into a largely compelled act.⁷⁹ Second, in relation to the “specific choice” and decisively for the “equivalence” requirement, the Commission held that the paid option could not qualify as the “less personalised but equivalent” alternative mandated by the DMA, since charging a monetary fee constitutes a differentiating element between the service versions.⁸⁰ It stressed that the two pathways – consenting through the proverbial “click”, on the one hand, and setting up a monthly payment through a dedicated flow, on the other – are not equivalent in terms of accessibility or user experience,⁸¹ and that this asymmetry is not incidental but structurally designed to make the consent option more attractive.⁸²

On this view, Article 5(2) does not allow gatekeepers to “monetise” refusal by substituting a paid option for the “less personalised but equivalent” alternative: the obligation is designed to preserve access for users who refuse, through a genuinely practicable and functionally equivalent option, albeit without the processing operations the gatekeeper seeks to perform.

From a systemic perspective, the episode sharply exposes the friction between substantive enforcement and compliance by design. On the one hand, the Commission sought to safeguard the regulatory substance of Article 5(2), preventing compliance from being reduced to an interface “variant” that reproduces the very dynamic of subjection the provision is meant to break. On the other hand, the case underscores Meta’s implementation strategy appears aimed at maintaining the economic *status quo* by adopting solutions that comply in form yet risk undermining the regulation’s requirements in substance. The

⁷⁹ *Ivi*, para. 223 ff.

⁸⁰ *Ivi*, para. 87 ff.

⁸¹ *Ivi*, para. 90.

⁸² See also: BEUC, *The European Consumer Organisation Bureau Européen des Unions de Consommateurs, Beuc Assessment Of Meta’s Latest Pay-Or-Consent Policy For Facebook And Instagram Users*, 2025.

Commission stated that «Meta has acted at the very least negligently»,⁸³ stressing that Meta’s own internal documents showed it was aware that its “Consent or Pay” advertising model would lead the overwhelming majority of end users to opt for the option involving the processing of personal data across the Facebook and Instagram environments, given the monetary counter-performance.⁸⁴

Finally, it addresses paragraph 150 of the CJEU’s judgment in order to explain why it is inapplicable,⁸⁵ clarifying that the legal notion of consent under the DMA does not coincide with the legal notion of consent under the GDPR⁸⁶ and that, accordingly, the considerations developed in *Meta C-252/21* are not fully transferable.⁸⁷ In particular, the Executive stresses that that judgment falls within the ambit of the GDPR and concerns solely the assessment of the validity of consent under Article 4(11) and Article 7 of Regulation (EU) 2016/679, in the context of specific processing operations carried out by a dominant undertaking. The Court, by contrast, did not rule on the interpretation of Article 5(2) DMA, which introduces an autonomous test based on two cumulative and legally distinct conditions: (i) “specific choice” and (ii) GDPR-valid consent. It follows that “specific choice” is an autonomous DMA concept, neither defined by the GDPR nor capable of being derived – by interpretation – from the C-252/21 judgment. Accordingly, that ruling cannot be relied upon to legitimise a binary “consent or pay” model as a means of complying with the *ex-ante* regulatory obligation.

⁸³ Case DMA.100055 – Meta – Article 5(2), cited above, para. 315 ff.

⁸⁴ *Ivi*, para. 96. Meta, already at the pre-compliance stage, showed – through its exchanges and meetings with the European Commission, as well as in its replies to the RFIs – that it was aware that the SNA option would never be regarded as an equivalent alternative to the “With Ads” option. See: T. MÜLLER-TRIBBENSEE ET AL., *Paying for Privacy: Pay-or-Tracking Walls*, in *HEC Paris Research Paper*, 2024, p. 35.

⁸⁵ *Ivi*, para. 101 ff.

⁸⁶ *Ivi*, para. 103 «In contrast to the second condition of ‘consent’, the first condition of ‘specific choice’ is an autonomous notion that does not refer to a definition found in Regulation (EU) 2016/679 or any other legal instrument».

⁸⁷ *Ivi*, para. 104 ff. In particular, the Court did not rule on the interpretation of Article 5(2) DMA, which introduces an autonomous test based on two cumulative and legally distinct conditions: (i) “specific choice” and (ii) GDPR-valid consent. It follows that “specific choice” is an autonomous DMA concept, neither defined by the GDPR nor capable of being derived – by interpretation – from the C-252/21 judgment.

Moreover, even if that reasoning were applicable, Meta would have had to show that the monthly fee it offered was appropriate and necessary, something it failed to do.⁸⁸

In the author's view, one further clarification is warranted. "Consent or Pay", considered in the abstract, is not unknown in digital practice and may, in certain settings, be defensible as a workable model. In freemium services such as Spotify or Apple Music, the fee remunerates access to copyright-protected and IP-protected content, while the free tier is sustained through advertising. The logic is different when "Consent or Pay" is transplanted to social networks: here, payment is not tied to access to a licensed product, but becomes the price of accessing a service that does not process user's personal data for monetisation purposes. As a result, the model effectively assigns an economic value to access to a service that intermediates organic, user-generated content, by pricing the foregone revenues that would otherwise be generated through behavioural advertising.

In sum, the Commission's enforcement action against Meta shows that the effectiveness of the DMA does not hinge solely on the formal articulation of prohibitions, but on enforcement's capacity to identify and neutralise design-based strategies aimed at preserving the underlying business model, without turning *ex ante* regulation into an open-ended bargaining process at the margins of compliance.

7. The law and economics of the "less personalised" alternative: envisioning the future of behavioural advertising

The obligation to provide "a less personalised but equivalent alternative" inevitably brings to the fore a question that has framed the discussion since C-252/21: what advertising model can sustain ostensibly "free" social services, consistently with the DMA, once behavioural advertising cannot serve as the default for users who refuse consent?

This is not merely a regulatory puzzle; it is, inescapably, an economic one. The point is particularly evident in *Meta's* case.

⁸⁸ *Ivi*, para. 105.

As the provision does not require the alternative to be “data-free” or “ad-free” – as shown in section 4 – it compels a reconfiguration of ad-tech towards advertising models that are, by design, markedly less remunerative. A number of proposals may here be advanced, while remaining within the parameters of Article 5(2) and while allowing the gatekeeper to finance its services.

First, one can envisage a form of “general” or undifferentiated advertising. The ads are delivered without reference to an individual user’s characteristics, past behaviour, or activity across services, and instead allocated through essentially neutral logics (for example, uniform rotation, time-based criteria, or inventory-driven delivery).

Second, contextual advertising.⁸⁹ In technical-functional terms, it involves ads based on the content or immediate context of consumption⁹⁰ (for example, the page’s editorial category or the theme of the content viewed – through keywords or textual analysis – and URL embeddings; in the case of search engines, the user’s query and IP address, insofar as it allows the likely geographic location to be inferred).⁹¹

Third, “topic-based” or interest-based advertising. This can be designed as targeting on broad categories that users select voluntarily (expressed preferences), without relying on behavioural inferences or cross-service correlations. A hybrid model is also possible.

From a DMA perspective, these forms of advertising can support the “less personalised” alternative because they allow an ad-funded service to operate – at least for non-consenting users – without resorting to the cross-service data combination (across the gatekeeper’s services and third-party services) and cross-use practices targeted by Article 5(2). As a matter of general legal framing, however, it is important to distinguish sharply between (i) the absence of behavioural advertising

⁸⁹ These forms of advertising do not have a specific definition in EU law. However, some guidance can be drawn from Article 29 Data Protection Working Party, *Opinion 2/2010 on online behavioural advertising*, 00909/10/EN, WP 171.

⁹⁰ See: C. ARMITAGE, N. BOTTON, L. DEJEU-CASTANG, L. LEMOINE, *Towards a more transparent, balanced and sustainable digital advertising ecosystem. Study on the impact of recent developments in digital advertising on privacy, publishers and advertisers, Final Report, European Commission*, 2023, p. 141 ff.

⁹¹ Article 29 Data Protection Working Party, *Opinion 2/2010 on online behavioural advertising*, cit., note 5.

and (ii) the absence of personal data processing. Even where advertising is delivered through contextual or topic-based models, the underlying operations may nonetheless entail the processing of personal data; accordingly, the GDPR requirements remain applicable.⁹² This may occur, for instance, where contextual advertising is delivered on the basis of a user's previous search query or the user's IP address, where it reveals the user's likely geographical location,⁹³ or where other personal data are processed (e.g., delivery logs, fraud prevention, performance metrics, or frequency capping). In such cases, an appropriate lawful basis under Article 6 GDPR must be identified, and the principles of data minimisation and purpose limitation under Article 5 GDPR must be complied with.⁹⁴ Moreover, where ad delivery or measurement requires storing or accessing information on the user's terminal equipment (cookies, SDKs, advertising identifiers, or similar

⁹² C. ARMITAGE, N. BOTTON, L. DEJEU-CASTANG, L. LEMOINE, *op. cit.*, p. 14.

⁹³ This raises a crucial issue concerning the categories of data that may be used and the need to ensure compliance with the GDPR, thereby creating undesirable confusion. In Opinion 2/2010, the Article 29 Working Party maintains that, for the purposes of contextual advertising, it may be possible to use, *inter alia*, «the previous search query or the user's IP address if it indicates their likely geographical location», which – in the present author's view – appear to constitute personal data within the meaning of Article 4(1) GDPR. That provision expressly includes data relating to “location”; moreover, as regards IP addresses – although the analysis is more complex given the need to demonstrate the possibility of identifying the user – the Court of Justice has held in *Breyer* (para. 49) that «a dynamic IP address registered by an online media services provider when a person accesses a website that the provider makes accessible to the public constitutes personal data within the meaning of that provision, in relation to that provider, where the latter has the legal means which enable it to identify the data subject with additional data which the internet service provider has about that person». As personal data, such information must be processed on the basis of one of the lawful bases under the GDPR and, in particular, consent pursuant to Article 6 GDPR and, therefore, under Article 5(2) DMA.

⁹⁴ EDPB, *Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms*, para. 75 «This alternative must entail no processing for behavioural advertising purposes and may for example be a version of the service with a different form of advertising involving the processing of less (or no) personal data, e.g. contextual or general advertising or advertising based on topics the data subject selected from a list of topics of interests. This is also linked to the principle of data minimisation as recalled in Section 4.1: controllers should ensure that only personal data that is necessary for the purpose of placing such advertisement would be processed».

technologies), Article 5(3) of Directive 2002/58/EC applies and – save for narrow exceptions of strict necessity – requires prior consent.⁹⁵

This undoubtedly entails significant practical difficulties and a considerable degree of legal uncertainty and therefore calls for precise guidance from the competent authorities – both the European Commission and the EDPB – on whether, and if so which, categories of personal data may be used even under the less personalised option, so as to prevent gatekeepers from pursuing compliance in the absence of clear reference points, particularly where the DMA must be applied in conjunction with other regulatory frameworks.

But the analysis must now take the platforms’ perspective. Without stating the obvious, the proposed advertisement alternatives would materially erode the revenues of services built on behavioural targeting. Taking Meta as the case study, the total revenue in 2024 was \$164.50 billion, of which approximately \$160.6 billion (roughly 98%) derived from personalised advertising, largely enabled by data collected across services.⁹⁶

However, the mere impact on a gatekeeper’s “profitability” – specifically, the lower per-user revenues associated with less personalised advertising – cannot, as a matter of law, justify a derogation from the obligation imposed. By contrast, the Union legislator has expressly addressed concerns of “financial sustainability” – a distinct issue from preserving exceptionally profitable business models – in Article 9(1) DMA.⁹⁷ Under that provision, where the constraints imposed by a specific DMA obligation would, due to exceptional circumstances beyond the gatekeeper’s control, jeopardise the economic viability of its operations within the EU, the Commission may exceptionally decide to suspend that specific obligation, in whole

⁹⁵ Directive 2002/58/EC of the European Parliament and of the Council, of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Art. 5(3).

⁹⁶ Information available at link www.investor.atmeta.com/investor-news/press-release-details/2025/Meta-Reports-Fourth-Quarter-and-Full-Year-2024-Results/. Similarly, Google has generated annual revenues of USD 264.59 billion through Google Ads.

⁹⁷ Digital Markets Act, Art. 9(1).

or in part. This exemption is unlikely to be engaged in Meta’s case, not least because alternative monetisation avenues remain available.

8. *The 2026 advertising landscape: the Meta offer*

A determinative moment in the regulatory trajectory may now be imminent. On 8 December 2025, the Commission publicly acknowledged Meta’s undertaking – following a “close dialogue” after the 2025 non-compliance decision – to make an Article 5(2)-compliant choice effectively available to users in the Union.⁹⁸ The key shift is the displacement of the “Consent or Pay” model: in 2026, alongside the option to consent to full personalisation, a “third way” is expected to be offered. The sanction, then, has had real compliance bite.

As described in the Commission’s press release, this option remains ad-supported and allows users to continue using the services while choosing to «share less personal data», with an advertising experience characterised as «more limited personalised».⁹⁹ In other words, the alternative would take the form of a free-of-charge option that reduces the intensity of data processing for advertising purposes, positioning itself, at least on its stated terms, within the logic of a “less personalised but equivalent” alternative. Still, the terms “share less personal data” and “more limited personalised advertising” are, at this stage, legally under-specified: they do not identify which categories of personal data would remain permissible for use, nor do they indicate whether the proposed configuration in fact amounts to a shift towards contextual or topic-based advertising models. In this context, the concerns previously highlighted regarding the need for the DMA to be applied in compliance with the GDPR should be reiterated, and the competent authorities should provide clear guidance as to whether – and, if so, which – categories of personal data may be used.

The point is, moreover, not the option’s existence in the abstract, but its practical effect on contestability. For that reason, the Commission

⁹⁸ European Commission, *Meta commits to give EU users choice on personalised ads under DMA*, Press Release, 8 December 2025, www.digital-markets-act.ec.europa.eu/meta-commits-give-eu-users-choice-personalised-ads-under-dma-2025-12-08_en.

⁹⁹ *Ibidem*.

simultaneously indicated that, once implemented, it will gather evidence and feedback from Meta and stakeholders on the model’s “uptake” and its impact, confirming that compliance with Article 5(2) ultimately turns on the substance of the choice architecture and cannot be reduced to a statement of principle.

9. Is the DMA delivering on its promises? The hidden costs of compliance

Read against the backdrop of the proceedings involving Meta and the commitments announced in 2026, Article 5(2) provides a tangible benchmark to address the question posed at the outset: is the DMA delivering on its promises? The answer remains complex and, to some extent, still open.

At first glance, the outcome is clearly positive. This is not only because advanced profiling and behavioural advertising can no longer be offered to users as a “default” option within the EU. Rather, the analysis of Article 5(2) identifies a *first* parameter for assessing whether the DMA is delivering on its promises: namely, the promptness and competence with which DG Competition has overseen gatekeepers’ compliance, preventing it from degenerating into mere “compliance by design” and instead carrying out an effective, substantive scrutiny of the actual conformity of the measures adopted.

However, the DMA’s decisive promise ultimately lies on a different and more demanding level: its practical effectiveness, rather than its *mere* compliance.¹⁰⁰ The regulation, in fact, imposes “outcome-oriented” and “structural” obligations that can be regarded as genuinely fulfilled only insofar as they produce verifiable improvements in the “fairness” and “contestability” of digital markets, with benefits accruing to SMEs and European consumers. Accordingly, the

¹⁰⁰ From the author’s perspective, there is indeed a need to draw clear distinction between *compliance outcomes* – namely, adherence to the letter of the law through the effective implementation of design solutions, choice architectures, and technical tools – and *result outcomes*, understood as measurable changes in the fairness of the relationship between gatekeepers and end users and business users, as well as in the contestability of core platform services, in the sense of a genuine reduction of entry barriers. For a first assessment on this question, see: F. BOSTOEN, *Understanding the Digital Markets Act*, in *Antitrust Bulletin*, 2023, p. 266 ff.

effectiveness of the DMA – and of Article 5(2) in particular – cannot be meaningfully assessed in the short term, as it presupposes a sufficiently long time horizon to observe and evaluate market responses; in this respect, the developments expected in 2026 will provide the *first* meaningful test.

With this milestone in view, this final section isolates a set of variables (and, to some extent, a critics) that should inform any genuinely holistic assessment of the Regulation’s effectiveness – variables that emerge from recent economic studies and empirical evaluations, yet appear largely absent from the Commission’s annual DMA enforcement reports.¹⁰¹ Building on that evidence, I argue that the DMA is capable of generating adverse second-order and downstream effects – externalities and regulatory trade-offs – which I conceptualise here as “hidden costs of compliance”. By this expression I do not refer to the gatekeepers’ internal compliance expenditures (engineering time, legal costs, organisational restructuring),¹⁰² but to the indirect costs and welfare-relevant spillovers that may be transmitted to business users and end users as a consequence of the mandated reconfiguration of platform services.

This analytical lens is particularly salient for Article 5(2) DMA in the context of online social networking and online advertising. As shown in section 7, the implementation of Article 5(2) pushes gatekeepers toward less data-intensive advertising options, the

¹⁰¹ See: European Commission, Annual report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 25 April 2025; *id.*, Annual report on Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), 7 March 2025.

¹⁰² In any event, these costs appear to be significantly higher than those identified by the European Commission in its Impact Assessment. The Commission had estimated aggregate compliance costs for all gatekeepers at approximately EUR 10 million per year. At the compliance workshop held earlier this year, however, Amazon reported that its own costs are “many orders of magnitude higher” than that projected amount, while a Meta representative stated that their costs are “well above” third-party estimates of USD 10–20 million per year. Although gatekeepers’ revenue losses are not treated as a decisive benchmark for assessing legality, this does not preclude the need for costs and operational frictions to remain proportionate to the outcomes actually achieved. See: M. BARCZENTEWICZ, *op. cit.*

compliance solution may be *less* remunerative and *less* precise, with effects that do not remain confined to the gatekeeper’s advertising intermediation service but propagate along the value chain: as emerging from the first wave of economic analysis, advertisers may face lower conversion rates, higher customer-acquisition costs, and reduced allocative efficiency of ad spend at constant budget,¹⁰³ while European undertakings – especially SMEs relying on Meta Ads to reach final users – may experience lower visibility and sales.¹⁰⁴ In fact, data shows that Meta’s revenues on online advertising services sustain 1.44 million jobs and €213 billion in economic activity in the EU, thanks to Meta Ads platforms that promote local advertisers and the visibility of European SMEs and companies that use these services. The total European audience for Meta Ads is wide and effective, with 335.8 million users, including 141.2 million engaged shoppers (42.1%).¹⁰⁵ It is precisely in this context that Meta’s statements fit in, affirming that

¹⁰³ C. ARMITAGE, N. BOTTON, L. DEJEU-CASTANG, L. LEMOINE, *op. cit.*, p. 148, where it highlights the asymmetry that contextual advertising may create between smaller and larger operators «Small advertisers in particular see this as a risk, because “we lose money if we show ads to people who are not interested”» and notes a reduction in the number of intermediary platforms involved in profiling, p. 154 «for publishers, contextual advertising may require fewer intermediaries than targeting based on profiling». The shift from personalized to generic marketing can also reduce click-through rates, with some field experiments showing a drop from 25% to 12%. Following GDPR compliance – which is less stringent than the DMA’s requirements – web publishers recorded a 5.7% decrease in revenue per click and a 2% reduction in online sales revenue, alongside an 8% decline in profits attributable to compliance costs. Marketing experts anticipate that smaller firms, in particular, will face higher customer acquisition costs because they lack the resources to target audiences efficiently without platforms’ data-aggregation capabilities. See: G. A. MANNE, D. AUER, L. RADIC, S. ÜNEKBAS, M. A. ZÚÑIGA, *Response of the International Center for Law & Economics Consultation on the First Review of the Digital Markets Act*, in *International Center for Law&Economics*, 2025.

¹⁰⁴ *Ibidem*. To support the effectiveness of its advertising models for SMEs, Meta cites, for example, “Eliza was here”, a Dutch travel company that used Meta’s personalised advertising technologies – including AI-based tools – to run a brand-awareness campaign that increased travel bookings by over 40%. Therefore, European SMEs may experience a significant loss of visibility (therefore, in terms of sales) alongside increased advertising expenditure. See also: C. CENNAMO, T. KRETSCHMER, I. CONSTANTIOU, E. GARCÉS, *Economic Impact of the Digital Markets Act on European Businesses and the European Economy*, in *LAMA Economic research*, 2025;

¹⁰⁵ D. MATRAS, *Meta’s Personalized Ads Boost Europe’s Economy: €213 Billion in Value and Almost 1.5 Million Jobs*, 14 May 2025.

«by unfairly restricting personalized advertising the European Commission is also hurting European businesses and economies».¹⁰⁶

Beyond Meta’s defensive rhetoric, the central evaluative question for 2026, therefore, is whether (and to what extent) these hidden costs will be passed through to advertisers and downstream businesses, or whether they will be offset by the emergence of effective compliant alternatives and/or by increased “contestability” in the relevant platform services.

In the author’s view, the downstream “hidden costs”, although they do not constitute an “autonomous” criterion for assessing either the contestability of gatekeepers’ positions or the fairness of relationships between gatekeeper and business users and between gatekeeper and end users, cannot be regarded as irrelevant *per se*. Rather they are relevant to assessing the effectiveness and, above all, the proportionality of the regulatory intervention, which should not impose a disproportionate burden on the very actors the regulation is intended to protect¹⁰⁷ nor generate negative externalities that may chill innovation or undermine the consumer experience.¹⁰⁸

Further inquiry is therefore required to ascertain whether – both legally and economically – such “hidden costs” are relevant in light of the regulation’s *ratio* and, if so, whether they are justifiable in view of the benefits actually produced in terms of fairness and contestability, or instead excessive when measured against the outcomes achieved, consistently with the principle of proportionality governing EU action (Article 5(4) TEU).

Moreover, it is worth paying attention to the gatekeeper’s strategic adaptation capable of preserving high revenue streams and advertising efficiency, while not undermining the contestability of the services. Meta recently presented GEM (Generative Ads Recommendation Model) as a “central” ads foundation model for advertising recommendations, trained on ad content and user

¹⁰⁶ J. KAPLAN, *Meta’s Statement in Response to the European Commission’s Decision on the Digital Markets Act*, 23 April 2025, www.about.fb.com/news/2025/04/metastatement-in-response-to-the-european-commissions-decision-on-the-digital-markets-act/.

¹⁰⁷ Digital Markets Act, Art. 1.

¹⁰⁸ Digital Markets Act, Recital No. 4.

engagement data derived from both interactions with ads and ‘organic’ interactions, using knowledge transfer techniques designed to improve the group’s entire “ads stack”.¹⁰⁹ In such a setting, personalisation can also be achieved through highly predictive inferences and indirect signals, reducing the need to explicitly “combine” databases. The point, then, is to verify whether the new EU option announced for 2026 will rely on the GEM model and, while “formally” compliant with Article 5(2), will nonetheless preserve – substantively – data-driven competitive advantages that are difficult to replicate and/or comparable levels of advertising efficiency. Should that be the case, it could (more or less overtly) undermine the regulation’s contestability objective.

Finally, two legal issues remain unresolved under Article 5(2) and the “hidden costs of compliance”. The first concerns the effectiveness of “DMA-compliant” consents and, more broadly, the reliance on user choice as a regulatory mechanism. Article 5(2) shifts the centre of gravity towards the user’s decision,¹¹⁰ but that very regulatory design leaves the provision vulnerable to a well-established critique – already extensively discussed in the GDPR context – namely the “consent fatigue”.¹¹¹ If users are repeatedly required to make decisions over complex information flows in fast-paced, low-attention contexts, choice may become routinised and effectively automatic.¹¹² The point, however, is not merely behavioural but legal, in the sense that consent that is formally valid yet given mechanically risks undermining its function as a genuine corrective to the imbalance between gatekeepers

¹⁰⁹ Meta, *Meta’s Generative Ads Model (GEM): The Central Brain Accelerating Ads Recommendation AI Innovation*, 2025, www.engineering.fb.com/2025/11/10/ml-applications/metas-generative-ads-model-gem-the-central-brain-accelerating-ads-recommendation-ai-innovation/.

¹¹⁰ A. ACQUISTI, C. TAYLOR, L. WAGMAN, *The economics of privacy*, in *Journal of Economic Literature*, 2016, p. 442 ff.; A. S. D’AMICO, *Market Power and the GDPR: Can Consent Given to Dominant Companies Ever Be Freely Given?*, in *EP*, 2023.

¹¹¹ “Consent fatigue” arises from repeated consent requests for different purposes, which may prompt users to consent automatically. Article 5(2) requires multiple operation-specific “DMA-compliant” consents, potentially aggravating this risk. However, the one-year limit on re-asking consent mitigates the problem by stabilising the user’s choice for a minimum period. See: European Commission, *Cookie Pledge Proposal*, 2023.

¹¹² See: J. SOLOVE, *Murky Consent: An Approach to the Fictions of Consent in Privacy Law*, in *Boston University Law Review*, 2023, p. 623 ff.

and users.¹¹³ Therefore, the 2026 assessment will need to examine whether the proliferation of interfaces and options leads to an erosion of substantive consent. Furthermore, it is necessary to assess consumer response to the availability of an alternative without personalized advertising:¹¹⁴ given the two free alternatives,¹¹⁵ will users prefer an experience with less use of their data? Or will they accept the highly personalized experience, making the competitive impact of the regulation more limited than enforcement currently suggests? This is because privacy protection is a purely subjective and interpersonal assessment, and some users may find a service with advertisements based on their interests rather than random ones to be advantageous (or non-invasive).¹¹⁶

Ultimately, 2026 may be the year in which the opening question admits of a more definitive response.

¹¹³ It is also conceivable that legal bases other than consent may be relied upon. On this point, see: I. GRAEF, *Why end-user consent cannot keep markets contestable: A suggestion for strengthening the limits on personal data combination in the proposed Digital Markets Act*, in *VBlog*, 2021.

¹¹⁴ For an analysis of European consumers' perceptions of personalised advertising, see: IAB Europe, *Optimisation over reform, Understanding EU consumers' perception and knowledge of the ad-founded internet and related privacy rights issues*, 2025, p. 14 ff.

¹¹⁵ Indeed, as discussed in section 6, users tend to accept tracking when the non-profiling alternative is offered only for payment. However, where both options are free of charge, user preferences may differ. See: T. MULLER-TRIBBENSEE ET AL., *op. cit.*

¹¹⁶ This calls into question the "privacy paradox" doctrine, which describes the gap between individuals' stated preference for privacy and their willingness to accept profiling in exchange for access to "free" digital services. It also captures cases in which users, despite privacy concerns, treat privacy as the "price" of personalisation and may even prefer interest-based advertising to untargeted, "random" ads. See also: D. J. SOLOVE, *Understanding Privacy*, Cambridge, 2008.

ABSTRACT (ITA)

L’articolo esamina se, e in quale misura, il *Digital Markets Act* (DMA) stia mantenendo le sue promesse. L’analisi si concentra sull’art. 5, par. 2, il quale vieta specifiche pratiche di trattamento dei dati da parte dei *gatekeeper* e condiziona, di conseguenza, l’operatività dei servizi di *social networking* e dell’*advertising online*. Il lavoro assume il caso *Meta* come principale caso studio di compliance ed enforcement: dal modello “*Consent or Pay*” sino alla decisione di non conformità, nonché agli sviluppi attesi nel 2026. In tale cornice, vengono delineati possibili assetti di monetizzazione e modelli pubblicitari idonei ad assicurare la piena conformità all’art. 5, par. 2. Nonché, si valuta l’effettività della disposizione distinguendo tra reattività istituzionale e effettività sostanziale, individuando futuri profili da considerare nella valutazione dell’operatività e dell’impatto della norma: costi “*hidden*” di compliance nei mercati “a valle”, strategie di adattamento dei *gatekeeper* che possono mirare la legittimità e l’effettività dell’intervento *ex ante* dell’Unione.

ABSTRACT (ENG)

The article examines whether, and to what extent, the Digital Markets Act (DMA) can be regarded as “effective”. The analysis focuses on Article 5(2), which prohibits specific data-processing practices by gatekeepers and, consequently, affects the operation of social networking services and online advertising. The article takes the Meta case as its main compliance and enforcement case study, from the “Consent or Pay” model to the non-compliance decision, as well as the developments expected in 2026. Within this framework, it outlines advertising models capable of ensuring full compliance with Article 5(2). It also assesses the provision’s effectiveness by distinguishing between institutional responsiveness and substantive effectiveness, identifying future aspects that should be considered when assessing the provision’s impact: downstream “hidden” compliance costs and gatekeepers’ adaptation strategies that may undermine the legitimacy and effectiveness of the Union’s ex-ante intervention.