Yearbook of European Law, 2025, **00**, 1–28
https://doi.org/10.1093/yel/yeaf005
Article

OXFORD

Meta's peculiar acumen—moving privacy ahead in social media markets

Adrian Kuenzler *

ABSTRACT

This article puts forward a new perspective on *Meta Platforms Inc.*, a recent breakthrough decision of the Court of Justice of the European Union (CJEU), reconfiguring key debates around the use of personal data by social media companies and how that use affects the manner in which individuals and social relations are represented, realized, and governed through digital markets. The decision enables dominant social media companies to offer, for an appropriate fee, a paid version of their products if users reject personal data processing by the platform. While *Meta* defies conventional viewpoints as to how consumers can give valid consent to the processing of their personal data, this article submits that the decision to enable them to do so in this fashion is expedient. The CJEU uncovers a rift between different avenues of consumer influence and recognizes that these avenues are interlinking means of moving privacy ahead in concentrated markets. Though existing legal doctrine does not fully accept that vital reality, *Meta* in fact clears the way for privacy to be realized in digital markets.

I. INTRODUCTION

The relationship between competition law and privacy has become a focal point in digital markets, where big technology companies increasingly accumulate, utilize, and sell consumers' personal data. That relationship is characterized by both mutual reinforcement and intrinsic tension. While competition law traditionally concentrates on promoting market competition, fostering greater access to and use of personal data to drive innovation and lower prices, privacy laws seek to limit the processing of such data to protect individual interests in autonomy, dignity, freedom, and control, restricting the exploitation and sharing of private information that an increased extent of competition typically encourages.[1] Recent scholarship on this relationship has tended to coalesce around several distinct paradigms.[2]

* Faculty of Law, The University of Hong Kong; Email: adriankuenzler@gmail.com

[1] Beate Roessler, *The Value of Privacy* (Polity Press 2005); Christopher Kuner, Lee A Bygrave and Christopher Docksey, 'Background and Evolution of the EU General Data Protection Regulation (GDPR)' in Christopher Kuner, Lee A Bygrave and Christopher Docksey (eds), *The EU General Data Protection Regulation (GDPR): A Commentary* (OUP 2020) 1–47.

[2] Vittorio Bachelet, 'Pay-or-Consent' and Emerging Trends in Digital Contract Law' (2024) 5 Eur Rev Private L 773; Claudia Maicher, *Coherence Between Data Protection and Competition Law in Digital Markets* (OUP 2023).

One concerns doctrinal separation. Early theorists emphasized keeping competition and privacy laws separate, observing traditional doctrinal boundaries.[3] Competition law, according to this view, is responsible for addressing market harms while data protection law attends to privacy and consumer protection interests. The view submits that melding the two domains would distort the goals of each, and that privacy concerns should rarely, if ever, be a factor in competition law analysis. Another paradigm regards privacy as a distinct quality attribute of market competition.[4] Advocates of this view treat privacy as a discrete dimension of product quality, incorporating it into competition law's conventional consumer welfare calculus. Under this theory, market actors can (and should) compete to offer greater privacy protections, and competition law is capable of addressing privacy degradations as non-price harms. The conception pivots on a shared assumption: that a greater extent of consumer choice, helped by notice-and-consent regimes, leads to healthier forms of rivalry and strengthened privacy safeguards.[5] A third view challenges the earlier assumption that a greater extent of competition is always beneficial or that privacy is just a parameter of competition.[6] In particular, recent privacy law scholarship has come to argue that, in view of the rapid development of digital technologies and the futility of notice-and-consent regimes, the use of personal data should be restricted and fiduciary duties and non-waivable rights ought to limit market competition, to the extent that privacy and competition law embody genuinely commensurate interests. This view gives rise to situations where neither competition nor data protection laws takes precedence and necessitates a pluralistic or eclectic outlook: at times, the law must choose which values to endorse, or carve out specific exceptions and immunities.

Although such scholarly distinctions are analytically useful, they tend to overstate specific aspects of an intricate reality in which each stance encapsulates a measure of validity and a particular facet of truth. The Court of Justice of the European Union's (CJEU) decision in *Meta Platforms Inc.*[7] is emblematic of the subtle interplay between several neglected aspects of competition and data protection law in the EU. At the most general level, the decision stands for the proposition that an abuse of dominance may manifest not only in well-known forms of exclusionary conduct or price manipulation but also through exploitative data practices that erode individuals' control over their personal information.[8] In this sense, EU courts and regulatory authorities acknowledge that the quality dimension of goods and services—including privacy—can be intrinsic to competition and that data protection laws may fundamentally influence market power and competition.[9] Conversely, *Meta* reveals an understanding of competition law that may require considering the implications of data accumulation, consumer consent, and user lock-in, particularly in highly concentrated markets, so that the objectives of competition and data protection law may intersect, align, or, at times, conflict.

Meta arose from Facebook's practice of collecting and utilizing personal data from its services and third-party websites and applications without the explicit consent of users, leveraging the combination of such data for targeted advertising. National competition authorities,

[3] See for an overview Giuseppe Colangelo and Mariateresa Maggiolino, 'Data Protection in Attention Markets: Protecting Privacy through Competition?' (2017) 8 J Eur Comp L Practice 363.

[4] See Samson Y Esayas, 'Privacy-As-A-Quality Parameter of Competition' in Björn Lundqvist and Michal S Gal (eds), *Competition Law for the Digital Economy* (Edward Elgar 2019) 126–172.

[5] Chris J Hoofnagle, 'Designing for Consent' (2018) 7 J Eur Consumer Market L 162.

[6] Arletta Gorecka, 'Convergence of Competing Powers: EU Competition Law and Privacy in the Digital Era—Scenarios and Impacts' (2024) 34 Information Comm Tech L 30; see also Frederik Z Borgesius, 'Informed Consent: We Can Do Better to Defend Privacy' (2015) 13 IEEE Security Privacy 103.

[7] CJEU Case C 252/21, *Meta Platforms Inc.* [2023] ECLI:EU:C:2023:537.

[8] Adrian Kuenzler, 'Why Algorithmic Collusion and Discrimination Upend the Foundations of Competition Law' in Yeşim M Atamer and Alexander Hellgardt (eds), *The Oxford Handbook of Regulatory Contract Law* (OUP 2026) 1.

[9] Giorgio Monti, 'Taming Digital Monopolies: A Comparative Account of the Evolution of Antitrust and Regulation in the European Union and the United States' (2022) 67 Antitrust Bull 40.

most notably the German Federal Cartel Office (FCO), found that Meta's terms and practices imposed unfair trading conditions on users, constituting an abuse of a dominant position, as users lacked both genuine alternatives and effective control over their data.[10] The CJEU ultimately endorsed the view adopted by the FCO in its proceedings against Meta, confirming that competition authorities can consider infringements of data protection rules as part of their assessment of abusive conduct, provided they cooperate with data protection authorities. *Meta* further clarified that, in the context of market dominance, users must not be forced into an 'all-or-nothing choice' in terms of using the platform and surrendering their personal data or abstaining from the platform altogether; instead, users should be offered, if necessary for an appropriate fee, an equivalent alternative that does not involve personal data processing.[11] This 'consent or pay' regime, however, raised significant concerns regarding the commodification of privacy, the potential for reinforcing socio-economic disparities, and the adequacy of consent in light of Meta's dominance.[12]

This article puts forward a new perspective on *Meta*, explaining how the decision reconfigures key debates around the use of personal data by social media companies and how that use affects the manner in which individuals and social relations are represented, realized, and governed through digital markets. While most parts of the decision have achieved approval in theory and practice, *Meta*'s most consequential tenets have met with intense criticism from industry, consumer research organizations, and data protection regulators.[13] From a competition law point of view, however, there appears to be a particular acumen in *Meta* that defies conventional wisdom as regards how privacy and data-driven markets intersect and correlate.

Meta breaks with an important precept established by previous case law on the collection and processing of personal data about user activities on and off dominant social media platforms. This article submits, however, that the decision is expedient because it confronts, head-on, how consumers can influence social media markets. It offers a possible interpretation of *Meta*, which differs from that which has been proposed to date. The article does not seek to claim that the proposed reading is the only plausible, conceivable, or even true one. Rather, it submits a reading of the judgment that is closely attuned to the workings of data-driven markets, albeit a reading that privacy, consumer protection, and some competition law commentary might not (yet) be ready to endorse. Offering an alternative reading of the judgment, however, might enable legal scholarship to engage more deeply with the criticisms levelled against the CJEU's opinion as well as the intersection of competition law and privacy.

The article suggests that, in digital markets, privacy is perhaps best accommodated through administrative action taken on behalf of consumers *and* as a result of consumer switching between different products. A salient theme in both *Meta* and the wider academic discussion is the recognition of multiple, interlinked channels of consumer influence in digital markets, especially where traditional forms of competition may be ineffective due to market concentration, network effects, and economies of scale and scope.[14] Administrative action refers to regulatory or judicial intervention taken on behalf of consumers, compelling

[10] Bundeskartellamt, Decision of 6 February 2019, B6-22/16.

[11] CJEU Case C 252/21 (n 7) para 150.

[12] See James Q Whitman, 'The Two Western Cultures of Privacy: Dignity versus Liberty' (2004) 113 Yale LJ 1151.

[13] Daniel Newman, 'Meta Launches Ad-Free Paid Model in Europe: Does This Solve the Privacy Issue?' (*Forbes*, 10 November 2023); BEUC, 'Choose to Loose with Meta. An Assessment of Meta's New Paid-Subscription Model From a Consumer Law Perspective' (Brussels, 2023); BEUC, 'How Meta Is Breaching Consumers' Fundamental Rights' (Brussels, 2024); European Data Protection Board, 'Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms' (Brussels, 2024).

[14] Frederic Jenny, 'Changing the Way We Think: Competition, Platforms and Ecosystems' (2021) 9 J Antitrust Enforcement 1.

dominant platforms to adjust their business practices—in *Meta*, for example, by requiring enhanced consent mechanisms and greater user voice regarding the platform's data processing. This channel recognizes that, in highly concentrated markets, consumers may lack effective bargaining power vis-à-vis the platform or viable opportunities to switch. As such, competition authorities and courts act to integrate consumer preferences, such as privacy or product quality, into the design and operation of dominant platforms. Administrative action taken on behalf of consumers is essential for agenda-setting, enabling collective consumer interests (including those of 'minority' users concerned about privacy) to affect the quality of digital services. On the other hand, competition law has traditionally relied on the notion of consumer sovereignty—the idea that consumers can discipline firms by switching to alternative providers. In the digital economy, however, effective switching may be hampered by strong network effects, as well as economies of scale and scope. Regulatory remedies such as interoperability mandates, data portability rights, or structural separations aim to lower barriers to switching and restore market contestability, but *Meta* recognizes that while switching is ordinarily a vital channel of consumer influence, it is often insufficient on its own to address product quality.[15] Instead, *Meta* underscores that administrative action and switching are perhaps best understood as complementary, not substitutive, channels of consumer influence. Effective protection of consumer interests in data-driven markets may require both: administrative action to articulate, and put into effect, consumers' preferences to address disparities in market power; and genuine rivalry to enable switching where alternatives exist. The FCO and subsequent courts recognized that dominance in social media networks means users cannot simply 'exit' and turn to another service if they object to personal data processing. From a competition law perspective, this may amount to an abuse of dominance because users are deprived of an effective choice, and from a privacy law standpoint, forced consent is deemed invalid. The tension is that market structure impinges on the viability of privacy rights, yet traditional competition law remedies that simply aim to restore consumer choice may turn out to be deficient. Social media networks have become so deeply ingrained in consumers' social and economic lives that access to the most prominent platforms has come to be a necessity.[16] Forcing users to leave if they disagree with a dominant platform's data practices is no longer a feasible option, raising the stakes for competition law and privacy protections. This is why administrative action taken on behalf of consumers happens to be essential when switching is ultimately impractical or unfeasible. *Meta* exemplifies how, under these conditions, privacy and competition require amending terms of service or particular features of a platform's design rather than simply relying on alternatives. To be sure, in theory, competition law would help spur social media platforms to offer a greater extent of privacy-protective features to promote quality competition. In practice, however, dominant platforms may often find it profitable to erode privacy, and new entrants may compete by offering more data-driven services. In this respect, *Meta* also demonstrates how different enforcement strategies can be staged or layered: early administrative action taken on behalf of consumers (eg, requiring opt-out consent) may foster the emergence of privacy as a competitive parameter, which subsequently enables the market mechanism to gain traction. Competition law must initially step in to prioritize privacy by giving consumers 'voice', although this can clash with the exclusive focus on creating and preserving several alternatives.

A significant criticism of *Meta* is that it transforms privacy into a feature one must pay for rather than a baseline entitlement that remains beyond the existing market logic. From a

[15] William E Kovacic and David A Hyman, 'Regulating Big Tech: Lessons From the FTC's Do Not Call Rule' (2022) 26 Virginia JL Tech 1.

[16] Rebecca Tushnet, 'Power Without Responsibility: Intermediaries and the First Amendment' (2008) 76 Geo Wash L Rev 986.

privacy perspective, fundamental rights should not depend on the ability to pay, especially when access to social media platforms is near-essential for participation in society, and commodification may further entrench inequalities, as only users who can afford subscriptions can effectively opt out of surveillance-based business models. The decision, however, illustrates that from a competition law perspective, paid options can constitute legitimate forms of differentiation. *Meta* stands as a crucial instance of the inevitable friction between economic regulation and fundamental rights protection and underlines the need for a careful, context-specific balancing of consumer welfare, market structure, and personal autonomy. It reveals that seemingly satisfactory solutions gleaned from one perspective can, from another, create palpable challenges or even harm.

Just as privacy law scholarship has come to realize that the law has failed to be successful in affording individuals autonomous control over their data and instead must seek to consider the larger backdrop that is set to take advantage of their behaviour,[17] this article maintains that legal scholarship tends to overlook the fact that competition law can help align technology more broadly with what individuals and societies value, accommodating market competition *and* addressing normative conflict. More to the point, the article suggests that competition law serves a broader purpose, although the common viewpoint is that it simply aims to produce more corporate alternatives by affording consumers a greater number of options in the market—a solution that cannot speak, however, to the deep consent-related flaws, information asymmetries, and moral hazards inherent in present-day digital technologies.[18] Using as forceful an argument as the one that privacy law scholarship has recently advanced, the article suggests that *Meta* requires us to reconsider the backbone of competition law to overcome the inconsistencies between the law's assumptions and the realities of digital markets, and to curb the ability of social media companies to freely exploit consumers whose data they collect, administer, and disseminate.[19] In short, the purpose of this contribution is to highlight one important feature that both privacy and competition law commentary have in common: rather than foreground the supposition that people always willingly make certain choices and are relatively indifferent to other options—enabling them to rely primarily, if not solely, on the market's 'exit' option—digital markets also require consumers to have the capacity to exercise a particular kind of 'voice', a device that policymakers and theorists have thus far overlooked.[20] Ultimately, this viewpoint recognizes that different avenues of consumer influence serve as interlinking means of pushing privacy ahead in social media markets, and that competition law plays a crucial part in facilitating these mechanisms despite (or perhaps because of) its conventional emphasis on preserving a multiplicity of options.[21]

The first part of the article explains the gist of the decision and lays out the doctrinal issues contained in it. The second part makes clear how different avenues of consumer influence work together to propel market dynamics ahead. The third part shows that *Meta* is perhaps best grasped as an attempt to clear the channels of consumer influence to enable privacy to materialize in data-driven markets.

[17] Daniel J Solove, *The Digital Person: Technology and Privacy in the Information Age* (NYU Press 2004); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford University Press 2009); Ignacio Cofone, *The Privacy Fallacy. Harm and Power in the Information Economy* (CUP 2024).

[18] See Adrian Kuenzler, 'On (Some Aspects Of) Social Privacy in the Social Media Space' (2022) 12 Int Data Privacy L 63.

[19] Adrian Kuenzler, *Restoring Consumer Sovereignty: How Markets Manipulate Us and What the Law Can Do About It* (OUP 2017).

[20] Adrian Kuenzler, 'Advancing Quality Competition in Big Data Markets' (2019) 15 J Comp L Econ 500.

[21] Adrian Kuenzler, 'Competition Law as a Catalyst for Collective Market Governance: Gauging the Discursive Benefits of Intensified Administrative Action' (2022) 41 Yearbook Eur L 252.

II. THE PUZZLES OF *META PLATFORMS INC.*

By and large, *Meta* has received approval from commentators and practitioners alike. The decision mainly holds that a national competition authority can find, in the context of examining an abuse of a dominant position, a breach of rules other than those relating to competition law—especially those laid down in the General Data Protection Regulation (GDPR).[22] However, if a national competition authority identifies an infringement of the GDPR in its investigation, it is required to take account of any decision by the competent supervisory authority under that regulation. *Meta* thus establishes, first and foremost, a duty of sincere consultation and cooperation between competition and data protection agencies.[23] *Meta* also confirms the widespread view that the processing of personal data by dominant social media companies without users' actual consent is lawful only if such data processing is covered by the reasons set out in the GDPR, that is, when it is objectively indispensable to achieve the subject matter of the contract.[24] Although the comprehensive collection of users' data may almost always serve to better personalize a platform's service, such personalization cannot justify, even if pursued as a legitimate interest by the platform, the processing of that data in the absence of the data subject's permission.[25]

However, certain consumer and data protection advocates saw the ruling as less than satisfactory, specifically concerning how consumers can validly give consent to the processing of their personal data by the operator of a dominant social media network. In this respect, the Court held that 'users must be free to refuse individually, in the context of the contractual process, to give their consent to particular data processing operations not necessary for the performance of the contract, without being obliged to refrain entirely from using the service offered by the online social network operator'.[26] Importantly, the Court added that this means 'that those users are to be offered, *if necessary for an appropriate fee*, an equivalent alternative not accompanied by such data processing operations'.[27] Contrary to what previous case law and legal commentary have established—that consent can only be given freely if dominant social media companies provide their services free of charge,[28] social media platforms can now offer users the alternative to 'consent or pay', that is, to ask them either to agree to the processing of personal data or to opt out of the platform's data tracking in return for an 'appropriate fee'. In so doing, the Court moved privacy from its inalienable and free domain into the paid market sphere, transforming it into a marketable commodity where personal data processing is traded off for profit.

It is perhaps unsurprising that consumer and data protection advocates were enraged, maintaining that privacy risks losing its distinctive qualities and social dimensions if it can be exchanged for money in this way. By now, a profound justice-related concern inherent in the 'consent or pay' argument has emerged, one in which it is assumed that the market system performs its traditional function as a means by which an exchange of goods, including personal data, between buyers and sellers will take place, and such an exchange is supposed to be secured by maintaining effective market competition. In this view, *people* should be paid for the information gleaned from them, especially if that information ends up being valuable. After all, people are the origin and end point of data that is meaningful to digital

[22] Regulation (EU) 2016/679 of 27 April 2016, OJ 2016 L 119/1 (GDPR).
[23] CJEU Case C 252/21 (n 7) paras 54–59.
[24] ibid para 125.
[25] ibid para 117.
[26] ibid para 150.
[27] ibid (emphasis added).
[28] Bundeskartellamt, Decision of 6 February 2019, B6-22/16; Bundesgerichtshof (23 June 2020) KVR 69/19 DE: BGH:2020:230620BKVR69.19.0; art 4(11) and Recitals 32, 42–43 of Regulation (EU) 2016/679 of 27 April 2016, OJ 2016 L 119/1 (GDPR); see for an overview Kuenzler (n 18).

technologies. If scrutiny of people's behaviour makes it possible for social media companies to offer personalized experiences, then people should be owed money for the utilization and exploitation of that valuable information. Rather than turning people's information into a free good—depleting them spiritually and materially, and letting those who amass and aggregate that information to become wealthy—the justice-related concern holds that those who provide the raw material for digital technologies should be compensated for what they give away as new technologies develop, which would afford them greater dignity and make them better off.[29] After all, affording property rights in data and the right to trade at will in a free market serves to strengthen individual liberty and self-determination, especially when digital technologies become so advanced that they grow autonomous and acquire general artificial intelligence.[30] Securing property rights and free trade through competition law, in this view, serves to maintain a market-based exchange of data, works to respect and fairly reimburse human beings for the information they divulge, and renders digital technologies sophisticated and affordable.[31]

However useful and enticing this narrative may have been, it now seems to hamper efforts to sort out the issues that plague contemporary social media markets with strong scale and scope, including network effects. In these markets, consumers typically are no longer able—or indeed willing—to migrate between different platforms that have established and built critical user numbers.[32] What is more, as soon as data and information became free commodities, services that generated revenue and profit were built *around* data and information, and businesses increasingly relied on the collection, analysis, and sale of user data to advertisers or used proprietary channels as an alternative. The unavoidable consequence of this arrangement is that people lack individual property rights—and thus control—in data, but the law nevertheless assumes that people have control over their information through various consent requirements.[33] While express consent is arguably the most meaningful manifestation of this idea, in practice, notice-and-choice frameworks, by which corporations communicate their data-gathering activities and which consumers can opt out of if they disagree with a platform's policy, aim to reinstate property-like command in data.[34]

This is an adequate image as far as it goes; however, it obfuscates several important criticisms from the point of view of privacy and consumer protection law commentators. In reality, when it comes to digital technologies, individual control, contemplated in this way, frequently turns out to be a fiction, as people cannot exercise it meaningfully.[35] People do not (and cannot) read all the fine print of the compressed and opaque notice policies they come across when browsing the internet, and individuals are often unaware of how their information is employed, so that their choices typically entail deciding to use services that are non-negotiable as part of take-it-or-leave-it offers.[36] Equipped with little concrete information, few realistic substitutes, and a lack of bargaining opportunities, once agreed, people's choices are bound to omit the consequences that materialize when large datasets converge

[29] Jaron Lanier, *Who Owns the Future* (Penguin 2013).

[30] Nadezhda Purtova, 'Do Property Rights in Personal Data Make Sense After the Big Data Turn?: Individual Control and Transparency' (2017) 10 JL Econ Reg 1.

[31] Jeffrey Ritter and Anna Mayer, 'Regulating Data as Property: A New Construct for Moving Forward' (2017) 16 Duke L Tech L Rev 220.

[32] Jean-Charles Rochet and Jean Tirole, 'Platform Competition in Two-Sided Markets' (2003) 1 J Eur Econ Ass 990.

[33] Woodrow Hartzog and Neil Richards, 'Privacy's Constitutional Moment and the Limits of Data Protection' (2020) 61 B C L Rev 1687.

[34] Paul M Schwartz, 'Privacy and Democracy in Cyberspace' (1999) 52 Vand L Rev 1609.

[35] Cofone (*supra* note 17.

[36] Elena Abrusci and Richard Mackenzie-Gray Scott, 'The Questionable Necessity of a New Human Right Against Being Subject to Automated Decision-Making' (2023) 31 Int JL Information Technology 114.

and information about them and others is inferred.[37] Because of the complexity and imperviousness of the entire online ecosystem, more often than not, people end up accepting harmful and subservient privacy resolutions and make choices that are not in their best interests.[38] Whether it is through temptation, seduction, or simple nudges, companies are in a position to design alternatives in a manner that requires people to give up control over their data and surrender personal information to the entities that collect, utilize, and sell them at scale, regardless of whether this happens to their detriment.[39]

Meta arguably extends this logic even further and oddly amplifies some of the most well-rehearsed concerns in privacy law scholarship. The fact that the CJEU enabled social media platforms to request an access fee from users or deny users' membership requests unless they agree to their personal data being processed exacerbates the power disparity between individuals and corporations and works to further limit individual control when users are requested to consent to the collection, processing, and sale of their personal information. Apologists maintain that requiring monetary compensation as an alternative to personal data processing restricts consumer choices, renders it more probable that individuals will relinquish their rights to privacy, and lessens the control of users to the point where any option apart from consenting to personal data processing fails to be worthwhile.[40] Before *Meta*, dominant social media platforms were obliged as a matter of law to offer users at least two versions of their free products if they combined consumers' data from third-party websites and applications. They were required to enable users to opt out of the platform's data tracking, allowing them to choose between different distinct features of the services that these platforms offered.[41] As regards Facebook in particular, the German Federal Court of Justice (FCJ) found that access to the platform determines the ability of (at least some) consumers to participate in daily life so that users cannot simply be expected to relinquish their membership of the platform if they disagree with the company's terms of service. The Court considered 'the social network [to be] an important form of social communication', holding that 'the use of the forum for the purpose of mutual exchange and expression of opinion is of particular essence because of the high number of users and the [platform's] network effects'.[42] This important finding notwithstanding, *Meta* enabled Facebook to introduce a paid version of its product as an alternative for those users who disagreed with the platform's data processing activities.[43]

The reasons why commentators were perturbed seem obvious. One concern is empirical. After the CJEU rendered its decision, Meta in fact announced the introduction of a paid subscription model for those users who wish to withdraw from the platform's data collection activities. According to the platform's terms of service, it remains unclear, however, whether users who decide to pay for Meta's service will still have their personal data processed—although they will no longer be exposed to advertisements. Meta stated that consumers who decide to pay to be part of Facebook's network would not have their data collected with a view to the rental of advertising spots on their accounts. However, the company did not

[37] Sandra Wachter and Brent Mittelstadt, 'A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI' (2019) 2019 Colum Bus L Rev 494; Alicia Solow-Niederman, 'Information Privacy and the Information Economy' (2022) 117 NW UL Rev 357; Salomé Viljoen, 'A Relational Theory of Data Governance' (2021) 131 Yale LJ 573.

[38] Cofone (n 17); Kuenzler (n 19).

[39] Natali Helberger and others, 'Choice Architectures in the Digital Economy: Towards a New Understanding of Digital Vulnerability' (2022) 45 J Cons Policy 175; Catalina Goanta, Giovanni de Gregorio and Jerry Spanakis, 'Consumer Protection and Digital Vulnerabilities: Common and Diverging Paths' in Camilla Crea and Alberto de Franceschi (eds), *The New Shapes of Digital Vulnerability in European Private Law* (Nomos 2024) 31–52.

[40] European Data Protection Board (n 13) 68–69, 70–73.

[41] ibid.

[42] Bundesgerichtshof (23 June 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0, para 102.

[43] CJEU Case C 252/21 (n 7) para 150.

promise that consumers who signed up for the paid version of its product would not have their data processed for other purposes.[44] The issue is whether Meta's policy is attuned to what the CJEU most likely had in mind (to render dominant social media platforms more privacy-protective) or whether this policy will instead permit the platform's data-gathering practices to become more effective through precise targeting (because more attention is given to the platform without advertisements while more data are extracted in the background).[45] Another concern is analytical. Quite a few observers have cast doubt on whether the provision of a paid subscription service as the sole alternative to personal data processing would be compliant with GDPR requirements. To avoid mass refusal by consumers to opt in to personal data processing for targeted advertising, Meta ostensibly based the paid version of its product on an initial EUR 12.99 monthly subscription payment.[46] Given the platform's special responsibility in drawing up terms and conditions of agreement,[47] it is doubtful, however, whether an annual payment of EUR 156 would amount to a viable alternative for users of all stripes to opt out of the platform's data tracking. Indeed, the underlying assumption in the debate over 'consent or pay' alternatives appears to be that privacy should be reserved for those who can afford it. This way of governing online platforms penalizes users who do not have the financial means to protect their privacy, while putting pressure on those users who have those means to make tough decisions about how to spend their money. As the FCJ previously observed, many individuals rely on social media platforms for their livelihoods, and linking financial and privacy costs to these vital services might worsen socio-economic disparities. Moreover, it might be troubling for independent businesses that have built a solid customer base on dominant social media platforms to adjust their organizations to a dominant platform's policy that starts charging fees for access to its network or introduces data practices that inundate those businesses with advertisements, especially at their most vulnerable point in time. Such scenarios arguably threaten to turn privacy into a privilege, reinforcing the obstacles that keep some people stuck on the lower rungs of the socio-economic ladder. Besides, the larger societal implications of turning privacy into a tradeable commodity are that a once democratic and open internet is gradually converted into a comparatively closed and restricted system that diminishes rather than improves the ability of people to pick the environment in which they can communicate, discover, and learn from new perspectives.[48]

Although after *Meta*, consumers are no longer given an 'all-or-nothing choice' in terms of either permitting the platform to collect their personal data or being forced to leave it altogether, the issue is whether, under Meta's revised policy, consent can still be regarded as freely given.[49] At the very least, Meta's fee could well be viewed as disproportionate, given the high price requested and the actual revenues generated through the company's targeted advertising. This raises the question of whether data privacy should be allowed to be charged for at all, and if so, how much is 'reasonable'—10 or 100 times as much as the cost of

[44] Meta, Press Release, 'Facebook and Instagram to Offer Subscription for No Ads in Europe' 30 October 2023 <https://about.fb.com/news/2023/10/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/> accessed 31 July 2025.

[45] Without seeing advertisements, users are likely to browse for longer and pay more attention to the platform so that more precise data about their behavior can be extracted. On the other hand, users will likely receive more personalised offers and get more useful recommendations.

[46] Meta (n 7). That price was subsequently lowered amid public pressure to EUR 9.99 and EUR 5.99, respectively, see Meta, Press Release, 'Facebook and Instagram to Offer Subscription for No Ads in Europe' 12 November 2024 <https://about.fb.com/news/2024/11/facebook-and-instagram-to-offer-subscription-for-no-ads-in-europe/> accessed 31 July 2025.

[47] Bundesgerichtshof (23 June 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0, para 124.

[48] Nathaniel Persily and Joshua A Tucker, *Social Media and Democracy. The State of the Field and Prospects for Reform* (CUP 2020).

[49] art 4(11) of Regulation (EU) 2016/679 of 27 April 2016, OJ 2016 L 119/1 (GDPR); CJEU Case C 252/21 (n 7) paras 142–145 ('consent cannot 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').

enabling personal data processing? Does data privacy still have value as a *right* in light of Meta's policy, or should social media companies, at best, be required to provide additional ('genuine and fair') alternatives? From the vantage point of consumers, the question is whether someone gives consent because they think it is the right path to take or whether they simply do not have the means to pay for a subscription fee, and the detriment to be incurred by relinquishing their social media account is such that they are obliged to accept the platform's terms of service.[50] In light of issues such as these, apologists contend that Meta's policy amounts to 'consent or pay up—and if you do not like it, leave'. Viewed from this perspective, 'consent or pay' suggests that *Meta* is at odds with the fundamental right to privacy, according to which every citizen, regardless of their social and financial status, must be able to protect their personal data.[51] It is hardly surprising, then, that several GDPR complaints have been launched with national regulatory authorities in the wake of *Meta*, and several consumer associations have lodged grievances with consumer protection agencies because the company's new policy allegedly amounts to an unfair, deceptive, and aggressive practice.[52] Significantly, the European Commission (EC) found that Meta's 'pay or consent' model violated Article 5(2) of the Digital Markets Act (DMA) because Meta neither provided an equivalent, less personalized alternative to its personalized advertising-driven social media service nor enabled users to give valid consent as required by the DMA.[53] The EC insisted not only on the formality of choice, but also on its substance: according to the EC, the proposed alternative must be functionally and economically equivalent (ie, free if the original service is free), and consent cannot be considered freely given if non-consenting users face an undue detriment.[54] The EC's position is thus distinct from the CJEU's standpoint in *Meta*. While the CJEU acknowledged that dominant platforms might, in principle, offer an 'equivalent alternative not accompanied by … data processing operations' for 'an appropriate fee',[55] leaving room for a subscription model as a potential means to balance contractual necessity and user control over data, the EC expressly rejects the idea that the same holds under the DMA. Although *Meta* remains valid in the context of competition law, the DMA overlays a new regulatory regime. Under the DMA, not only must consent satisfy existing GDPR standards, but it must also be anchored to a genuine, non-coerced, and 'free' alternative. This means that DMA enforcement extends well beyond GDPR and competition law requirements, prohibiting reliance on subscription 'consent or pay' business models as a compliance measure for designated gatekeepers. In spite of this, however, *Meta* sets the baseline for lawful data processing and consent under competition law, focusing on case-specific abuses and considerations regarding market dominance. Meanwhile, for many users, abandoning dominant social media platforms has arguably ceased to be a true option. Turning existing alternatives into feasible choices, however, appears vital in light of dominant platforms' policies, especially for those users who cannot find the means to opt out.

The issue that *Meta* raises is thus how individuals can effectively be steered toward alternatives that prioritize privacy over surveillance. This is precisely what this article aims to offer—a constructive reading of *Meta* that enables legal scholarship to engage in a fresh conversation about how to move privacy ahead in social media markets. In contrast to the

[50] European Data Protection Board (n 13).

[51] BEUC (n 13).

[52] BEUC, Press Release, 'Consumer Groups File Complaint Against Meta's Unfair Pay-Or-Consent Model' 30 November 2023 <https://www.beuc.eu/press-releases/consumer-groups-file-complaint-against-metas-unfair-pay-or-consent-model> accessed 31 July 2025; NOYB, Press Release, 'noyb Files GDPR Complaint Against Meta Over "Pay or Okay"' 28 November 2023.

[53] EC Case DMA.100055 of 23 April 2025, *Meta*, Regulation (EU) 2022/1925 of the European Parliament and of the Council, Article 29(1), 30(1) and 31(1) Regulation (EU) 2022/1925.

[54] ibid, para 271.

[55] CJEU Case C 252/21 (n 7) para 150.

traditional property rights-based view regarding data, *Meta* irrevocably flips the conversation, creating a landscape in which privacy needs to be purchased for a price. Offering a frame by which the law can navigate this landscape, the proposed reading encourages legal scholarship to recognize that the essential logic behind the Court's reasoning involves permeating the market with more privacy-enhancing alternatives, and not solely by integrating additional technological features such as opt-out rights into the design of leading platforms. Rather, the CJEU sought to render social media markets more receptive to consumer preferences when new websites and applications offer a range of different pricing terms. *Meta*, in this sense, does not observe the logic of pre-existing legal categories in which the function of competition law is only to address market failures where the allocation of property rights in data by the free market is not efficient.[56] Instead, it stands for two simultaneous propositions: that, despite a lack of property rights in data, authorities and courts, acting in the best interests of consumers, can render dominant social media platforms more privacy-protective and responsive—that consumers in such markets can have their voices heard by having at least some say in the decision-making processes of leading actors in terms of the conditions according to which those actors offer, supply or improve their products; and that privacy is also rooted in a conception of markets that clings firmly to the notion that a choice between different modes of doing business (price-based and/or non-price-based) renders social media platforms more amenable to what users arguably request. While the former is typically achieved as a result of administrative action taken on behalf of consumers (voice), the latter follows inevitably as a result of switching between different products (exit)—the main avenue by which consumers ordinarily exert an influence on product manufacturers and sellers. Importantly, however, *Meta* says nothing about the interplay of these avenues of consumer influence and how this impacts privacy. Instead, the decision reads as if privacy had already been recognized as a driving force that helps define how social media companies design their products and compete against one another in data-driven settings. This article seeks to clarify precisely that connection.

The reading of *Meta* proposed in this article fuses different avenues of consumer influence, albeit the CJEU did not spell out a logic that would reveal their interrelation. It is important to note, however, that *Meta* accepts previous findings according to which privacy in concentrated markets is often best achieved through administrative action taken on behalf of consumers.[57] Switching between different products, according to the Court, is not the only avenue available to consumers seeking to exert an influence on the market; in concentrated and increasingly personalized marketplaces, consumers can also exert an influence over product manufacturers and sellers by helping to administer them. Authorities and courts regularly investigate data-driven markets on behalf of consumers to ensure their preferences determine the market's state of quality equilibrium. The established view in competition law scholarship often fails to provide sufficient room for this important observation. *Meta*, in contrast, candidly assumes—contrary to conventional wisdom—that in the digital economy, consumers cannot simply be left to resort to switching. Instead, the institutional corrective must also be to *integrate* their preferences into the platform's service. Rather than forcing those users who value privacy to renounce their memberships and have them switch to a different product in case of disagreement, a more effective remedy, in the Court's view, lies in intensifying the extent of constructive cohesion between the dominant platform and its users.[58]

[56] Robert Bork, *The Antitrust Paradox: A Policy at War With Itself* (Basic Books 1978); Richard Posner, *Antitrust Law* (University of Chicago Press 2001).

[57] A Kuenzler, 'Direct Consumer Influence—The Missing Strategy to Integrate Data Privacy Preferences into the Market' (2020) 39 Yearbook Eur L 423.

[58] See already Bundesgerichtshof (23 June 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0.

However, the portion of the Court's opinion that permits dominant social media companies to provide consumers with a paid alternative to personal data processing moderates this perspective. *Meta* interweaves price- and non-price-based parameters of competition, and along with this, different channels of consumer influence. Privacy, in terms of embedding distinct product features into the design of leading actors' businesses, it is assumed, no longer needs to be the exclusive way by which other actors are spurred to compete on it (voice); rather, by permitting social media platforms to offer privacy in exchange for a monetary payment, the CJEU enables rivalry to unfold along a broader spectrum of alternatives so that competition around privacy now extends across multiple dimensions—monetary and non-monetary—which facilitates a more precise differentiation of, and responsiveness to, diverse consumer preferences (exit). Yet by connecting voice with choice in this manner, the decision ostensibly casts doubt on whether, and to what extent, consumers will still be able to successfully join in the conversation. Any convincing account of the CJEU's ruling, reflecting on the latter's consequences in terms of how privacy is realized in data-driven markets, must be able to elucidate this tension. The next part attempts to provide a preliminary explanation of how the two positions can be reconciled.

III. *META'S* UNDERLYING RATIONALE: THE INTERLINKING MEANS OF CONSUMER INFLUENCE THROUGH ADMINISTRATIVE ACTION AND SWITCHING

In view of *Meta*'s tensions, the issue is whether the decision should be seen as an opinion that contemplates data privacy as being realized merely as a result of consumer switching between several different products in the market or as an upshot of consumers exerting a direct influence on dominant social media companies' terms and conditions of agreement. Commentators rebuffed the decision because it authorized 'pay or okay' *or* 'opt out'—the ability of leading social media platforms to demand monetary compensation in exchange for data privacy *or* the ability of such platforms to afford consumers different degrees of personalization when proffering a free service.[59] Although the decision's criticism is defensible and convincing, the emphasis on two mutually exclusive possibilities is also disturbing. It frames privacy in data-driven markets as having a price *or* a quality dimension—that is, as getting social media companies to offer their services at different prices *or* as requiring them to integrate into their free products distinct privacy-protective features. That view appears to be coherent with a strong preference in legal doctrine for conceptual clarity. But it also follows on from one of the law's most consequential blind spots—the notion that consumer influence is grounded in rivalry *or* integration.[60]

The reading of *Meta* proposed in this article acknowledges that data privacy is perhaps best achieved by attending to both rivalry *and* integration. To put it more succinctly, it would be inadequate to suppose that the benefits of privacy could only be realized by having to resort to consumer switching or by integrating privacy into leading actors' modes of doing business. Competition law frequently contemplates rivalry arising from different price-based options, while consumer and data protection laws almost exclusively attend to the design of

[59] A synopsis provide Anne C Witt, '*Meta v Bundeskartellamt*—Data-based Conduct Between Antitrust Law and Regulation' (2024) 12 J Antitrust Enforcement 345; Arletta Gorecka, 'On the Interplay Between Competition Law and Privacy: The Impact of Meta Platforms Case' (2024) Eur Comp J 1; see sources (n 13); see also Alessia D'Amico, 'The Boundary Between EU Competition Law and the GDPR After *Meta*' (2024) 61 Common Market L Rev 787; Leonardo Parona, 'Addressing the Interplay Between Competition Law and Data Protection Law in the Digital Economy Through Administrative Cooperation: The CJEU Judgment in the *Meta Platforms* Case' (2024) 16 Italian J Public L 239.

[60] Adrian Kuenzler, 'What Competition Law Can Do for Data Privacy (And Vice Versa)' (2022) 47 Comp L Security Rev 105757, 1.

dominant platforms' technological architecture. Both views overlook what can be referred to as the interlinking means of different avenues of consumer influence—the manner in which those avenues create synergy and, eventually, progress. *Meta* seems to recognize how rivalry and integration work together to bring about a change and to render concentrated markets more responsive to consumers' preferences. The CJEU might not be explicit in this regard, but it appears to acknowledge this significant fact. It does not give precedence to either mechanism; instead, it relies on both.

What does the notion of switching and consumer influence through administrative action as interlinking means involve? By and large, privacy and competition are frequently viewed as antagonistic, and existing scholarship presumes, for the most part, that there is a tension between privacy and competition.[61]

Take, as an example, the debate around Facebook's general terms and conditions before the FCO initiated its investigation into the social media company's data-gathering practices. Privacy advocates objected to Facebook's data policy for a long time. And they did exactly what privacy advocates do when defending their rights. They complained, joined groups committed to objecting to the company's privacy policies, and wrote editorials and public reports. All these actions were significant. The result of this growing pressure was that Facebook set out to actively involve its users in helping to design the platform's terms and conditions of agreement. However, the company did so only to the extent that these terms were consistent with its advertising-driven business model.[62] Market dynamics only truly shifted when the FCO issued a decision on behalf of consumers, requiring Facebook to incorporate additional technological features into the platform and enabling users to opt out of the platform's data tracking.[63] There is an explanation for this staged dynamic. Data-driven markets have become so concentrated that consumers, by themselves, can only bring about a marginal change.[64] Although there is often no dearth of opportunities for consumers to articulate their preferences (perhaps even by choosing between different alternatives), consumers regularly lack the chance to put their preferences into effect.[65] The most difficult task when attempting to realize privacy in digital markets is not to facilitate the ability of consumers to *object*; it is to effect a palpable *change*—to bring consumers' views into the mix of market offers, to put their issues on the agenda, and to force leading actors to engage.[66]

Before the FCO's investigation, a small number of competitor networks, such as Minds, Steemit, and StudiVZ tried to account for privacy, touting their compliance with existing GDPR provisions. But their measures failed to yield the desired market dynamic; reliance on consumer switching, overall, was not enough for privacy to be recognized as a parameter of competition. Because of the market's advertising-driven backdrop, the majority of actors were incentivized to maximize profits by selling users' data to advertisers, and consumer switching between different platforms would merely produce new opportunities for other actors to vie for the collection, processing, and sale of user data. While the strongest force at work was competition for market shares rather than for consumer preferences (speak: privacy), market leaders could purposely degrade privacy, triggering incentives for other actors

[61] Oz Shy and Rune Stenbacka, 'Customer Privacy and Competition' (2016) 25 J Econ Management Strategy 539; Avi Goldfarb and Verina F Que, 'The Economics of Digital Privacy' (2023) 15 Ann Rev Econ 267.

[62] See Kuenzler (n 57) 445–449.

[63] Kuenzler (n 21).

[64] Jan Eeckhout, *The Profit Paradox. How Thriving Firms Threaten the Future of Work* (New Jersey: Princeton University Press, 2021); Francis Fukuyama and others, 'Report of the Working Group on Platform Scale' (Stanford, 2020).

[65] Jonathan A Knee, *The Platform Delusion. Who Wins and Who Loses in the Age of Tech Titans* (Portfolio 2021); Robert H Bork and J Gregory Sidak, 'What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?' (2012) 8 J Comp L Econ 663; David Wismer, 'Google's Larry Page: "Competition is One Click Away"' (*Forbes*, 14 October 2012).

[66] Kuenzler (n 21).

to do so as well, by collecting a greater amount of personal data and maximizing their profits without supplying any cogent benefits for consumers. Many customers saw no advantage to such competition because it did not take into account their privacy preferences—preferences that were barely accounted for, simply because more actors would compete. Although some social media companies still had an interest in contending for privacy, those actors had difficulties communicating to consumers the benefits of doing so.[67] Consumers could not always readily identify, let alone evaluate, a platform's privacy-enhancing measures, and leading actors could easily obscure the full extent of these commitments when they devised new ways to allow consumer targeting.[68] As a result, firms could profit more from exploiting user data than from vying for privacy. This is precisely why the FCO intervened: to readdress incentives and point competition toward the qualities consumers genuinely valued. Through the FCO's investigation, consumers were allowed to wield some significant influence over the market and were authorized to adjust—through administrative action—the dominant platform's terms and conditions of agreement. The FCO compelled Facebook as the leading actor to cede command of the flow of user data to consumers so that users could effectively demand from the platform what they reasonably expected.[69] And since the FCO's decision was definite and conclusive, it was to be observed by other actors. That circumstance guaranteed it would be recognized in the market, creating an incentive for all participants to pay heed to what consumers were requesting. Once the authority put consumers in a position to modify the dominant platform's terms and conditions of agreement—compelling other actors to adopt the same, or similar, privacy-enhancing measures and inducing increased privacy protections and better product offerings across the market—it would become possible for competition for privacy to unravel.[70]

The reason why consumer influence through administrative action turns out to be so significant in terms of facilitating privacy is that it enables consumers to instil their perspective into a real-life instance. It represents an institutional act of disagreement with the leading platform's data processing policy, one which compels the dominant platform to engage. When consumers are not only able to articulate their preferences but can also put them into effect, other actors are driven to take steps as well—they are forced to engage—although they might resist such change and would rather carry on as before. Importantly, consumers are no longer constrained to express their perspective via theoretical disputes, hoping that the market will bring about the desired outcomes; instead, they can point to a successful example of their points of view being put into actual effect.

Privacy in digital markets has benefitted greatly from this sort of consumer influence. When the FCO rendered its decision, the debate around privacy unexpectedly changed. At first, the broader policy landscape transformed: prior to the FCO's decision, *progressive realists* endorsed competition law investigations into social media platforms' data processing practices[71]; following the decision, other big technology companies, including Google and Apple, sought to position themselves as privacy advocates, and competition law investigations came to be the *sympathetic mainstream*'s preferred instrument to facilitate privacy.[72] The conversation changed for consumers and users of social media platforms too. Their

[67] Alessandro Acquisti, Laura Brandimarte and George Loewenstein, 'Privacy and Human Behavior in the Age of Information' (2015) 347 Science 509.

[68] Dustin D Berger, 'Balancing Consumer Privacy With Behavioral Targeting' (2011) 27 Santa Clara Computer High Tech LJ 3.

[69] Bundesgerichtshof (23 June 2020) KVR 69/19 DE:BGH:2020:230620BKVR69.19.0, para 86.

[70] ibid.

[71] See for an overview Wolfgang Kerber, 'Digital Markets, Data and Privacy: Competition Law, Consumer Law and Data Protection' (2016) 11 J Intell Property L Practice 856.

[72] See Shira Ovide, 'How Klobuchar and Hawley See Things When It Comes to Technology' The *New York Times* (New York, 13 May 2021), s On Tech.

concerns could no longer be viewed as abstract conjectures once leading actors began to offer products that aimed to vindicate the interests of their customers.[73] This market dynamic brought about incentives for other companies to develop novel technological features and alternative funding methods for advertising and monetization of digital content, including solutions that sought to involve consumers in the sale and sharing of their personal information, and the negotiation of fair market value.[74] Policymakers were encouraged to adjust as well. Competition law investigations into leading actors' data policies gave rise to the enactment of numerous new obligations proposed and/or implemented by legislators in different jurisdictions.[75]

The CJEU's emphasis in *Meta* is on 'pay or consent', but consumer influence through administrative action also played a pivotal part in the CJEU's decision. Indeed, *Meta* attests to the fact that this avenue was key in almost any dispute regarding quality in digital markets: it pushed scrutiny of the practice of self-preferencing by dominant search engines into the spotlight[76]; the move to open up leading app stores to allow for the side-loading of, or interoperation with, third-party applications picked up the pace when competition authorities began looking into the stores' practices on behalf of consumers[77]; and the growing use and exploitation of customer data by dominant online marketplaces to privilege their private-label goods and to ultimately supplant the products of competitors could be addressed only because competition authorities enabled a form of advocacy on behalf of consumers that switching alone could not provide.[78] Most of these examples involved complaints by competitors, but they eventually hinged on institutional avenues of consumer influence—the benefits that administrative action confers upon consumers, compelling leading actors to engage with and push for users' quality concerns in data-driven markets.

Administrative action taken on behalf of consumers can bring about a change in the market's state of quality equilibrium in another way. It enables consumers to compel leading actors to consider consumers' perspectives incrementally—through small steps over time. That is exactly what was at issue in *Meta*, although the Court did not wholly spell out that reality. While new legislation, such as the DMA, allows for the implementation of a change from the outset, it is typically very difficult to put in place new legislation without being able to resort to specific case law first.[79] Putting new legislation in place began with several unusual competition law investigations into big technology companies' business practices and has grown into comprehensive catalogues of new obligations to be observed by designated gatekeepers. Evidence-based investigations have long been utilized as test beds for legislators' initiatives because case-by-case specific examinations make it possible to ease the rallying of public participation and to connect emerging apprehensions about hidden market failures with the entrenched policy coalitions that drive the priorities of legislators.[80]

[73] Eric Johansson, 'Google and Apple Seek to Position Themselves as Privacy Champions' (*The Verdict*, 29 July 2021) <https://www.verdict.co.uk/google-apple-privacy/> accessed 31 July 2025.

[74] The possibility of offering paid subscriptions for content posted on social media platforms has also been a boon to artists that seek a higher level of privacy if they do not want their content to be utilised for AI training, see Michael Mainelli, 'Blockchain Could Help Us Reclaim Control of Our Personal Data' (*Harvard Business Review*, 5 October 2017); Alex Marthews and Catherine E Tucker, 'Blockchain and Identity Persistence' in Chris Brummer (ed), *Cryptoassets. Legal, Regulatory, and Monetary Perspectives* (OUP 2019) 243; Alex Pentland, Alexander Lipton and Thomas Hardjono, *Building the New Economy. Data as Capital* (MIT Press 2021).

[75] See Regulation (EU) 2022/1925 of 14 September 2022, OJ L265/1 (DMA); German Act Against Restraints on Competition, art 19a(2)(1).

[76] EC Case AT.39740 *Google Search (Shopping)*.

[77] EC Case AT.40437 Apple—App Store Practices (music streaming).

[78] EC Case AT.40462 *Amazon Marketplace*.

[79] See Adrian Kuenzler, 'Third-Generation Competition Law' (2023) 11 J Antitrust Enforcement 133.

[80] Pierre Larouche and Alexandre de Streel, 'The European Digital Markets Act: A Revolution Grounded on Traditions' (2021) 12 J Eur Comp L Practice 542; see also Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 Colum L Rev 267; Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization*

Legislation is a powerful vehicle for widespread transformation, but it requires numerous minor forces that set everything else in motion. This is exactly what has been witnessed in the debate around privacy in data-driven markets—an evolving body of case law that drove the legislative mechanism and facilitated progress.

There is an additional underrated aspect of consumer influence through administrative action that the CJEU's decision intimates. That channel of influence permits consumers to avail themselves of *regulatory integration*: case-by-case specific investigations and new legislation have become inexorably tethered.[81] This is true where case-specific investigations form the basis of new legislation.[82] It is also true that legislation resorts to case-specific investigations to ensure its rules remain up to date.[83] This is all the more so the position in terms of enforcement. When competition authorities *apply* new obligations such as those contained in the DMA, they effectively *influence* new and existing legislation because the application of these provisions depends, for the most part, on authorities that act on behalf of consumers.[84] Commentators have pointed out that such regulatory integration materializes through: the EC's operationalization of the DMA's main objectives of ensuring contestability and fairness in the digital sector, and how the interpretation of these objectives influences gatekeeper designations[85]; the content and specification of designated gatekeepers' substantive compliance obligations[86]; the prioritization of cases and the decision whether to open competition law investigations[87]; the initiation of market investigations[88]; and the enforcement of those provisions whose objective is to avoid circumvention.[89] Or take the debate around the DMA's scope. Here, the EC has a role in acting on behalf of consumers to the extent that the interpretation of the scope of the DMA's obligations may affect (and leave room for) the enforcement of competition law at both national and supranational levels.[90]

Current competition law doctrine, with its predominant focus on consumer switching and proclivity for a sharp division between regulation and market-based decentralization, frequently ignores the reality of regulatory overlay and multiple avenues of consumer influence. In digital markets, consumer influence is increasingly contingent on the activities of authorities and courts, and these authorities have a significant bearing on the effective operation of digital markets. Consumer influence through switching and administrative action work together to govern and render data-driven markets responsive to, consumer interests, especially once market dynamics have become petrified.

As a result of this high degree of regulatory overlay and integration, consumers can exert an unforeseen level of influence over the market when authorities and courts take action on

(OUP 2002); Nicolas Economides and Iannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective' (2021) 17 J Comp L Econ 765.

[81] Kuenzler (n 79).

[82] arts 5, 6, and 7 of Regulation (EU) 2022/1925 of 14 September 2022, OJ L265/1 (DMA).

[83] art 19 of Regulation (EU) 2022/1925 of 14 September 2022, OJ L265/1 (DMA).

[84] See eg, EC Case DMA.100055 of 23 April 2025, *Meta*, Regulation (EU) 2022/1925 of the European Parliament and of the Council, arts 29(1), 30(1), and 31(1) Regulation (EU) 2022/1925. The EC is given broad discretion as to the manner in which the DMA's provisions are to be interpreted, applied, and enforced.

[85] Martin Eifert and others, 'Taming the Giants: The DMA/DSA Package' (2021) 58 Common Market L Rev 987.

[86] Thorsten Kaeseberg, 'The DMA—Taking Stock and Looking Ahead' (2023) 13 J Eur Comp L Practice 1.

[87] Or Brook and Katalin J Cseres, 'Priority Setting as the Blind Spot of Administrative Law Enforcement: A Theoretical, Conceptual, and Empirical Study of Competition Authorities in Europe' (2024) 87 Modern L Rev 1; Adrian Kuenzler and Laurent Warlouzet, 'National Traditions of Competition Law: A Belated Europeanization through Convergence?' in Kiran K Patel and Heike Schweitzer (eds), *The Historical Foundations of EU Competition Law* (OUP 2013) 89–124.

[88] Adrian Kuenzler, 'Searching for New Instruments in Competition Law—Market Investigations as a Case in Point' in Maria Ioannidou and Deni Mantzari (eds), *Research Handbook on Competition Law and Data Privacy* (Edward Elgar 2026) 1.

[89] Jacques Crémer and others, 'Enforcing the Digital Markets Act: Institutional Choices, Compliance, and Antitrust' (2023) 11 J Antitrust Enforcement 315.

[90] Jan Blockx, 'The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices' (2023) 14 J Eur Comp L Practice 325.

their behalf. This sort of overlay bestows vast benefits upon consumers who are dissatisfied with leading actors' policies—benefits that consumer switching by itself cannot provide.[91] Consumer influence through administrative action can ensure that consumers' views simultaneously influence market dynamics and new legislation, creating the capacity to shift debates about privacy rights and entitlements as well.[92] In brief, consumer influence through administrative action does not just further the same or similar goals as switching; rather, it makes up for the market mechanism's limitations in concentrated settings. It affords consumers who oppose leading actors' policies a distinct path of opposition and discrete devices for change.

The reading of *Meta* advanced in this article recognizes, however, that the opposite also holds up. Where administrative action taken on behalf of consumers is viewed as an option not worth pursuing, consumer influence through switching typically succeeds. The potential for consumers to exert an influence on the market is to make the best of those avenues that are available, arising at different moments and under different circumstances in the governance terrain. Switching is regarded as the default, enabling consumers to act and move about whenever they prefer. And switching enables consumers to disagree on whatever grounds they wish. Administrative action taken on behalf of consumers enables them to suffuse the market with their viewpoints, but it requires consumers to justify, rationalize, and explain the reasons for their disagreement. In contrast, switching gives consumers the comfort of analytical purity, something that can only be ensured through the market mechanism itself.

This is arguably the reason why the Court in *Meta* emphasizes that switching and consumer influence through administrative action operate in seamless synergy with one another and play an important part in ensuring effective competition in data-driven markets. *Meta*, on this view, stands for the proposition that in concentrated marketplaces, the push for leading actors to accommodate privacy emanates not only from dissatisfied consumers who compel the dominant company as insiders to listen, bringing about a change from within the consumers' favoured segment, but also from consumers as outsiders who request something beyond and different from without. In the Court's view, consumer influence through administrative action *complements* switching so that both mechanisms are practical avenues of influence that move data-driven markets ahead.

To be sure, critics of *Meta* maintain that while technological progress is being made, market dynamics may take undesirable turns, especially concerning data privacy. Indeed, unlike in traditional marketplaces that are mainly about low prices and high output, when quality, such as privacy, is quintessential, what precisely constitutes progress may become difficult to gauge. Some consumers may value privacy in one context, while others may be indifferent, and again others may appreciate more personalized offers in another setting. But the point of the proposed reading of *Meta* in this article is merely that switching and consumer influence through administrative action are essential means to facilitate a greater extent of debate and contestation in concentrated settings. These avenues are most effective when they are drawn up to advance a proper dialogue between leading actors and consumers and encourage integration of consumers' views into the market. By facilitating debate and contestation among all within the market, it may be possible to put the digital economy in a position

[91] In exceptional circumstances we can observe collective switching by a large number of consumers, Dani Di Placido, 'The X (Twitter) Exodus to Bluesky, Explained' (*Forbes*, 19 November 2024). However, such collective acts of disagreement lack the institutional features of consumer influence through administrative action discussed here. Collective exit by consumers is rare and requires the presence of special conditions. It is thus not as reliable and comprehensive as institutional avenues of consumer influence.

[92] The literature often bemoans the weak status of privacy rights in the digital economy, see Samson Y Esayas, *Data Privacy and Competition Law in the Age of Big Data: Unpacking the Interface Through Complexity Science* (OUP 2024).

whereby it is better attuned to contribute to human flourishing.[93] *Both* avenues are thus essential mechanisms to push market dynamics ahead.

IV. ELUCIDATING *META'S* PUZZLES: CLEARING THE CHANNELS OF CONSUMER INFLUENCE

To show that *Meta* enables multiple dimensions of competition over privacy to unfold not just in theory but in actual practice, and to clarify how legal doctrine in fact responds to societal change, this section articulates how *Meta*'s premises play out in an evolving digital market. The moment switching and consumer influence through administrative action are viewed as interlinking means, pushing market dynamics ahead, some of *Meta*'s puzzles begin to vanish. The interpretation of *Meta* submitted in this article suggests that what was at issue in the CJEU's decision was not simply whether data-driven markets would need to be rendered more responsive to consumer preferences as a result of compelling dominant social media platforms to incorporate additional technological features into their products. Rather, *Meta* was about how competition around privacy was going to unfold *from there*—that competition in all its possible dimensions would ultimately enable privacy to materialize.

It appears that this is a claim that has not been previously discussed in relation to *Meta*, and perhaps one that may not sit well with everyone, and understandably so. At first blush, it also runs against the EC's finding that Meta's binary 'pay or consent' model breached Article 5(2) of the DMA. According to the provision, gatekeepers must seek users' consent to combine their personal data between designated core platform services and other services, and if a user refuses such consent, they should have access to a less personalized but equivalent alternative. As intimated above, the EC took the view that Meta's model does not allow users to (i) opt for a service that uses less of their personal data but is otherwise equivalent to the 'personalised ads'-based service, and (ii) exercise their right to freely consent to the combination of their personal data. To ensure compliance with the DMA, users who do not consent should still be given access, in the EC's view, to an equivalent service that uses less of their personal data, in this case for the personalization of advertising—that is, one that is offered *free of charge*.[94] The EC's position notwithstanding, the reading proposed in this article provides valuable insight into *Meta*, though there may be other interpretations as well; first, the EC's assessment relates to a new DMA provision, an obligation that applies only to designated gatekeepers (Article 3(1) and (2) DMA), and which entails a different threshold than that required for dominant undertakings under Article 102 TFEU. Secondly, the DMA's emphasis is on contributing to the proper functioning of the internal market by laying down rules ensuring, for all businesses, contestable and fair markets in the digital sector where gatekeepers are present (Articles 1(1) and 12(5) DMA). Hence, the DMA may justifiably contain stricter requirements—it prioritizes structural contestability and user autonomy by proscribing systemic practices deemed harmful to market fairness, regardless of whether an undertaking's dominance or abuse is established in a particular case.[95]

At the very least, the proposed reading presents a practical handle on *Meta*'s central puzzle. In terms of hands-on application, rather than mere theoretical contemplation, consider

[93] Daron Acemoglu and Simon Johnson, *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity* (Hachette 2023).

[94] EC Case DMA.100055 of 23 April 2025, *Meta*, Regulation (EU) 2022/1925 of the European Parliament and of the Council, arts 29(1), 30(1), and 31(1) Regulation (EU) 2022/1925. After its press release (see EC, Press Release, *Commission Sends Preliminary Findings to Meta Over Its 'Pay or Consent' Model for Breach of the Digital Markets Act*, 1 July 2024), EC officials clarified that the EC is perfectly fine with 'pay or consent' as long as there is a middle option that may still contain advertisements but that are less targeted.

[95] ibid.

the fact that after the FCJ's decision in *Facebook*, dominant platforms were meaningfully constrained from degrading quality in free products, resulting in incentives to invest in privacy and service quality across the sector. Yet, as advocacy groups have maintained, when it comes to content websites and app providers, the choices that consumers have are not uniform; they vary significantly between large, dominant gatekeeper platforms or public services, in relation to which consumers frequently have few or no equivalent alternatives available, and smaller providers, including press publishers and niche service providers whose business model diversity, incorporating various combinations of paid and/or unpaid access and privacy options, is vital to sustaining both trustworthy content creation and democratic engagement.[96] To put it differently, the ability of market actors to choose from a diversity of modes of doing business, whether based on paid or unpaid subscriptions, and to compete for privacy in the market's price and non-price realm, is often essential to sustain the (expensive) creation and production of new content, and may even be required to sustain the costly and complex services they provide.[97] *Meta* enables the offers of those actors to involve different types of compensation—free of charge or paid, with varying prices, additional features, or a mix of price and non-price elements—as market alternatives.[98] Such actors are not forced into a given mode of doing business but can explore a diversity of privacy-protective solutions that they know will likely work best for their particular markets and audiences. With this goal in mind, *Meta* enables online social media platforms to offer more than one single way of protecting privacy, acknowledging the complexity of different backgrounds, market settings, addressees, and actors. That is, *Meta* facilitates competition not just on technological features that enable privacy, but also across varied price points and user value propositions. This enables market actors—large and small—to bring their offers into line with a diversity of consumer preferences regarding privacy—monetized or non-monetized.[99] Above all, this pluralism is positioned to be essential for the content sustainability of publishers and to preserve a sufficient extent of dynamism in the market. At heart, *Meta* was thus really about *clearing the channels of consumer influence*. This reading of the decision appears to capture the essence of what the Court realistically sought to achieve. Although other interpretations may also be valid, the proposed reading is an attempt to comprehend and explain, opening a path forward for a fresh conversation about how to move privacy ahead in concentrated markets.

A. Why *Meta* is about both switching and consumer influence through administrative action

In terms of legal doctrine, under the view advanced here, the reason *Meta* granted the opportunity for leading social media platforms to offer, if necessary for an appropriate fee, an equivalent alternative to the advertising-driven version of their products is that the CJEU

[96] European Publishers Council, Press Release, *EPC Open Letter to the European Data Protection Board (EDPB) On the Consent or Pay Model*, 26 March 2024.

[97] Kuenzler (n 60).

[98] This, in turn, will contribute to a greater extent of variety in the marketplace, see Adrian Kuenzler, 'Competition Law Enforcement on Digital Markets—Lessons from Recent EU Case Law' (2019) 7 J Antitrust Enforcement 249.

[99] The CJEU thus moved away from a rigid approach that would force all actors into a specific mode of doing business (such as data-driven 'free'-only or 'always'-subscription). This opens up the potential for new privacy-protective business models to emerge and for companies to test what works best in their specific segment, Wolfgang Kerber, 'Governance of IoT Data: Why the EU Data Act Will Not Fulfill Its Objectives' 72 (2023) GRUR Int 120; Bachelet (n 2) (emphasizing that the CJEU's acceptance of 'consent or pay' reflects an acknowledgement that online platforms must retain entrepreneurial freedom to design their own modes of doing business—including both data-driven advertising and paid subscription models. This freedom is not just a theoretical ideal, but a practical necessity for sustaining content creation, innovation, and service diversity in digital markets. Recital 4 of the GDPR requires balancing the fundamental right to data protection with the fundamental right to conduct a business. *Meta* arguably strives for such a balance, allowing platforms to offer alternatives without mandating a single 'free' business model or imposing uniform norms regarding privacy).

viewed privacy not merely as a right or entitlement to be integrated into the platforms' service but because privacy, in the Court's view, has 'become a significant parameter of competition between undertakings in the digital economy'.[100] The decision reads as if the protection of personal data was fully recognized by actors in the market, with privacy no longer a mere preference of consumers; it had become a 'reality of economic development' whose disregard 'would be liable to undermine the effectiveness of competition'.[101]

This reasoning is arguably difficult to reconcile with what scholars of privacy law contend about 'pay or consent'. But it is a sensible position to adopt from the point of view of competition law. It envisages consumer preferences as the basis of what product manufacturers and sellers offer *and* the main vehicle for pushing competition towards what the market requests. However, *Meta* might only be anticipating the manner in which data-driven markets plausibly accommodate privacy. Consumer influence through administrative action has been an important avenue initially for users of social media platforms to lend weight to the protection of their personal information, enabling them to opt out of dominant social media platforms' data processing activities—as *Meta* itself appears to underscore. By compelling leading actors to discard the sort of 'all-or-nothing choices' that social media platforms regularly imposed upon their users, such as the choice between agreeing to unlimited data processing or avoiding using their products altogether, competition authorities were—indeed are—working to incorporate consumer preferences into the market and to render privacy a significant parameter of competition. Privacy advocates have accomplished as much by appealing to fundamental values, pursuing political agendas, petitioning, and filing complaints in courts. But at least until now, on the legal front, much of the actual effort has been borne by competition authorities investigating the realities of the digital economy. Courts, in turn, have arrived late to the effort, in terms of helping to adjust market incentives to these ongoing real-world changes. The CJEU in *Meta* was ostensibly aware of this predicament when it acknowledged 'the reality of this economic development'.[102] The fact that the decision does not follow established doctrine and avoids relying exclusively on consumer switching is thus a feature of the opinion rather than a bug, because the doctrine's emphasis on switching turns out to be incomplete, at least in concentrated settings. But the Court is also right to stress the significance of switching to push competition for privacy ahead, thus not ruling out the possibility that some day the market will produce a variety of different services that provide consumers with alternatives that can better accommodate privacy. Equally, *Meta* does not reflect the view that privacy rights are part of an all-pervading force that easily guides and ultimately shapes the behaviour of leading actors. That is another feature of the opinion because consumer preferences for privacy are often fabricated rather than uncovered[103]; and privacy, at least in the digital economy, is arguably requested, not bestowed.[104]

Meta is thus perhaps best grasped as an attempt, if only a provisional one, to reflect in concrete ways upon the connection between societal and legal change. However, *Meta* does not stand for a mere account of the law becoming accustomed to societal change. Rather, it represents an account in which legal, technological, and societal change are co-constitutive of one another, so that the law is not only a reflective and reactive mechanism but is also a tentative endeavour oriented towards crafting desirable futures. By emphasizing switching *and* consumer influence through administrative action, *Meta* seems to recognize that both

[100] CJEU Case C 252/21 (n 7) para 51.
[101] ibid para 51.
[102] ibid para 51.
[103] Kuenzler (n 19).
[104] Daniel J Solove and Woodrow Hartzog, 'Kafka in the Age of AI and the Futility of Privacy as Control' (2024) 104 Boston UL Rev 1021.

avenues are vital in helping to adjust the circumstances by which data-driven markets are rendered more responsive to consumer interests.

By and large, courts have a range of tools available to help them contend with adjustments in the facts. However, courts generally have greater difficulty dealing with societal change. When it comes to privacy in data-driven markets, an issue for courts is typically how to decide whether to look to the past or ahead in establishing what consumers truly value.[105] When courts consider the design and technological features of leading social media platforms, they need to rely on what they know users desire and what they know about how users *want to* behave, not how they *do* behave. That is a task for which courts are typically not well prepared.[106] Scholars have attempted to fill the void, providing courts with several different accounts for dealing with how societal change can be incorporated into legal doctrine. In the market regulatory realm, this includes work that elucidates: how authorities may ask a sample of consumers what they desire, to ensure they act on their behalf[107]; the development of principles of good governance in what competition authorities do[108]; questions on priority setting[109]; the variation in competition law's underlying objectives[110]; and the proper place of privacy in competition law and special purpose regulation.[111] All of these accounts seek to provide a framework for considering how issues of societal change can be linked with the necessity of legal adaptation. But courts have nonetheless had trouble dealing with societal change. The litigation history leading up to *Meta* is perhaps the most pertinent case in point. To illustrate briefly, on appeal, the Düsseldorf Higher Regional Court (HRC) broadly implied that those consumers who had refrained from joining Facebook's social network were those who disagreed with the platform's terms and conditions of agreement,[112] an inference that ignored the possibility that users who had signed up to the platform's service might have disapproved of Facebook's terms as well, but nonetheless felt strongly that they had no choice but to participate in the network to be involved in social life.[113] Even a court as attuned as the HRC to the likelihood of technology driving societal change might sensibly have had trouble recognizing what consumers truly desired. This is because conjectures about the interplay between societal change and adjustments in legal doctrine are beset by an enduring problem—whether consumer preferences are simply given and revealed by their own choices or whether they are subject to adaptation and concealment.[114] In the market sphere at least, authorities and courts are involved in a constant struggle as to whether the actions of consumers are based on their actual preferences or whether the inferences made instead reflect the preferences of authorities (or perhaps those of an incumbent's rivals).[115] Despite the most formidable scholarly attempts to contend with issues such as

[105] Diane Coyle, *Cogs and Monsters: What Economics Is, and What It Should Be* (Princeton University Press 2021); Pablo I Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook Eur L Stud 143.

[106] See Kuenzler (n 19); A Fletcher, Peter L Ormosi and R Savani, 'Recommender Systems and Supplier Competition on Platforms' (2023) 19 J Comp L Econ 397.

[107] Regulation (EU) 1/2003 of 16 September 2002, OJ 2003 L1/1; Albertina Albors-Llorens, 'Competition and Consumer Law in the European Union: Evolution and Convergence' (2014) 33 Yearbook Eur L 163.

[108] Annetje Ottow, *Market and Competition Authorities: Good Agency Principles* (OUP 2015).

[109] Brook and Cseres (n 87); Kuenzler and Warlouzet (n 87).

[110] Heike Schweitzer and Simon de Ridder, 'How to Fix a Failing Art. 102 TFEU: Substantive Interpretation, Evidentiary Requirements, and the Commission's Future Guidelines on Exclusionary Abuses' (2024) 15 J Eur Comp L Practice 1.

[111] Colin J Bennett, 'The European General Data Protection Regulation: An Instrument for the Globalization of Privacy Standards?' (2018) 23 Information Polity 239.

[112] OLG Düsseldorf, Order of 26 August 2019, VI-Kart 1/19 (V), paras 10, 14, 16–17, 28–31.

[113] Kuenzler (n 57) 437.

[114] Amartya K Sen, *Choice, Welfare and Measurement* (Harvard University Press 1997).

[115] Paul Belleflamme and Martin Peitz, *The Economics of Platforms. Concepts and Strategy* (Cambridge University Press 2021).

these, there is no simple method of identifying when a true shift in preferences occurs—when technological or societal change does or ought to affect legal doctrine. Courts may therefore be forgiven for being cautious when they seek to avoid the risk of market shifting.[116] They may reasonably hold certain apprehensions that if they intervene too carelessly, they will simply impose socially progressive attitudes upon purportedly free-market dynamics.

Accommodating potential shifts in consumer preferences arguably turns out to be more straightforward when authorities and courts give way to consumer influence through administrative action *and* consumer switching. When authorities and courts act on behalf of consumers, consumers as insiders can modify the design of leading platform operators. When courts simultaneously defer to conventional market mechanisms such as switching, consumers can sway those actors as outsiders too, permitting the market to yield to what has already been achieved and appraising the spirit of the time. What is more, the remedies imposed by a competition authority or court have to be less specific when giving way to consumer switching. It is less difficult for a court to grant a dominant social media platform the ability to compete for privacy by offering a paid version of its product as an alternative to personal data processing than to work out a modification to the platform's technological design that allows those customers who value privacy to obtain a less personalized alternative if they do not wish to consent to personal data processing.[117]

The CJEU in *Meta* is arguably aware of this predicament when it grants dominant social media platforms the opportunity to request an appropriate fee, if necessary, as an equivalent alternative to personal data processing. Privacy advocates are justifiably concerned about the prospect of commodifying personal data in this way,[118] about introducing problematic inequalities in terms of the ability of citizens to exercise their privacy rights,[119] and about putting an end to the era of the free and open internet.[120] But from the point of view of those who are apprehensive about the position of judges subtly interfering with how markets operate, enabling privacy to unfold along their unpaid *and* paid domains may well be preferable to making intricate adjustments to a dominant platform operator's product design choices.

However, *Meta* can scarcely be read as a decision that simply bows to purportedly free-market dynamics and imagines avenues of consumer influence beyond switching as a preemptive means to weave societal change into market regulatory doctrine. *Meta* comes at the final point of a long history of litigation concerning Facebook's data processing practices, a point at which consumers and market participants have become knowledgeable and informed about the complexity of the issue, big technology companies' attitudes towards privacy have somewhat shifted, and markets have grown considerably more responsive to consumer interests.[121] *Meta*, in this sense, must be understood as pivoting around societal change *in the midst of things*. The privacy movement is at an inflection point, with numerous legislative initiatives being or having been put in place.[122] It is precisely for this reason that the Court explains that privacy has '*become* a significant parameter of competition between

[116] Coyle (n 105); see also Andriani Kalintiri, 'Burden of Proof and Judicial Review' in Pinar Akman, Or Brook and Konstantinos Stylianou (eds), *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar 2023) 317–336.

[117] Lauren E Willis, 'Consumer-Facing Competition Remedies: Lessons from Consumer Law for Competition Law' (2023) 4 Utah L Rev 887.

[118] See already Margarete J Radin, *Contested Commodities* (Harvard University Press 2001).

[119] NOYB (n 52).

[120] Debra Satz, *Why Some Things Should Not Be Up For Sale* (OUP 2010).

[121] Kevin E Davis and Florencia Marotta-Wurgler, 'Filling the Void: How EU Privacy Law Spills Over to the U.S.' (2024) 1 JL Empirical Analysis 1.

[122] Oluwatosin Reis and others, 'Privacy Law Challenges in the Digital Age: A Global Review of Legislation and Enforcement' (2024) 6 Int J Applied Res Social Sci 73.

undertakings in the digital economy' instead of just endorsing a given state of affairs.[123] This particular understanding of *Meta* requires the decision to be viewed from a process-based perspective rather than as a plain snapshot in time. Authorities and courts have given way to consumer preferences for privacy through administrative action taken on their behalf in the market's non-price realm while subsequently also enabling privacy to be realized as a result of consumer switching along the market's price-based sphere. From the perspective advanced here, the CJEU's approach can thus be understood as a decisive effort to clear the channels of consumer influence: to ensure that users who prioritize privacy can take advantage of the full range of market options—spanning both paid and unpaid offerings. Crucially, this enables social media platforms to decide for themselves whether submitting a paid alternative to personal data processing represents a viable and sufficiently attractive proposition for their user base.[124]

B. Clearing the channels of consumer influence

In light of the previous analysis, the remaining issue is how the CJEU analytically lends support to the theoretical logic underpinning *Meta*—emphasizing how administrative action and consumer switching jointly advance privacy as a competitive parameter—and how it operationalizes the interplay between these mechanisms to accommodate both price- and non-price competition for privacy, including business model diversity, aligning doctrinal evolution with observable shifts in consumer influence. Unpacking this practical aspect of *Meta* is essential as it illustrates how the Court facilitates a dynamic and pluralistic market setting in which consumer influence can meaningfully contribute towards privacy, and how the CJEU links the descriptive account of its legal reasoning with a forward-looking and pragmatic evaluation of market and societal outcomes.

To shed light on how the CJEU sought to achieve these goals, it is essential to understand how *Meta* pulled privacy from the market's non-price-based to its price-based terrain, giving way to a new dynamic and rendering competition around privacy more vibrant along that dimension too. As the Court points out, 'access to and use of personal data are of great importance in the context of the digital economy', and how personal data are governed depends on 'the business model on which [social media networks rely]'.[125] From a pure privacy law standpoint, endorsing the CJEU's logic is inevitably concerning, given that, in the main, social media companies are driven by strong incentives to collect, process, and sell the maximum extent of user data. But the Court's move to permit paid subscriptions as an alternative to personal data processing makes far more sense when viewed as an attempt to preclude *pulling the plug* on an economic process in which competition over privacy-protective modes of doing business was just about to lift off. That was not the case at the time the FCJ decided on the matter. Facebook had initially been able to silence users before their criticism could reach the market and managed to prevent the market mechanism from adjusting to the expectations of consumers. The FCJ did not have to worry about pulling the plug on an up-and-coming shift in market dynamics. Instead, the FCJ's attention was directed upon compelling leading actors to take steps to reassess and absorb distinct consumer vantage points and to enable them to participate in the kind of agenda-setting that otherwise would not have been possible in concentrated marketplaces.

[123] CJEU Case C 252/21 (n 7) para 51 (emphasis added).

[124] Any assessment of the 'adequacy' of a fee imposed would depend on the size of the undertaking and the scale of its data processing activities, the existence of lock-in effects, network externalities, the degree of market concentration and (lack of) competition, the respective power imbalances, the degree of consumer dependence, and the target group or audience that uses the platform. Such an assessment will most likely be the domain of data protection authorities that evaluate consumers' complaints and the consent conditions of social media platforms.

[125] CJEU Case C 252/21 (n 7) para 50.

The forces the CJEU arguably seeks to authorize in *Meta*, in contrast, seem perfectly sensible if dynamics have changed and the objective is not to shut down reliance on the market mechanism itself. In *Facebook*, the FCJ compelled the leading social media platform to adjust terms and conditions of agreement to require the platform to pay heed to consumer privacy because the only incentive it had was to vie for market shares rather than for consumer preferences.[126] The CJEU in *Meta*, however, recognized that if privacy had become a significant parameter of competition, social media platforms should be able to compete for privacy along all dimensions, allowing them to adjust their business models as they see fit and avoiding any undue interference with the altered makeup of the market process. That meant enabling market actors to offer a paid version of their service as an alternative to personal data processing rather than insisting on the provision of different degrees of personalization free of charge.

As already pointed out, privacy apologists might object on the basis that it is doubtful whether *Meta* can sensibly be read as an attempt to clear the channels of consumer influence in this way because *Meta*'s shift to a paid subscription model could set a precedent for other companies to directly monetize personal data, eroding privacy rights across the board and creating a two-tiered digital ecosystem where privacy becomes a commodity available only to those who can afford it. This means that those who cannot pay for privacy will be deprived of a genuine choice, while those who can afford to do so will likely be coerced, steered, or nudged into making inadvertent and possibly harmful decisions as a consequence of adverse user interface design choices.[127] Without doubt, these concerns are valid and compelling.[128] But nonetheless, that line of reasoning might not fully capture the significant ways in which the CJEU sought to *protect* privacy, albeit for a fee. Leading social media platforms now *have to* enable consumers to opt out of personal data processing; however, it is up to them to work out how. That is a big leap in terms of adjusting legal doctrine to the realities of data-driven markets, because the CJEU's decision in *Meta* attempts not only to yield to everyday market dynamics but also, arguably, to complete debates around different channels of consumer influence. To be sure, if market actors can compete for privacy along all dimensions and the market offers a variety of business models, consumers may not only need to read different terms and conditions of agreement, including privacy notices, but they will also have to select from different models of privacy protection.[129] However, such models will also bring about a variety of user interface designs that expose consumers to different data practices with different degrees of transparency regarding the alternatives that users can elect to choose in different ways. This might well result in platform settings that better secure user privacy, present them with fewer box-ticking exercises, and confront them with less complicated descriptive text or interstitial webpage linkings to policies that even the most sophisticated experts have a hard time reading.[130] Exposing social media platforms to this sort of market dynamic might then converge with the views of privacy advocates and might guarantee that privacy resembles more of a basic right than a limited privilege.[131]

This is not to claim that effective consumer switching wholly depends on the existence of alternative offers in the market. Consumer research has revealed that even where alternative offers are available, consumers frequently do not switch. This may be due to cognitive overload, status quo bias, and challenges in fully apprehending the privacy or quality implications

[126] Kuenzler (n 21).
[127] European Data Protection Board (n 13) paras 36, 60–63, 79–81, 111, 154–155, and 165–169.
[128] See Kuenzler (nn 18 and 19).
[129] Helberger and others (n 39); Goanta, de Gregorio and Spanakis (n 39).
[130] Oren Bar Gill and Omri Ben-Shahar, 'Misprioritized Information: A Theory of Manipulation' (2023) 52 JL Studies 305.
[131] Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philo Tech 307.

of alternative platforms.[132] The FCO's findings underline that user interface design—shaped by different business models—may exacerbate rather than mitigate these difficulties, introducing 'noise' that obscures optimal choices and entrenches inertia.[133] Moreover, switching in the context of online social media platforms may uniquely be hampered by tie-in effects, such as ecosystem lock-in and lack of interoperability, which bind users to dominant platforms through social graphs, personalized data, and service integrations.[134] These technical and relational barriers mean that, for many users, their actual range of choices may be far more limited than the formal menu of options that forthright market competition would suggest. Only after genuine, privacy-protective and readily accessible alternatives are offered—accompanied by interface and ecosystem designs that minimize friction and maximize comparability—can it be ascertained whether observed user decisions truly reflect underlying preferences rather than default responses to constrained conditions.[135] Thus, meaningful competition in the domain of privacy requires more than nominal switching options; it effectively demands the dismantling of structural, cognitive, and design barriers that preclude informed and autonomous consumer choice.[136] However, any underlying analysis must nonetheless distinguish between at least two dimensions that influence consumer choices. On the one hand, there is an empirical or cognitive dimension: consumers often struggle to articulate their preferences due to informational complexity and cognitive limitations—for example, when convoluted terms of service obscure the implications of their actions. On the other hand, at the prescriptive or normative level, genuine consumer choice assumes the real-world availability of multiple meaningful alternatives. Even if users theoretically know what they desire, their choices can only be said to reflect their genuine preferences if they have the opportunity to select among a range of diverse, privacy-protective options. From an analytical perspective, this demonstrates that cognitive perspicuity and a diversity of substantive options are issues that need to be attended to separately, in order to reliably conclude whether consumers can articulate, and put into effect, their preferences rather than resort to constrained or manipulated choices.

With this in mind, it is important to recall that previous competition law investigations into Facebook's data-gathering practices taken on behalf of consumers facilitated agenda-setting and compelled leading actors to engage.[137] Once Facebook was required to offer users opt-out rights, other big technology companies sought to position themselves as privacy advocates.[138] In turn, market dynamics have grown increasingly responsive to consumer privacy, and other actors have shown a greater willingness to act upon them.[139] Even lawmakers have begun to act in response to competition authorities' investigations, further empowering those authorities to act on behalf of consumers.[140] The FCO's investigation, in particular, altered market dynamics and encouraged the economy to grow more congenial to privacy. Any failure to take this vital shift into account, as *Meta* emphasizes, 'would disregard the reality of this economic development and would be liable to undermine the effectiveness of competition law'.[141] Before *Meta*, Facebook could bar consumers' views from having an

[132] Bar Gill and Ben-Shahar (n 130).
[133] Daniel Kahneman, Olivier Sibony and Cass R Sunstein, *Noise: A Flaw in Human Judgment* (Little, Brown Spark 2021).
[134] Alison Jones, Brenda Surfin and Niamh Dunne, *EU Competition Law: Text, Cases, and Materials* (OUP 2023).
[135] Sen (n 114).
[136] Helberger and others (n 39); Goanta, de Gregorio and Spanakis (n 39).
[137] ibid.
[138] Johansson (n 73).
[139] Patrick McGee, 'Apple Takes On the Internet: The Big Tech Battle Over Privacy' *Financial Times* (London, 30 April 2021), s The Big Read; Mike Isaac, 'WhatsApp Delays Privacy Changes Amid User Backlash' The New York Times (New York, 15 January 2021); Betsy Atkins, 'Big Tech, Data Privacy And the Board's Role' (*Forbes*, 12 November 2020).
[140] Davis and Marotta-Wurgler (n 121).
[141] CJEU Case C 252/21 (n 7) para 51.

effect on the market, and switching between different products was not a viable avenue for consumers to pursue. Now that market dynamics have changed to a certain extent, consumers are progressively authorized to accomplish what they can also do in other settings: to seek out alternatives to move market actors jointly along with them. Put otherwise, in *Meta*, the Court had to contend with a distinctive set of circumstances; its task was to figure out how the growing sensitivity of the market towards privacy could be given practical shape.

An additional reason why *Meta* completes debates around different channels of consumer influence is that it adds force to previous attempts to put in place a real-world example of consumers' points of view. Competition authorities that investigate data-driven markets on behalf of consumers seek to approximate on-the-ground realities as closely as possible. Affording consumers opt-out rights to render leading social media platforms more privacy-protective makes an enormous difference in concentrated marketplaces. But when the forms of privacy consumers enjoy become more diverse and varied, achieving privacy also necessitates that it is put in place through the market mechanism itself—that actors recognize and can respond to it as a significant parameter of competition.

That seems precisely what *Meta* seeks to ensure. Consumers can no longer simply opt to turn on privacy features on leading social media platforms but are supposed to explore a broader range of possibilities that encompass different forms of privacy—paid or unpaid, or a blend of both—depending on how market dynamics will unfold. After the FCO redressed market incentives to bring them more closely into alignment with the preferences of consumers, the CJEU was in a position to enable actors to realize privacy *in the market*. Hence, *Meta* underpins the fact that consumer influence through administrative action is workable in practice and will not morph into the sort of dubious interference associated with undue market shifting.[142]

This reading of *Meta* also suggests that legal scholarship should be less reluctant to acknowledge that competition authorities and courts can effectively work to attain privacy in concentrated settings. Assuming that *Meta* permits consumers to make the most of the interlinking means of consumer influence through administrative action and switching, the market can now move jointly with leading actors that have grown receptive to the demands of their customers. This is because *Meta* gives room to the market to pull all actors along. After *Meta*, leading social media platforms *have to* accommodate users' privacy, producing incentives for other actors to accommodate privacy as well, regardless of their choice of business model; that is, *Meta* left it to the market to work out *how* actors would viably do so.[143] Indeed, all the policymaking legwork that involves integrating privacy into big technology platforms' terms of service, their technical architecture, or their modes of doing business can now (also) be dealt with by the market rather than (only) by authorities or courts.

That is what clearing the channels of consumer influence entails. The reading proposed in this article submits that the CJEU did not just require that leading actors adjust terms and conditions of service by affording consumers a right to opt out *before* market realities had changed. The Court demanded that privacy could unfold as a parameter of competition in any conceivable dimension (price and/or non-price) *after* market dynamics had transformed. The Court ensured that once the (less familiar) avenue of consumer influence through administrative action had been engaged, the (common) mechanism of switching could follow along, putting privacy into actual effect. In keeping with the notion of clearing the channels

[142] Adrian Kuenzler, 'The Consumer as Constructive Antagonist' in Stavros Makris, Elias Deutscher and Justin Lindeboom (eds), *Cambridge Handbook on the Theoretical Foundations of Antitrust and Competition Law* (CUP 2026) 1.

[143] As market observers have pointed out, it is far from clear whether Meta's subscription model, at least in its current form, will gain traction or if social media platforms will come up with alternatives such as those envisaged by the European Data Protection Board.

of consumer influence, the Court ensured that both mechanisms, as interlinking means, push data-driven settings ahead, without commanding the market to move along any predetermined path.

Presuming this reading of *Meta* is accepted, it might still appear that the CJEU seeks to champion an account that emphasizes autonomy or individual privacy, that is, the right to be left alone, and thus a notion of privacy that is focused on how best to limit the stream of personal information, by enabling markets to churn out several different products with privacy-enhancing features at different prices.[144] But that just harkens back to the outdated notion of privacy that *Meta* arguably seeks to eschew. In the digital economy, there are also social dimensions of privacy, and narrowing down privacy to a right to be left alone neglects the fact that users are (predominantly) concerned about appropriate information flows.[145] Sharing, communicating, and contributing information must be viewed as an indispensable facet of privacy so that users do not only limit information flows but also modify how they communicate with others depending on a given situation.[146] This viewpoint recognizes social and collective dimensions of digital privacy, including where users are afforded some control over how their desired stream of information flows, taking preventive action, and ensuring such information cannot be construed out of context.[147] This requires leading actors to give users some control over the processing of personal information, but consumers must also have the ability to join different platforms with different privacy-protective features when different business models emerge. At the very least, *Meta* did not rule out one or the other by itself.

Another advantage of the proposed account is that it does not need to envision competition authorities and courts exclusively considering leading actors' product design choices when seeking to integrate privacy into the market. Instead, actors are incentivized to integrate privacy into their services themselves. *Meta*, in this view, confirms one of the most basic observations relating to exit and voice: different avenues of consumer influence do not undercut one another; they each render concentrated markets more responsive to consumer preferences. They do so not by being disconnected and detached mechanisms but by being engaged as truly interlinked. Moreover, if we value different avenues of consumer influence that can make markets more responsive to consumer preferences, it is reasonable for the CJEU to ensure that the price mechanism as such will not preclude businesses from pursuing that objective.

V. CONCLUSION

This article maintains that for most observers, it might, on the whole, be premature to endorse *Meta*. As it turns out, there is a deep justice-related concern enshrined in the CJEU's 'consent or pay' argument, and the decision has been subject to severe criticism from privacy and consumer protection advocates. From a competition law point of view, the decision's foremost problem lies in how authorities and courts can reliably recognize when a true shift in market dynamics occurs, over and above the various additional problematic issues contained in it. However, the interpretation offered in this article seeks to provide a different,

[144] Katherine J Strandburg, 'Monitoring, Datafication and Consent: Legal Approaches to Privacy in the Big Data Context' in Julia Lane and others (eds), *Privacy, Big Data and the Public Good: Frameworks for Engagement* (CUP 2014) 5–43; Andrei Marmor, 'What is the Right to Privacy?' (2015) 43 Phil Pub Affairs 4.

[145] Robert C Post, 'Data Privacy and Dignitary Privacy: Google Spain, the Right To Be Forgotten, and the Construction of the Public Sphere' (2018) 67 Duke LJ 981.

[146] Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press 1995).

[147] ibid; Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (John Murray 2013).

affirmative reading of the judgment, enabling—and requiring—legal scholarship to engage more thoroughly with the critiques levelled against *Meta*. Apart from praise the Court has earned concerning its finding that national competition authorities can conclude, in the context of an investigation, that privacy laws have been infringed and that such authorities are, however, bound by a duty of sincere cooperation, the viewpoint offered in this article can at least explain how, after *Meta*, we are supposed to envisage privacy unfolding in digital markets when dominant social media platforms are permitted to request an appropriate fee, if necessary, as an equivalent alternative to personal data processing. This highlights a significant aspect of how concentrated markets operate, one that the business historian Alfred D Chandler observed almost half a decade ago. In his view, in many areas 'modern business enterprise took the place of market mechanisms in coordinating the activities of the economy and allocating its resources' and '[in] many sectors of the economy the visible hand of [business enterprise] replaced what Adam Smith referred to as the invisible hand of market forces'.[148] Under such circumstances, the principles that market regulatory doctrine has embraced thus far may likely end up disrupting rather than accommodating societal change, and there may be no single, immovable and definite doctrinal precept to embrace by which effective competition can be safeguarded on its own. Under the proposed reading, *Meta*, despite its shortcomings, acknowledges that data-driven markets are a 21st-century breeding ground of the visible hand and are therefore unlikely to be governed by a given set of established principles. The decision acknowledges that different avenues of consumer influence are profoundly interlaced, and that these avenues are vital if concentrated markets are to become more responsive to consumer interests: they are interlinking means that push data-driven markets ahead.

Conflict of interest. None declared.

[148] Alfred D Chandler, *The Visible Hand* (Harvard University Press 1993) 1.

Yearbook of European Law, 2025, 00, 1–28
https://doi.org/10.1093/yel/yeaf005
Article