



**Only the French version is authentic and it prevails  
in the event of its differing from the translated version**

**Decision 22-D-12 of 16 June 2022  
regarding practices implemented in the online advertising sector \***

The Autorité de la concurrence (Permanent standing committee),

Having regard to the registered letter dated 10 September 2019, under number 19/0054 F, in which the company Criteo lodged a complaint with the Autorité de la concurrence regarding practices implemented by the companies Facebook Inc, Facebook Ireland and Facebook France in the online advertising sector;

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 102 thereof;

Having regard to Book IV of the French Commercial Code (Code de commerce), and in particular Article L. 420-2;

Having regard to the preliminary assessment sent to Criteo SA, Facebook Inc, Facebook Ireland and Facebook France, and to the Representative of the Minister of the Economy on 2 April 2021;

Having regard to the observations submitted by the companies Criteo, Meta Platforms Inc. and the Representative of the Minister of the Economy;

Having regard to the proposed commitments of 1 June 2021, as amended on 30 September 2021, 29 October 2021, 2 December 2021, 4 February 2022 and 11 February 2022;

Having regard to the observations received in the context of the market test;

Having regard to the other evidence in the file;

Having regard to the note from Meta Platforms Inc. dated 11 February 2022, prior to the deliberations;

The Rapporteurs, the Deputy General Rapporteur, the Representative of the Minister of the Economy and the representatives of the companies Meta Platforms and Criteo who were

heard at the hearing of the Autorité de la concurrence on 13 October 2021, which was resumed following suspensions on 10 November 2021 and then on 8 February 2022;

Adopts the following decision:

## Summary<sup>1</sup>

Under the terms of the present decision, the Autorité de la concurrence (hereinafter "the Autorité") accepts the commitments proposed by the companies Meta Platforms Inc., Meta Platforms Ireland Ltd., and Facebook France (hereinafter "Meta"), makes them binding, and closes the procedure initiated following the complaint submitted by the company Criteo SA (hereinafter "Criteo"), regarding practices implemented in the online advertising sector.

Criteo is a French online advertising company. It offers intermediation services to its advertising clients, through which, in particular, thanks to its own technologies, it optimises the placement of their ads on different inventories, including on platforms such as Facebook and Instagram.

Meta, formerly Facebook, was set up in 2004. It offers a range of products and services to Internet users, advertisers and developers. Meta derives most of its revenue from the sale of its proprietary advertising inventory to advertisers, and to a lesser extent, from the sale of third-party publisher inventory using the Meta Audience Network (MAN) service, formerly the Facebook Audience Network, which is an advertising network for publishers (Ad Network). Since entering the online advertising market, Meta has provided advertisers with its own advertising inventory (Facebook, Instagram, Messenger) and that of publishers using MAN, a bidding system, a campaign management and buying platform, and data analysis capabilities for targeting and measuring campaign performances. From 2012 to 2016, Meta allowed third-party demand side platforms to participate in auctions on its own ad exchange (Facebook Ad Exchange). From 2016 to 2018, Meta provided specific application programming interfaces ("APIs") to certain intermediaries, including Criteo, allowing them to use Meta's technologies to improve bidding and campaign performance tracking. However, in 2018, Meta withdrew access to these APIs, including from Criteo.

In their preliminary assessment, the case team identified various practices implemented by Meta which were likely to raise competition concerns in the French market for online non-search advertising, or in the market for online non-search advertising limited to social networks, on which Meta was likely to hold a dominant position.

Firstly, the conditions under which Criteo had been deprived, in July 2018, of access to Meta's former partnership programme, called "Facebook Marketing Partner", were likely to reflect a lack of objectivity, transparency, predictability and stability in the criteria for accessing this programme, and differences in treatment in their implementation.

Secondly, Meta's sales teams engaged in conduct from late 2017 that was likely to constitute "denigrating" practices against Criteo. This conduct was likely to prevent the company from re-joining the Facebook Marketing Partner programme.

Thirdly, in 2018 Meta removed Criteo's access to an API, called "User Level Bidding," which was made available to a limited number of intermediaries on a trial basis. Among other things, this API allowed Criteo to use its own bidding and product recommendation technologies to optimise its retargeting offering<sup>2</sup> within the Meta advertising ecosystem. The conditions of this loss of access raised concerns about the transparency, objectivity and non-discriminatory nature of the criteria for accessing Meta's APIs.

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<sup>1</sup> This summary is for information purposes only. Only the following numbered reasons for the decision are authentic.

<sup>2</sup> Retargeting is a specific form of personalised advertising, which aims to identify and deliver targeted ads to specific individuals that advertisers identify as customers or potential customers.

As such, the conduct identified in the preliminary assessment was likely, on the one hand, to distort competition between online advertising service providers seeking to place ads on Meta's inventory and, on the other hand, in a context marked by the strengthening of Meta's vertical integration, to have foreclosure effects by weakening the competitive pressure exerted by intermediaries such as Criteo, whose retargeting services competed with that developed by Meta.

To address these competition concerns, Meta proposed three series of commitments.

Firstly, Meta made a commitment to offer access to a partnership programme called the *Meta Business Partner* programme (hereinafter "MBP"), to companies in the field of advertiser services (speciality "*Advertising Technology*" hereinafter "Ad Tech"). The *Ad Tech MBP* programme has two levels of partnership: Status and Badge. The first level provides access to documentary resources, online training and operational support. The second level also entitles the relevant companies to be listed in Meta's partner directory and receive dedicated technical support regarding the operation of Meta's APIs. These commitments were proposed for a period of five years. The Autorité considers that the conditions for accessing the "*Ad Tech MBP*" programme are such as to meet the competition concerns insofar as they are based on objective, transparent and predictable criteria.

Secondly, Meta made a commitment to provide its sales teams with compliance training on the content of their communications, in particular vis-à-vis advertising clients. It will be mandatory for employees to take the training every year and validate it by correctly answering all the questions in the knowledge test they will have to take. The Autorité considers that these commitments, which have been made for a period of five years, are likely to remedy the shortcomings identified in the preliminary assessment with regard to the conduct of the company's sales teams.

Thirdly, Meta made a commitment to develop a new API for advertising service providers, called the "*Recommendation Functionality*". The API, which is being made available free of charge, will allow eligible companies to send individualised queries for product recommendations on Meta-controlled social networks, or to send individualised bid adjustments. These commitments have been proposed for a period of three years. The Autorité considers that they are likely to meet the competition concerns insofar as the criteria for accessing this API are sufficiently justified, objective, transparent and non-discriminatory.

In addition, these commitments are likely to address the consequences that the practices identified in the preliminary assessment may have had on the market for advertiser services for advertisers. They are intended to guarantee that advertiser services providers can develop their business and their clients' advertising campaigns according to the model of their choice, under conditions that are not likely to have a negative impact on the competition between Meta and these providers.

With respect to their geographic scope, the commitments concern all advertiser services providers which, during a period of 180 days, participated in at least one advertising campaign targeting, in particular, users of Meta's services in France. However, as long as a company falls within the scope of the commitments and meets the conditions set forth in the commitments, it can benefit from the advantages of the "*Ad Tech MBP*" programme and use the "*Recommendation Functionality*" for all its advertising campaigns, without geographical restrictions.

Finally, the commitments proposed by Meta give a central role to a monitoring trustee responsible for their follow-up. Independently of Meta, this monitoring trustee must have the required qualifications, particularly in legal, statistical and IT matters. They must have

access to all the information necessary for the accomplishment of their mission, as soon as they request it. They also have the right to alert and thus send observations to Meta and, if necessary, notify the Autorité of any decision of which they have been notified and which, in their opinion, would distort the commitments due to a lack of objectivity or proportionality.

All in all, the Autorité considers that the commitments proposed by Meta are substantial, credible and verifiable, and are likely to put an end to the competition concerns highlighted in the preliminary assessment.

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# I. Findings

## A. THE COMPLAINT

1. On 10 September 2019, the company Criteo lodged a complaint with the Autorité de la concurrence regarding alleged abuse of a dominant position by of the companies Facebook Inc., Facebook Ireland Limited and Facebook France, in the online advertising sector<sup>3</sup>. These companies are now controlled by the company Meta Platforms (hereinafter "Meta"), which brings together all the group's technologies and applications under this single brand. Meta is said to have abused its dominant position on the social network market, which allegedly had an effect on the related market for intermediation and ad serving services on social networks.

## B. THE ONLINE ADVERTISING SECTOR

2. Digital advertising "*includes promotional advertisements and messages delivered through a variety of digital media channels and devices such as email, social media, websites, mobile devices and connected TVs.*"<sup>4</sup>
3. Digital advertising is the largest and fastest growing advertising sector<sup>5</sup>. According to data from the 27<sup>th</sup> 'Observatoire de l'e-pub' (Online Advertising Observatory) set up by the Syndicat des Régies Internet (SRI) and the firm Oliver Wyman<sup>6</sup>, online advertising revenues reached €5.970 billion in France in 2019 and €7.678 billion in 2021, up 29% over 2 years, following 4% growth achieved in 2020<sup>7</sup>.
4. The following discussions cover, in succession, the different types of digital advertising (1), the supply of advertising space by publishers and advertiser demand (2), the advertising intermediation services provided to advertisers and publishers (3), and finally, data analysis for advertising purposes (4).

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<sup>3</sup> As the companies in the group have since changed their corporate names, reference will be made to Meta when referring to the companies in the group.

<sup>4</sup> <https://iabeurope.eu/digital-advertising-explained/>

<sup>5</sup> Autorité de la concurrence, Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, page 4.

<sup>6</sup> [https://www.oliverwyman.fr/A\\_propos\\_dOliver\\_Wyman.html](https://www.oliverwyman.fr/A_propos_dOliver_Wyman.html) and <https://www.sri-france.org/qui-sommes-nous/>

<sup>7</sup> <https://www.sri-france.org/observatoire-epub/27eme-observatoire-de-le-pub/>

## 1. CATEGORIES OF ONLINE ADVERTISING

5. Online advertising can be differentiated according to various criteria. They are sometimes classified by actors in the sector according to hardware (computers, smartphones) and applications (web, mobile apps)<sup>8</sup>, ad spaces, campaign objectives, advertising formats<sup>9</sup> or targeting methods.
6. The distinction between search advertising and display advertising<sup>10</sup> is also frequently used. Search advertising corresponds to sponsored links appearing on the results pages of a search engine, general or specialised, displayed following a query. Display advertising generally refers to forms of advertising on the Internet using graphic elements (banners, tiles, and website skins), possibly animated, or a video medium<sup>11</sup>. Advertising on social networks is often considered a specific category within the Display advertising sector<sup>12</sup> and is distinguished these days from Display advertising by certain sectoral trade associations<sup>13</sup>.
7. The table below provides a breakdown of the revenue sources by distribution channel. According to the SRI, in 2021, search advertising was the largest source of revenue in France, with advertisers spending €3.2 billion. Advertising on social networks<sup>14</sup> is the second largest source of revenue, exceeding €2 billion. In turn, display advertising (excluding social

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<sup>8</sup> The SRI also distinguishes between display advertising according to their medium of distribution, generally differentiating between distribution on a computer, on a smartphone - itself split between the web environment, i.e. via the browser installed on the phone, and the app environment, i.e. in an app other than the browser - and addressable television, which groups together smart TVs, Internet boxes provided by operators, and comparable media connected to a TV, for example Roku, Amazon Fire TV Stick or Apple TV.

<sup>9</sup> The SRI distinguishes between banners, site skins, video and special formats.

<sup>10</sup> Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector, paragraph 10.

<sup>11</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, page 14.

<sup>12</sup> See, for example, "Observatoire de l'e-pub, Bilan 2017", 19<sup>th</sup> edition, January 2018, which states that "display" is (freely translated) "driven by social networks".

<sup>13</sup> See, for example, Observatoire de l'e-pub, Bilan 2021, 27<sup>th</sup> edition, January 2022.

<sup>14</sup> Definition given in the 19<sup>th</sup> Observatoire de l'E-pub (SRI): "*Social networks: All of the websites and mobile sites that allow their users to build a network of acquaintances using tools and interfaces designed for interactions, presentations and communication. For the purposes of this study, YouTube is not considered to be a social network*".

networks) generated €1.5 billion in revenue. Affiliation<sup>15</sup>, emailing<sup>16</sup> and comparison shopping sites<sup>17</sup> generated €0.9 billion.

**Table 1 - The digital advertising market in France (in € millions)**

	2019 <sup>18</sup>	2020 <sup>19</sup>	2021 <sup>20</sup>
<b>Search</b>	2,478	2,543	3,254
<b>Social</b>	1,447	1,558	2,034
<b>Display</b>	1,165	1,140	1,501
<b>Affiliate marketing, Emailing &amp; price comparison sites</b>	772	825	890
<b>Total</b>	5,862	6,066	7,678

Source: Observatoire de l'e-pub

## 2. SUPPLY AND DEMAND OF ADVERTISING INVENTORIES

8. The term advertising inventory refers to all the advertising space available for sale at a given time, for a given period, and for a given advertising medium. The advertising inventories of a website correspond to the surface area of the advertising spaces of each page of this site, multiplied by the number of times this page is opened by the various users (Internet users, smartphone users or app users). Each time a page of the site is opened, a new ad display surface is possible<sup>21</sup>. The inventories are marketed to advertisers and their media agencies.

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<sup>15</sup> Affiliate marketing is "a performance-based marketing/distribution technique that is unique to the Internet. Affiliate marketing is an advertising model in which a company compensates third-party publishers to generate traffic or leads to the company's products and services. The third-party publishers are affiliates, and the commission fee incentivizes them to find ways to promote the company". (<https://www.investopedia.com/terms/a/affiliate-marketing.asp>).

<sup>16</sup> Emailing designates "Email marketing is a powerful marketing channel, a form of direct marketing as well as digital marketing, that uses email to promote your business's products or services. It can help make your customers aware of your latest items or offers by integrating it into your marketing automation efforts. It can also play a pivotal role in your marketing strategy with lead generation, brand awareness, building relationships or keeping customers engaged between purchases through different types of marketing emails" (<https://mailchimp.com/marketing-glossary/email-marketing/>).

<sup>17</sup> A price comparison site is "A vertical search engine that shoppers use to filter and compare products based on price, features, reviews and other criteria. Most comparison shopping sites aggregate product listings from many different retailers but do not directly sell products themselves, instead earning money from affiliate marketing agreements" ([https://en.wikipedia.org/wiki/Comparison\\_shopping\\_website](https://en.wikipedia.org/wiki/Comparison_shopping_website)).

<sup>18</sup> <https://www.sri-france.org/observatoire-epub/23eme-observatoire-de-le-pub/>

<sup>19</sup> <https://www.sri-france.org/observatoire-epub/25eme-observatoire-de-le-pub/>

<sup>20</sup> <https://www.sri-france.org/observatoire-epub/27eme-observatoire-de-le-pub/>

<sup>21</sup> Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector, paragraph 11, and glossary to Opinion 18-A-03 of 6 March 2018.

9. An advertiser is the company or organisation that initiates a communication campaign (advertising, marketing, etc.) to promote its products and services or its brand. The advertiser is the company that sponsors a campaign. In order to run its campaign, it buys advertising space (television spots, displays on the underground, space on a website, etc.). Media agencies assist advertisers in designing and implementing their communication strategies<sup>22</sup>.
10. On the Internet, advertisers can use different categories of advertiser services that are chosen according to the objectives pursued, i.e. the action that an advertiser wants internet users to perform when they are exposed to an ad. Advertisers can use a variety of ad formats and placements that vary depending on the publisher selling the ad space.
11. In order to maximise their chances of achieving their objectives, advertisers need to reach the audience they want to expose to their ads. The various companies involved in selling ad space use data for advertising purposes to allow them to target the desired audience as effectively as possible, to monitor the conditions under which advertiser services are provided and to assess the performance of ad campaigns.
12. Two methods of marketing online advertising space coexist: direct sales and programmatic sales. Direct sales are based on an agreement concluded directly between the publisher of the website or mobile app and the advertiser, possibly represented by an agency<sup>23</sup>. This can be automated (referred to as programmatic<sup>24</sup>) or not. Most publishers who sell their inventory (i.e. their ad spaces, corresponding to various spaces on a webpage viewed by internet users: in columns, between paragraphs of text, etc.) through programmatic technologies use intermediaries, in that their ad space could not be sold through a vertically integrated model due to a lack of audience<sup>25</sup>.
13. Within the ad space offering, social networks occupy a special position on account of their large audience and the characteristics of these services, which are multi-sided platforms on which private and professional users generate content, unlike traditional media. Indeed, social networks generally make it possible to develop interactions with other users, allowing them to communicate with each other, to share and discover various content.
14. The main social networks used in France are Facebook, Instagram, Snapchat, Twitter, LinkedIn, Pinterest and TikTok. Commonly provided features include user profiles or accounts, user relationships, a personalised "feed" of content, content sharing features of comments and feedback, and private messaging services<sup>26</sup>. Some players, such as Meta, which operates Facebook and Instagram, offer a wider range of services, including classified ad marketplaces, video services, and online gaming portals. Others, like LinkedIn, are specialised in professional networking.
15. Social networks are multi-sided platforms whose business model is based on monetising user engagement and the data they generate by selling ad space directly and programmatically to advertisers. Most social networks are accessible by Internet users free of charge and their

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<sup>22</sup> They optimise the relationship between the brand and its target audience. They implement the media strategy, media planning, media buying and also use a range of communication techniques and distribution methods.

<sup>23</sup> Decision 21-D-11 of 7 June 2021, paragraph 31.

<sup>24</sup> Programmatic advertising is a type of advertising where ad buying purchase and campaign implementation and release are automated (see Opinion 18-A-03, paragraph 18).

<sup>25</sup> Opinion 18-A-03 of 6 March 2018, paragraph 21.

<sup>26</sup> Online platforms and digital advertising, Market study final report, 1 July 2020, Competition and Markets Authority.

revenue comes mainly from ad services sold to advertisers. Their model is to attract a large number of users and create rich data sets on their users, to offer personalised ad services to advertisers. Social networks can use a variety of data collected in "logged"<sup>27</sup> environments for advertising purposes to maximise advertising revenue, which in turn can be used to invest in new features and services, improve the consumer experience and optimise data collection techniques. Many stakeholders consider that social networks, and in particular Facebook, generate data that is particularly detailed and relevant for advertising purposes<sup>28</sup>.

### 3. ADVERTISING INTERMEDIATION SERVICES

16. While social networks have vertically integrated the provision of advertiser services in order to offer their services directly to advertisers, the vast majority of website and mobile app publishers sell their ad space through a chain of supply and demand side intermediaries. This environment is sometimes referred to as Open Display<sup>29</sup>, as opposed to selling ad space through vertically integrated platforms (Owned and Operated), such as social networks.
17. In Open Display, publishers and their intermediaries compete in real time to market their ad space. The marketed inventories are sold through open auctions but can also be sold directly<sup>30</sup>.
18. The intermediation services used by the publishers are the following:
  - Ad servers: services that allow publishers to manage their ad inventories by evaluating their availability, and automatically select the most relevant and profitable ads available;
  - Ad Networks: networks that buy advertising inventory from different publishers and then sell it directly to advertisers or through ad exchanges;
  - Supply Side Platforms (SSPs): services which are intended to optimise and automate sales of ad space<sup>31</sup>. Publishers lay down the conditions for making their inventories available on these platforms (e.g. minimum prices, formats, excluded advertisers);
  - Ad Exchanges: marketplaces that allow publishers and advertisers to buy and sell ad space.

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<sup>27</sup> There are generally two main methods of data collection: the use of cookies (or other tracking tools that safeguard the anonymity of Internet users) and the collection of data in a "logged" context, i.e., following an identification process after a user "logs in", specifically by filling in a form with information such as a user name and password. This can be the case following the registration to a service dedicated to Internet users such as Gmail, or a social network such as Facebook.

<sup>28</sup> Opinion 18-A-03 of 6 March 2018, paragraph 177.

<sup>29</sup> See for example, Market power and transparency in open display advertising - a case study, Doh-Shin Jeon, Final Report, Expert Group for the Observatory on the Online Platform Economy (<https://www.tse-fr.eu/publications/market-power-and-transparency-open-display-advertising-case-study>).

<sup>30</sup> See Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector.

<sup>31</sup> Unlike historical advertising networks, SSPs hold an auction for each available impression, and therefore do not offer a fixed remuneration to the publisher. These platforms also offer publishers additional services, including greater control over the content of the campaigns they run.

SSPs and Demand Side Platforms (DSPs) connect to the Ad Exchanges. The function of Ad Exchanges is increasingly combined with that of SSPs<sup>32</sup>.

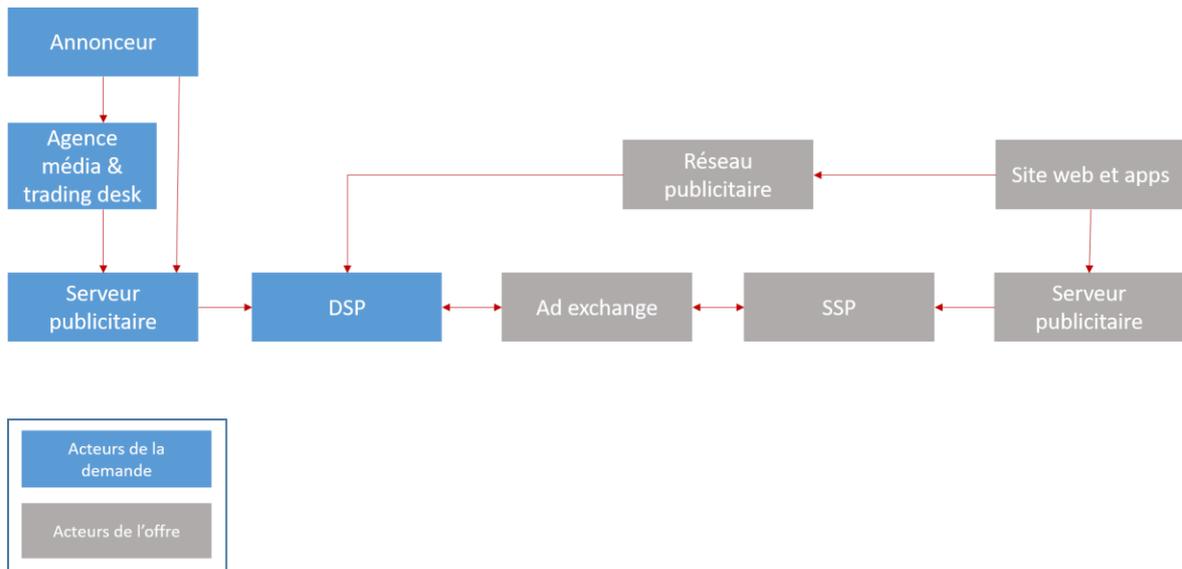
19. On the demand side, advertisers also compete in auctions that may involve multiple SSPs. The intermediation services used by the advertisers are the following:
  - Media agencies: they assist advertisers in designing and implementing their communication strategies, in order to optimise the relationship between the brand and the public;
  - trading desks: centralised service platforms specialised in programmatic purchases. They can be from media agencies or independent;
  - Ad servers: technologies that make it possible to host advertisers' adverts and track campaigns by providing statistics and indicators (e.g., volumes, dates, click rates, conversion rates, etc.);
  - Demand Side Platforms (DSPs): technologies that make it possible to optimise, automate and control the purchase of advertising space through participation in auctions organised by SSPs, but also, in some cases, the purchase from ad networks, as well as the purchase of inventory from vertically integrated players, such as social networks. The modalities for managing DSP auctions varies across a broad spectrum, with, at one end, services that optimise bidding strategies using advanced algorithms but are opaque to the advertiser, and, at the other, almost total control by the advertiser over the amount of the bids<sup>33</sup>. They offer advertisers a variety of targeting options and allow them to manage their ad campaign objectives.
20. The diagram below illustrates the relationships between the players in advertising intermediation for advertisers and publishers.

**Figure 1- Advertising technologies for advertisers and publishers of websites and mobile apps**

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<sup>32</sup> Decision 21-D-11 of 7 June 2021 regarding practices implemented in the online advertising sector, paragraph 56. In its 2018 opinion on online advertising, the Autorité had recalled that "*Some SSPs are part of ad exchanges. Google was the first to do this, when it acquired AdMeld and integrated it into Google Ad Exchange*" (See paragraph 35 of the above-mentioned Opinion 18-A-03).

<sup>33</sup> In this respect, some DSPs propose that advertisers themselves supply the algorithm that evaluates the amount of the bid to be made.



Source: Autorité de la concurrence

FR	ENG
Annonceur	Advertiser
Agence média & trading desk	Media agency & trading desk
Serveur publicitaire	Ad Server
DSP	DSP
SSP	SSP
Acteurs de la demande	Demand-side actors
Acteurs de l'offre	Supply-side actors
Serveur publicitaire	Ad Server
Site web et apps	Website and apps
Réseau publicitaire	Ad network

21. When a user visits a website, the page loads with empty ad spaces. The web browser used sends a request to the publisher's Ad Server to ascertain whether the ad space in question is the subject of a direct agreement between the publisher and an advertiser. If this is not the case, the publisher's SSP is contacted. This SSP receives all the relevant data available to the publisher's Ad Server on the ad space and on the user visiting the page. In the course of the transactions between publishers and advertisers, a lot of data may be transmitted. These relate to the bid request, the impression (e.g. format), the environment of the impression (publisher, web, app, editorial content), the user (type of terminal, associated data), the type of agreement and the bid<sup>34</sup> (see paragraphs 24 et seq. on data analysis for advertising

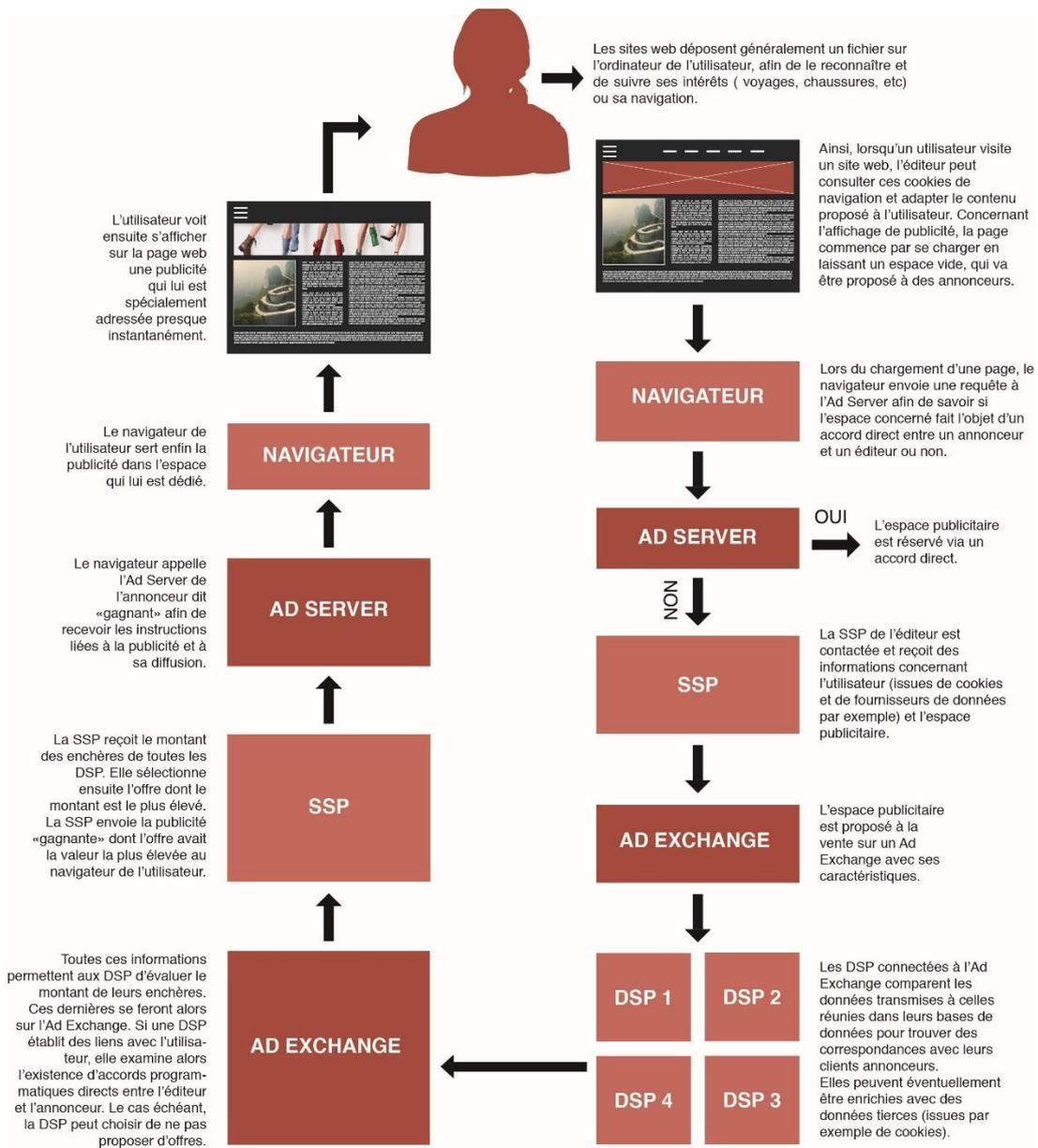
<sup>34</sup> Guide on the traceability of programmatic flows, IAB France (available at: <https://www.iabfrance.com/publication/liab-france-publie-son-guide-sur-la-tracabilite-des-flux-programmatiques>)

purposes). The impression, i.e. the ad space in question, is offered for sale on an Ad Exchange. DSPs connected to this Ad Exchange compare the data they receive with those of their advertising clients, which are grouped in their databases, in order to establish possible matches with the advertiser's objectives. If a DSP links to the ad's target user, it looks at the data of the publisher's site as well as any proprietary or third-party data it has on the individual. It also examines whether there are any direct programmatic agreements. All this information allows the DSPs to work out the amount of their bid. If a DSP does not make a match, it may choose not to submit a bid. The SSP receives the bid amounts from all the DSPs and selects the highest bid. The SSP then sends the winning ad to the user's browser, which calls the advertiser's Ad Server to obtain instructions about the ad and how it is to be delivered. Finally, the Internet user's browser serves the ad<sup>35</sup>.

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<sup>35</sup> Opinion 18-A-03 of 6 March 2018, paragraph 24.

**Figure 2 - Real-time bidding process in the programmatic advertising sector**



Source: Autorité de la concurrence

FR	ENG
Fonctionnement du système d'enchères en temps réel dans le secteur de la publicité programmatique	Real-time bidding process in the programmatic advertising sector
Les sites web déposent généralement un fichier sur l'ordinateur de l'utilisateur, afin de le reconnaître et de suivre ses intérêts (voyages, chaussures, etc.) ou sa navigation	Websites generally leave a file (cookie) on the user's computer in order to recognise and track his/her interests (travel, shoes, etc.) or browsing activity
L'utilisateur voit ensuite s'afficher sur la page web une publicité qui lui est spécialement adressée presque instantanément	The user then sees a specifically targeted ad on the website, almost instantaneously
Le navigateur de l'utilisateur sert enfin la publicité dans l'espace qui lui est dédié.	Finally, the user's browser serves the ad in the dedicated space
Le navigateur appelle l'Ad Server de l'annonceur dit "gagnant" afin de recevoir les instructions liées à la publicité et à sa diffusion	The browser calls the ad server of the highest bidding advertiser to obtain instructions on the ad and how it is to be delivered
Le SSP reçoit le montant des enchères de toutes les DSP. Elle sélectionne ensuite l'offre dont le montant est le plus élevé. Le SSP envoie la publicité "gagnante" dont l'offre avait la valeur la plus élevée au navigateur de l'utilisateur.	The SSP receives the bids from all the DSPs and chooses the highest bid. It then sends the "winning" ad with the highest bid to the user's browser.
Toutes ces informations permettent aux DSP d'évaluer le montant de leurs enchères. Ces derniers se feront alors sur l'Ad Exchange. Si une DSP établit des liens avec l'utilisateur, elle examine alors l'existence d'accords programmatiques directs entre l'éditeur et l'annonceur. Le cas échéant, la DSP peut choisir de ne pas proposer d'offres.	All this information helps DSPs determine how much they will bid. These bids are made on the Ad Exchange. If a DSP finds matches with the user, it checks to see if there are programmatic direct agreements between the publisher and advertiser. Depending on the case, the DSP may choose not to make a bid.
Navigateur	Browser
SSP	SSP
Ainsi, lorsqu'un utilisateur visite un site web, l'éditeur peut consulter ces cookies de navigation et adapter le contenu proposé à l'utilisateur. Concernant l'affichage de publicité, la page commence par se charger en laissant un espace vide, qui va être proposé à des annonceurs.	When a user visits a website, the publisher checks these cookies and adapts the content offered to the user. When an ad is displayed, the page starts loading and leaves an empty space that is offered up for sale to advertisers.
Lorsqu'un chargement d'une page, le navigateur envoie une requête à l'Ad Server afin de savoir si l'espace concerné fait objet d'un accord direct entre un annonceur et un éditeur ou non.	When a page begins to load, the browser sends a request to the ad server to find out if the space in question is under a direct agreement between an advertiser and publisher.
L'espace publicitaire est réservé via un accord direct	The ad space is reserved under a direct agreement
La SSP de l'éditeur est contactée et reçoit des informations concernant l'utilisateur (issues de cookies et de fournisseurs de données par exemple) et l'espace publicitaire.	The publisher's SSP is contacted and receives information concerning the user (e.g. from cookies and data providers) and ad space.
L'espace publicitaire est proposé à la vente sur un Ad Exchange avec ses caractéristiques.	The ad space is offered for sale on an ad exchange with its characteristics.
Les DSP connectées à l'Ad Exchange comparent les données transmises à celles réunies dans leurs bases de données pour trouver des correspondances avec leurs clients annonceurs. Elles peuvent	DSPs connected to the ad exchange compare the data they receive with the data in their own databases to find matches with their advertiser clients. This can potentially be enriched with third-party data (e.g. from cookies).

éventuellement être enrichies avec des données tierces (issues par exemple de cookies).	
DSP 1	DSP 1
DSP 2	DSP 2
DSP 3	DSP 3
DSP 4	DSP 4
Plateforme automatisée de vente et d'achat d'espaces publicitaires sur laquelle se rencontrent les demandeurs et les offreurs d'espaces publicitaires.	Automated platform where ad space buyers and sellers meet to buy and sell ad space.
Plateforme côté offre. C'est une plateforme technologique qui permet d'optimiser et d'automatiser la vente des différents espaces publicitaires.	Supply-side platform. This is a technology platform that optimises and automates the sale of different ad spaces.
Serveur publicitaire. Pour les annonceurs, c'est une plateforme technologique qui héberge les créations publicitaires et permet leur diffusion. Pour les éditeurs, il permet de gérer les inventaires et d'optimiser la diffusion les campagnes sur les sites en fonction de plusieurs critères (date, volume, etc.)	Ad Server. This is a technological platform which, on the advertiser side, hosts ads so they can be distributed. On the publisher side, it is used to manage inventories and optimise the delivery of campaigns on websites, based on various criteria (date, volume, etc.)
Plateforme côté demande. Permet aux annonceurs d'optimiser leurs achats d'espaces publicitaires.	Demand-side platform. This helps advertisers optimise the way they buy ad space.
Oui	Yes
Non	No

22. Publishers and advertisers alike also use related services, such as data analysis and analytics, which may be independent of the services of DSPs, SSPs and ad servers. Publishers and advertisers are therefore likely to use Data Management Platforms (DMP) <sup>36</sup> services to store, manage and analyse the data collected. Advertisers also use data analysis services for ad verification and ad attribution.

The attribution function consists of determining a causal link between a given event and exposure to an ad, and makes it possible to determine the terms and levels of remuneration for the various actors in the ecosystem<sup>37</sup>. Verification involves an evaluation of the visibility of ads, the context in which they are displayed, and whether there is any fraud.

23. On social networks and Owned and Operated platforms, the structure of advertiser services and the progression of transactions differ to a significant extent from Open Display, to the

<sup>36</sup> Data Management Platforms (DMPs) are used by advertisers and publishers. DMPs are connected to DSPs, SSPs, Ad Exchanges and Ad Servers to optimise the use of data throughout the buying and selling process. On the advertiser's side, a DMP is used to organise, segment and exploit targets, but also to collect, organise and analyse the online and offline behaviours of consumers. A DMP makes it possible to centralise the storage of data that can be accessed directly by the advertising partners. Integrated and organised data may be proprietary data on the users of the advertiser's website, data purchased from third-party data providers, data relating to customer relationship management (CRM), mobile data, data from an email service provider, or purchase data. On the publisher's side, DMPs are used to better understand the audiences of the sites concerned, through socio-demographic, affinity or purchase intention criteria. This in-depth knowledge allows publishers to monetise their own inventory more effectively and reassure advertisers that the proposed audiences do actually exist.

<sup>37</sup> Decision 21-D-07 of March 17, 2021 regarding a request for interim measures submitted by the associations Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet in the sector of advertising on mobile apps on iOS, paragraph 12.

extent that these players have vertically integrated to provide services directly to advertisers, by internalising various ad technology services. As such, social networks combine their ad inventory, bidding technology, a buying and campaign optimisation platform, ad server capabilities, and data analysis and analysis services for advertising purposes. Social networks also allow some demand-side intermediaries to provide advertisers with advertising and data analytics services within their proprietary ecosystems, by connecting to the platform's infrastructure, usually via application programming interface (API) systems. The figure below shows the ad spaces and technologies that Meta makes available, the intermediaries that can provide ad technologies on Meta, and the space and technology providers in the Open Display.

**Table 2 - Comparison of advertising technologies provided by Meta and in the Open Display**

Fournisseurs d'espaces et de technologies publicitaires tiers dans l'Open Display	Fonctionnalités et technologies publicitaires	Espaces et technologies publicitaires fournis par Meta	Espaces et technologies publicitaires fournis sur Meta par des entreprises tierces
Lemonde.fr, Météo France, Candy crush...	Espaces publicitaires	Facebook, Instagram, Messenger	Meta Audience Network
Google, Smart AdServer, Adhese...	Serveur publicitaire	Technologies de Meta	Non disponible
Google, Smart AdServer, Xandr, Adhese...	SSP/ Ad Exchange		
Google, Xandr, Criteo, Mediamath...	DSP	Technologies de Meta	Criteo, Nextroll...
Google, Weborama, Sizmek...	Serveur publicitaire pour annonceur		Non disponible
Integral Ad Science, ComScore...	Attribution et vérification publicitaire		Integral Ad Science, ComScore...
Adobe, Oracle, Weborama...	DMP		Non disponible (depuis 2018)

Source: Autorité de la concurrence

FR	ENG
Fournisseurs d'espaces et de technologies publicitaires tiers dans l'Open Display	Third-party ad space and technology providers in Open Display
Fonctionnalités et technologies publicitaires	Ad functionalities and technologies
Espaces publicitaires	Ad spaces
Serveur publicitaire	Ad Server
SSP/Ad Exchange	SSP/Ad Exchange
DSP	DSP
Serveur publicitaire pour annonceur	Advertiser Ad Server
Attribution et vérification publicitaire	Ad attribution and verification
DMP	DMP
Espaces et technologies publicitaires fournis par Meta	Ad space and technology provided by Meta
Technologies de Meta	Meta technologies
Espaces et technologies publicitaires fournis sur Meta par des entreprises tierces	Ad space and technology on Meta provided by third-party companies
Meta Audience Network	Meta Audience Network
Non disponible	Not available
Non disponible (depuis 2018)	Not available (since 2018)

#### 4. DATA ANALYSIS FOR ADVERTISING PURPOSES

24. The online advertising sector is characterised by the importance of data analysis, which takes various forms and takes place at various key stages of advertising campaigns<sup>38</sup>. The data are collected and used by all companies involved in the transactions, whether they are intermediaries, vertically integrated platforms, publishers or advertisers. In particular, they make it possible to target audiences in order to supply personalised ads to Internet users, and provide advertisers with campaign performance analysis services.
25. There are various categories of data that are used for advertising purposes: user data, contextual data and campaign analysis data. User data includes information about the behaviour and characteristics, including socio-demographic characteristics, of individuals. These data may be provided voluntarily (e.g., data linked to an account, searches), observed (e.g., browser history, terminal used), or inferred, i.e., deduced from voluntary and observed data. Contextual data refers to data related to the environment of the ad (e.g., the theme of the website, weather conditions). Finally, campaign analysis data is data such as clicks, views, and conversions, which are essential to assess the performance of a campaign.
26. Data can be collected by a company directly from the services it provides to Internet users (first-party data) or from third-party sites or applications (third-party data). Third-party data may be collected and provided directly by advertisers, publishers, or data providers, or collected via third-party technologies, such as SDKs<sup>39</sup>, pixels<sup>40</sup>, or cookies<sup>41</sup> (hereinafter "trackers"). Data may also be collected via login features to third-party sites or apps that are provided by large platforms (e.g.: Facebook login). Finally, data may be collected via ad services provided to publishers. In the case of vertically integrated platforms, which provide their services to users in a logged-in context (i.e., one that requires initial identification), user login features typically give them specific measurement capabilities compared to approaches based on cookies<sup>42</sup>. Indeed, they are able to link all exposure and conversions across devices

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<sup>38</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraph 40.

<sup>39</sup> SDK stands for Software Development Kit. An SDK is a set of programming tools offered to publishers / developers of mobile apps. Marketing and advertising SDKs are used to analyse audiences and behaviour on mobile apps.

<sup>40</sup> It is a picture element (pixel) that can be inserted in a web page in order to collect technical information (IP address, URL, etc.) and measure a behaviour (example: the number of visits to a web page). The term "impression pixel" is used when the pixel is delivered along with the ad for the purpose of tracking impressions and measuring their effects. In this case, the display of the pixel prompts the downloading of a cookie on the user's browser, which will enable tracking. Conversion pixels make it possible to track the purchases of users and are generally placed on the landing page confirming a conversion process. In this case, the pixel is usually placed on the web page using JavaScript code, which makes it possible to collect more detailed information.

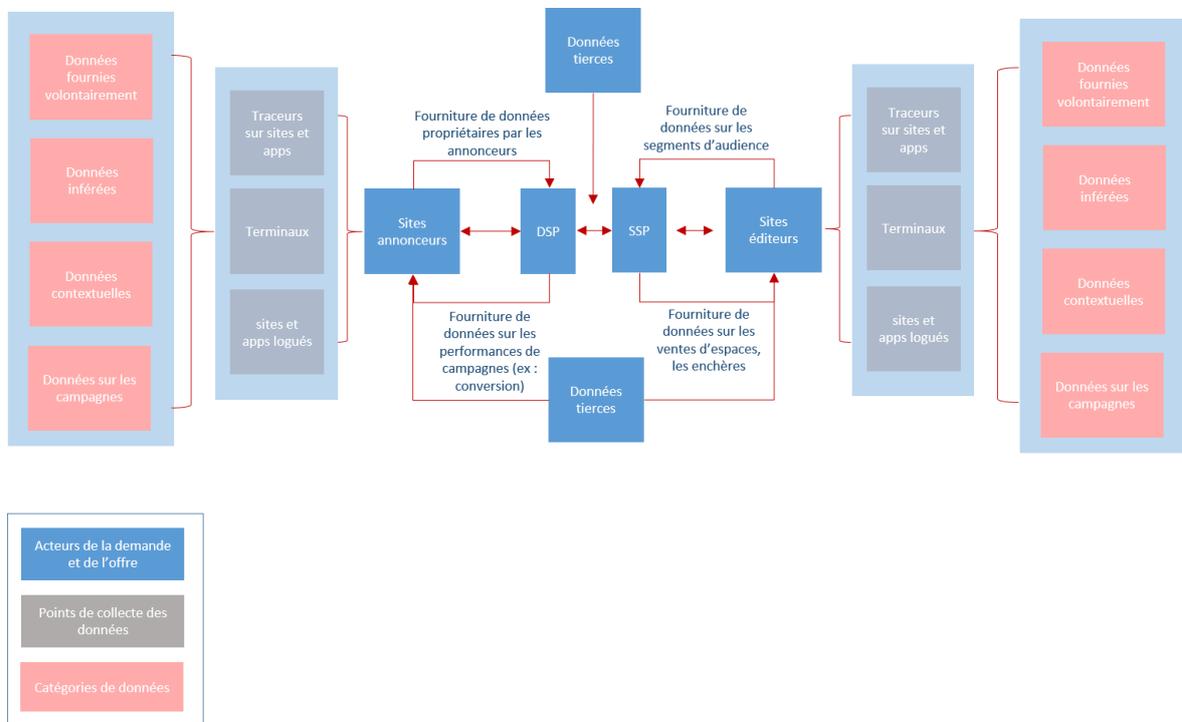
<sup>41</sup> It is a text file installed on the hard disk or terminal of an Internet user either by the server of the site he or she is visiting (so-called proprietary or First Party cookies) or by a third-party server, i.e. from a separate domain (so-called Third Party cookies). It contains various data: the name of the server that installed it, an identifier in the form of a unique number and, usually, an expiration date. Cookies are used to store information about the user's browsing experience (e.g. shopping cart) and make it easier. In the context of the ad buying and selling process, almost all players (ad servers, inventory providers, verification tools, data management tools) also install their own cookies, in part to ensure that they have fulfilled their role in delivering the ad, and to track the ad campaign.

<sup>42</sup> See Opinion 18-A-03, cited above, paragraph 128.

and sessions with a specific user, as opposed to a browser on a laptop that might be used by different people in a family.

27. The diagram below provides a simplified illustration of the categories, collection tools and data flows in the context of programmatic transactions between advertisers, publishers and the different intermediaries. It shows that the roll-out and evaluation of campaigns involves mining data from advertisers but also from publishers. These data are collected either directly by advertisers<sup>43</sup> and publishers or by third parties. The advertisers and publishers can, in effect, collect their own data, voluntarily provided or observed (for example via their websites, loyalty programs, etc.) to share with the platforms that run their ad campaigns (DSPs, DMPs, etc.). They can also use data collected by third parties, who can provide it directly to the platforms, or indirectly, through advertisers and publishers.

**Figure 3 - Data origins and flows in the context of programmatic transactions**



Source: Autorité de la concurrence

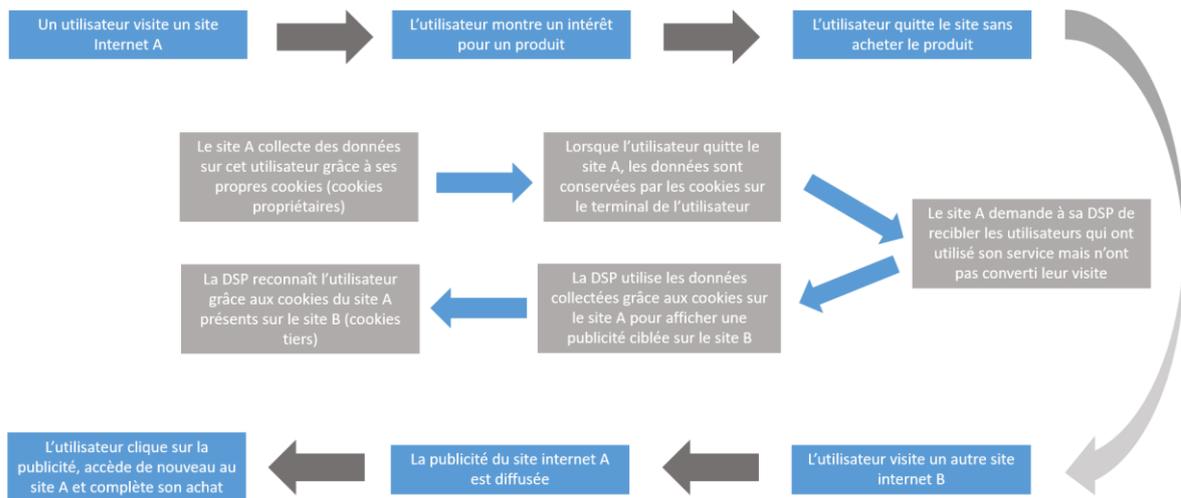
FR	ENG
Données fournies volontairement	Data provided voluntarily
Données inférées	Inferred data

<sup>43</sup> Advertisers may collect their own voluntarily provided or observed data (e.g., via their websites, loyalty programs, etc.) to share with the platforms that run their ad campaigns, or they may source data on platform users that they source from other agents such as data management platforms (more detail in the "Targeting in Digital Advertising" section below).

Données contextuelles	Contextual data
Données sur les campagnes	Campaign data
Acteurs de la demande et de l'offre	Demand-side and supply-side actors
Points de collecte des données	Data collection points
Catégories de données	Data categories
Trauceurs sur sites et apps	Trackers on sites and apps
Terminaux	Terminals
Sites et apps logués	Logged sites and apps
Sites annonceurs	Advertiser sites
DSP	DSP
SSP	SSP
Sites éditeurs	Publisher sites
Fourniture de données propriétaires par les annonceurs	Supply of proprietary data by advertisers
Fourniture de données sur les performances de campagnes (ex: conversion)	Supply of campaign performance data (e.g. conversion)
Données tierces	Third party data
Fourniture de données sur les segments d'audience	Supply of audience segment data
Fourniture de données sur les ventes d'espaces, les enchères	Supply of data on sales of ad spaces, auctions

28. All of these data can be used, in the first instance, for ad targeting. There are different types of targeting that require different types and volumes of data: contextual targeting, personalised targeting, socio-demographic targeting or action targeting.
29. The latter method of targeting, which is offered by Meta and Criteo (see paragraphs 95 et seq.), is also referred to as retargeting. This is a specific form of personalised advertising, which aims to identify and deliver targeted ads to specific individuals that advertisers identify as customers or potential customers. In order to run a retargeting campaign, advertisers provide ad service providers with customer data such as contact lists, email IDs or other IDs that the advertiser has previously obtained through its own customer relationships. Alternatively, the ad service providers of advertisers may collect data on the customers of advertisers directly from their websites, via SDKs, cookies and pixel tags that allow advertisers to target these consumers. The diagram below provides a simplified overview of how retargeting works.

**Figure 4 - How Ad Retargeting works**



Source: Autorité de la concurrence

FR	ENG
Un utilisateur visite un site Internet A	A user visits a website A
L'utilisateur montre un intérêt pour un produit	The user shows interest in a product
L'utilisateur quitte le site sans acheter le produit	The user leaves the site without buying the product
L'utilisateur visite un autre site internet B	The user visits another website B
La publicité du site internet A est diffusée	The ad on the website A is still served
L'utilisateur clique sur la publicité, accède de nouveau au site A et complète son achat	The user clicks on the ad, goes back to site A and completes the purchase
Le site A collecte des données sur cet utilisateur grâce à ses propres cookies (cookies propriétaires)	Website A collects data about this user via its own cookies (proprietary cookies)
Lorsque l'utilisateur quitte le site A, les données sont conservées par les cookies sur le terminal de l'utilisateur	When the user leaves website A, the data is stored by the cookies on the user's terminal
La DSP utilise les données collectées grâce aux cookies sur le site A pour afficher une publicité ciblée sur le site B	The DSP uses the data collected via cookies on website A to display a targeted ad on website B
Le site A collecte des données sur cet utilisateur grâce à ses propres cookies (cookies propriétaires)	Website A collects data about this user via its own cookies (proprietary cookies)
La DSP reconnaît l'utilisateur grâce aux cookies du site A présents sur le site B (cookies tiers)	The DSP recognises the user thanks to the cookies of website A present on website B (third-party cookies)

30. After the ad campaigns are targeted, the data is used for ad verification, ad attribution and campaign performance measurement.

31. Tracking user behaviour for the purpose of ad attribution and measurement generally involves the use of cookies or other tracking technologies such as pixels or tags<sup>44</sup>. When a user visits a website or a mobile app, the latter install, with the user's consent, a number of trackers on the browser or mobile device, to collect data. Third-party trackers may also be installed on the user's browser. Ad attribution can be made difficult if a single user uses multiple devices, and if they delete cookies.
32. In conclusion, running ad campaigns, in Open Display or on social networks, requires the use of various technologies, which can be provided directly by the seller of the ad space, when it is a vertically integrated platform that provides bidding and buying technologies, or by intermediaries between the advertiser and the publisher. To maximise the odds of achieving the campaign objectives, it is necessary to mine data from advertisers, publishers and providers of ad technologies. These data may be collected through various types of trackers installed by publishers and advertisers, or purchased from advertising and data service providers.

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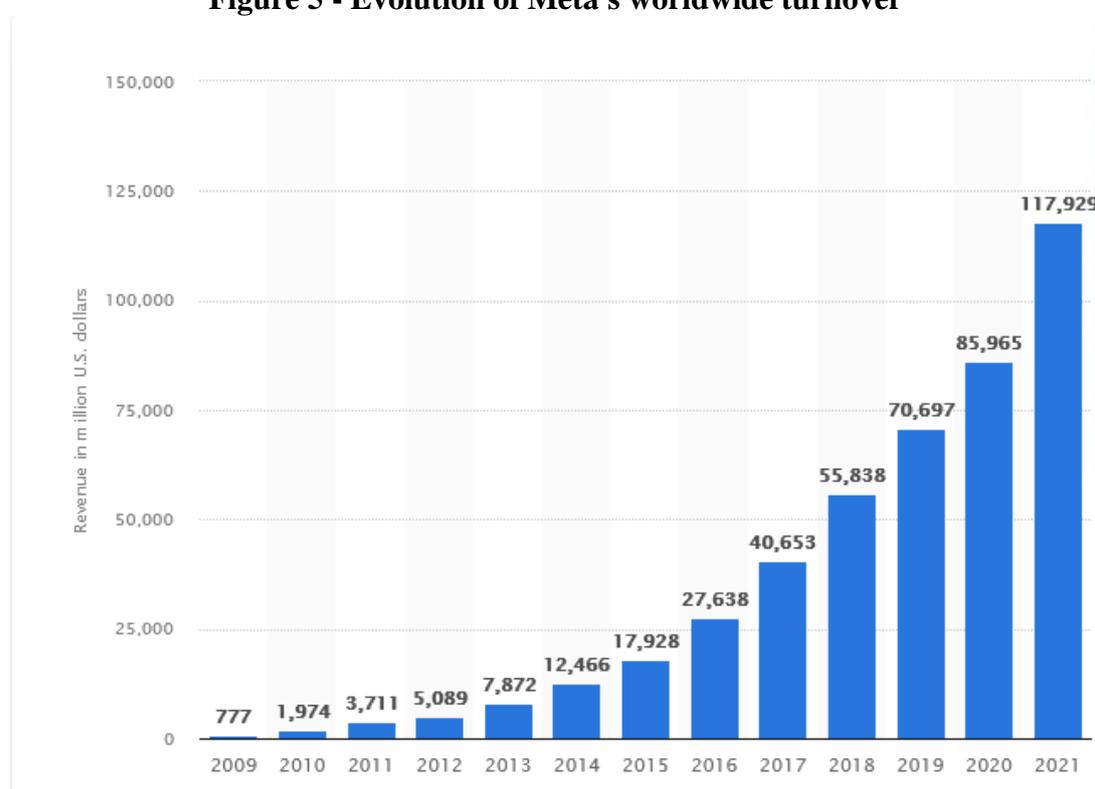
<sup>44</sup> A tag is an insertion on a web page, which makes it possible to track visits or trigger actions (on the page viewed by the Internet user or remotely on an ad server). In particular, they can count clicks, the number of impressions of an ad, redirect the user who clicked to the landing page, ascertain who sees the ad, in what context and at what time.

## C. THE COMPANIES INVOLVED

### 1. META

33. Meta, formerly Facebook, was set up in 2004. It offers a range of products and services to Internet users, advertisers and developers. Meta derives most of its revenue from the sale of its proprietary advertising inventory to advertisers, and to a lesser extent, from the sale of third-party publisher inventory using the Meta Audience Network (MAN) service, formerly the Facebook Audience Network (FAN), which is an ad network for publishers. In 2021, its worldwide turnover was US\$117.9 billion, a rise of 37%<sup>45</sup>. The chart below shows the evolution of Meta's turnovers since 2009<sup>46</sup>.

**Figure 5 - Evolution of Meta's worldwide turnover**



Source: Statista

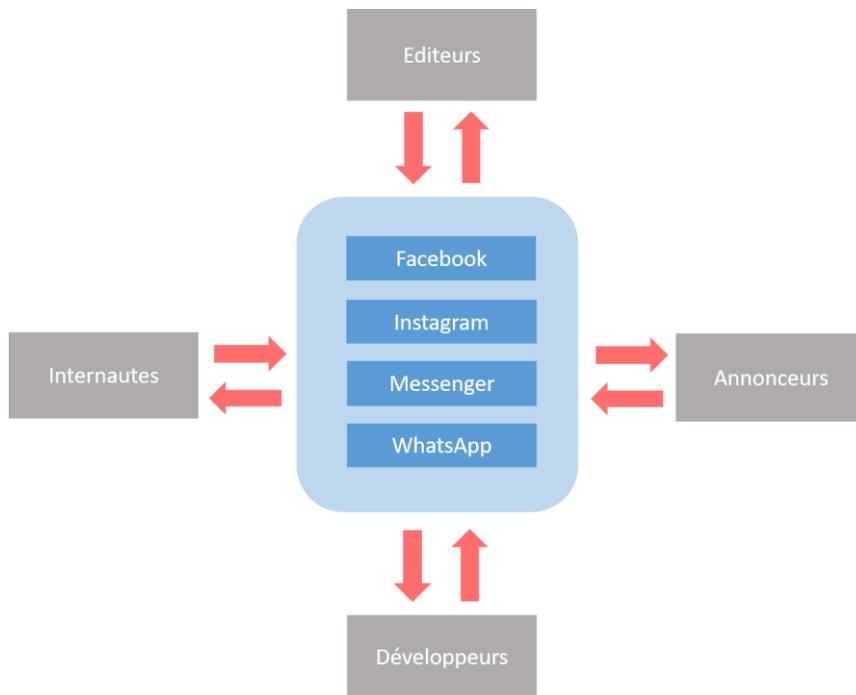
<sup>45</sup> <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx>

<sup>46</sup> <https://www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/>

**a) Meta's services to Internet users**

- 34. Meta provides users with the social networking services Facebook and Instagram, as well as the messaging services Messenger and WhatsApp<sup>47</sup>. More recently, Meta started selling terminals (*Portal*).
- 35. Meta's main product is the social network Facebook. Facebook *"enables people to connect, share, discover, and communicate with each other on mobile devices and personal computers"*<sup>48</sup>.
- 36. Meta operates various multi-sided platforms, where users, advertisers, content developers and publishers are active.

**Figure 6 - Schematic representation of the Meta platform**



Source: Autorité de la concurrence

FR	ENG
Développeurs	Developers
Annonceurs	Advertisers
Editeurs	Publishers
Internautes	Internet users

<sup>47</sup> Classification mark 13.

<sup>48</sup> Facebook Annual Report, 2019: <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/45290cc0-656d-4a88-a2f3-147c8de86506.pdf>

37. The table below illustrates the steady increase, since 2016, in the number of users of Meta's services worldwide and in France.

**Table 3 - Average number of monthly active unique users of Meta services worldwide and in France**

Average number of unique monthly active users <sup>49</sup> (in millions)		2016	2017	2018	2019
<b>Worldwide</b> <sup>50</sup>	Facebook	[confidential]	[confidential]	[confidential]	[confidential]
	Instagram	[confidential]	[confidential]	[confidential]	[confidential]
	Messenger	[confidential]	[confidential]	[confidential]	[confidential]
	WhatsApp	[confidential]	[confidential]	[confidential]	[confidential]
<b>France</b> <sup>51</sup>	Facebook	[confidential]	[confidential]	[confidential]	[confidential]
	Instagram	[confidential]	[confidential]	[confidential]	[confidential]
	Messenger	[confidential]	[confidential]	[confidential]	[confidential]
	WhatsApp	[confidential]	[confidential]	[confidential]	[confidential]

*Source: Meta and Autorité de la concurrence*

38. In return for providing its services to users free of charge, Meta uses their data to provide advertiser services to advertisers.
39. For this, it collects data about a user's profile as well as information about their activity. For example, to use Facebook, every user has to create a profile, with basic information: age, gender, residence, language and geographical location. Users also have the option to add other information, such as education, employment, hobbies and favourite movies, books and music. Meta also receives information about a user's level of engagement with the Facebook service. This includes, for example, the Facebook pages a user has liked, the Facebook groups a user has joined, the ads a user has engaged with, the Facebook apps a user has accessed, the financial transactions made through Facebook or Facebook games, and the devices and browser types used. Meta also collects certain location data from users, based on the mobile device permissions the user has granted to the Facebook app. It also collects data about users' engagement with ads and may also receive feedback from users.

<sup>49</sup> The average number of Monthly Active Users (MAU) is defined by Meta as the number of active users on the last day of each month. Given that the MAU is a monthly value and not an annual value, MAU data is provided for December of each year as a representative value for all of a given year.

<sup>50</sup> Classification mark 7568 VC (classification mark 14 701 VNC).

<sup>51</sup> Classification mark 7570 VC (classification mark 14 703 VNC).

40. Instagram and WhatsApp collect data similar in nature to that collected by Facebook, including information from a user's account and information about a user's engagement with the service.
41. Meta also collects data from third-party sites and mobile apps. If third parties choose to install certain data collection technologies offered by Meta on their website or mobile app (Facebook social plugin<sup>52</sup>, Facebook pixel<sup>53</sup> or the SDK<sup>54</sup>), Meta may collect information about Facebook users' activity on their websites and apps. This information may include the website or app that a Facebook user visited, the actions taken (for example, whether the user set up an online shopping cart), the IP address of the user, the type of browser used, and the date and time of the visit. Various third-party publishers have opted to install these technologies to evaluate the performance of existing ad campaigns more effectively, target potential customers more effectively with future ads, and obtain other information about their user base.

#### **b) Meta's advertiser services to advertisers**

42. Meta provides services that allow advertisers to create, target and serve ads, as well as manage and evaluate ad campaigns. Meta sells its proprietary advertising inventory, which consists of Facebook, Instagram and Messenger, and that of the publisher intermediaries network *Meta Audience Network* (MAN). Meta launched the service in 2014 to allow advertisers to extend their reach beyond Facebook to third-party mobile websites and mobile apps that use FAN, which earn around 70% of the ad spend of advertisers.
43. In 2008, Meta unveiled an early version of targeted advertising, to display ads to audiences whom the advertiser believed would be receptive to the subject of the ad, and most likely to engage with it. In 2012, it launched *Custom Audiences*, a targeting tool that allows businesses to advertise to their existing customers on Facebook. In 2013, Meta then offered the *Lookalike Audiences* service to allow advertisers to find Facebook users with similar characteristics to their existing customers. In 2015, Meta marketed the "*Dynamic Ads*" ad retargeting service, which makes it possible to automatically create personalised ads, from the advertiser's catalogue, intended for Internet users based on their interests, intentions or actions<sup>55</sup>.

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<sup>52</sup> Social plugins, such as the Like button, Share button and comments, are tools that allow users to share their experiences on other websites with their friends on Facebook. These social plugins are the Like Button, the Share Button, Embedded Posts (makes it possible to add a public Facebook post to a site, and the Comments Box (makes it possible to use a Facebook account to write a public comment on a website).

<sup>53</sup> The Facebook pixel is a piece of JavaScript code that an advertiser can embed in their own website to allow Meta to serve and measure ads. For example, advertisers can use the Facebook pixel tool to target ads specifically to users who view products, add products to their shopping cart, or purchase products on the advertiser's website. Meta can use the information it collects from pixels to provide information on how ads are served to users.

<sup>54</sup> In order to display dynamic ads to individuals who have viewed a mobile app, the publisher must add the Facebook SDK for Android or iOS to their mobile app. These SDKs allow Facebook to work out which users to serve ads to, based on actions they have taken, such as viewing a specific product or adding an item to their shopping cart.

<sup>55</sup> For example, if a user visits an online footwear store and adds a specific pair of shoes to the cart, but never completes the purchase, the store can use Dynamic Ads to serve an ad for that specific pair of shoes to that user via Facebook.

44. Meta sells ad space to advertisers or intermediaries almost entirely via its auction mechanism, and only to a limited extent via direct sales<sup>56</sup>. With regard to auctions, it is possible to run campaigns via different interfaces:
- Ads Manager, which is a graphical user interface available through the Facebook website that allows companies to create and manage their own Facebook advertising campaigns;
  - less sophisticated advertisers can purchase advertising inventory through a certain number of lighter-version interfaces;
  - The Facebook Marketing API, which recreates the functionality of Ads Manager in the form of computer code<sup>57</sup>. Meta offers a standard API which is available to all advertisers and technical intermediaries as well as specific APIs with restricted access.
45. Meta has stated that “[80-90]% of its sales were generated via the Ads Manager interface, around [10-20]% via the Marketing API and the remaining [0-10]% via a number of lighter-version interfaces.”<sup>58</sup>
46. Whereas Facebook Ads Manager is a manual interface, the use of APIs, which are automated interfaces, requires more sophisticated technical expertise and in principle makes it easier to manage multiple campaigns<sup>59</sup>.
47. Campaigns are run via the Facebook Ads Manager tool in several main steps.
48. First, an advertiser logs onto Ads Manager and selects their marketing objective. Meta offers advertisers three broad categories of advertising objectives: awareness, consideration and conversions, which are further broken down into sub-objectives as detailed in the table below.

**Table 4 - Overview of Meta's ad campaign objectives**

Campaign objectives and sub-objectives	
Awareness	
<i>Brand awareness</i>	Increase people's awareness of your business, brand or service.
<i>Reach</i>	Show your ad to as many people as possible in your target audience.

For more information on Meta's dynamic ads, see: <https://www.facebook.com/business/help/397103717129942>.

<sup>56</sup> The media agency Publicis states that Meta's ad management platform makes it possible to aggregate inventory purchases across all platforms provided by Meta (Instagram, etc) (freely translated). "Purchasing on the platform is differentiated into two purchasing methods:

- *Reach & Frequency: Reach and Frequency is an alternative ad buying method that allows individuals to book campaigns in advance with predictable, optimised reach and controlled frequency.*

- *Auction: For each ad impression, the ad bidding system selects the best ads to run based on their maximum bids and performance. All the ads on Facebook compete during this process and the ad that the system designates as the best wins the auction"* (classification mark 3354 VC (classification mark 6317 VNC)).

<sup>57</sup> Classification mark 15 922.

<sup>58</sup> Classification mark 15 900 VC (classification mark 17 152 VNC).

<sup>59</sup> Neither Criteo nor its advertiser clients use Facebook's campaign management tools such as Facebook Ads Manager when Criteo campaigns are run on Facebook (classification mark 14 959).

<b>Consideration</b>	
<i>Traffic</i>	Send people from Facebook to any destination you choose, such as your website's landing page, a blog post, app, phone call, etc.
<i>Engagement</i>	Reach people more likely to engage with your post. Engagement includes likes, comments and shares but can also include offers claimed from your page.
<i>App installs</i>	Send people to the store where they can download your business's app.
<i>Video views</i>	Share videos of your business with people on Facebook most likely to watch it.
<i>Lead generation</i>	Collect leads for your business. Create ads that collect info from people interested in your product, such as sign-ups for newsletters, or have people give your business a call.
<i>Messages</i>	Connect with people on Messenger, Instagram Direct, and WhatsApp. Communicate with potential or existing customers to encourage interest in your business.
<b>Conversion</b>	
<i>Conversion</i>	Encourage people to take a specific action on your business's site, such as having them add items to a cart, download your app, register for your site, call your business, or make a purchase.
<i>Catalog sales</i>	Show products from your ecommerce store's catalog to generate sales.
<i>Store traffic</i>	Promote your brick-and-mortar business locations to people that are nearby.

*Source: Meta*

49. Depending on the objectives chosen by the advertiser, the latter has access to a set of ad placements on the advertising inventory marketed by Meta<sup>60</sup>.
50. Then, in the second step, the advertiser chooses the criteria for targeting its audience. The criteria for the sought-after audience can be based on variables such as location, age, gender and language. After selecting basic demographics, Meta authorises the optional selection of detailed targeting parameters, such as demographic information (e.g., education, work), interests (e.g., music, movies), and behaviours (e.g., shopping frequency)<sup>61</sup>.
51. The advertiser then specifies their budget (third step), either for the duration of the ad, or a daily budget that is reset every day, and specifies for how long the ad will be run. Once the target audience and budget are specified, Meta will provide an advertiser with an estimated

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<sup>60</sup> Facebook Flux, Facebook Right Column, Facebook Instant Articles, Facebook In-stream Video, Facebook Marketplace, Facebook Stories, Facebook Search Results, Facebook Video Feeds, Facebook Reels, Instagram Stories, Instagram Feed, Instagram Explore, Instagram Reels, Audience Network Native, Audience Network Rewarded Video, Sponsored Message, Messenger Inbox, Messenger Stories. See the information at the following address:

[https://www.facebook.com/business/help/279271845888065?id=369787570424415&locale=en\\_US](https://www.facebook.com/business/help/279271845888065?id=369787570424415&locale=en_US)

<sup>61</sup> <https://www.facebook.com/business/help/168922287067163?id=176276233019487>

audience size of users who would be eligible (based on the objective and targeting criteria chosen, among other things) to see the ad.

52. In the final stage, the advertiser chooses an ad format and creates the ad. Meta offers various ad formats: Image, Video, Carousel, Instant Experience, Collection, Stories and Branded Content. The advertiser can also select other parameters such as the time of day the ads are displayed. Depending on the advertiser's objective and preferences, Meta can be paid according to the number of impressions served (in thousands), the number of clicks or the number of actions (e.g. page likes).
53. Meta also makes it possible for advertisers to manage and evaluate the performance of an ad campaign. It provides them with aggregated metrics on how users are interacting with the ads. The various metrics provided can be grouped into three broad categories: Ads reporting; insights; and conversion.
54. Ad reports are based solely on Meta's own data and reflect the level of engagement between a user and the ad (e.g. number of clicks on an ad).
55. Insights provide aggregated demographic and interest information about Meta users who visit the advertiser's site, use the advertiser's mobile app or interact with the advertiser's campaign<sup>62</sup>. The data Meta uses to provide Insights includes: demographic information (age, gender, lifestyle, education, relationship status, job role and household size); page likes (the top pages people like in different categories); location and language; Facebook usage (e.g., How frequently are people logging onto Facebook); and purchase activity (past purchase behaviour and purchase methods).
56. Finally, the conversion metrics focus on the performance of a campaign according to the objective (e.g.: increase visits to the site, app downloads). For example, if an advertiser wants to increase traffic, Meta will provide metrics identifying the number of users who visited the website after seeing the ad. Unlike ad reporting metrics, conversion metrics use the advertiser's data. For advertisers who opt to use the Facebook Pixel (for their website) or the SDK (for their mobile app), Meta may collect information about Facebook users who visit the website or app. Meta can compare conversion data to user activity data, to identify correlations between Facebook users who have seen ads and the conversions.
57. Information on campaign performance is accessible through Ads Manager, which summarises the data on a company's ad campaigns, including budget and performance, and allows advertisers to modify or cancel campaigns that are not meeting expectations. Among other things, Ads Manager allows advertisers to measure the number of people who interacted with their ads and the demographics of the audience<sup>63</sup>. Meta also markets several specific services to evaluate campaigns, such as Brand Lift, to evaluate whether an ad increases brand awareness<sup>64</sup>, and Conversion Lift, to measure the effectiveness of ads in generating sales using random audience testing. Conversion Lift results are provided on an aggregate basis without individualised results. Advertisers and ad intermediation service providers on Meta can also access campaign performance information through the Meta

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<sup>62</sup> See <https://www.facebook.com/business/news/audience-insights>.

<sup>63</sup> For advertisers with multiple ad campaigns, Facebook pages and apps, Meta's Business Manager service allows businesses to manage all their ad accounts in one place.

<sup>64</sup> This product compares brand awareness among users who have seen ads, with brand awareness among users who have not seen ads (on Facebook).

Marketing API (see below). For example, Meta provides an Insights API that allows advertisers to retrieve ad statistics<sup>65</sup>.

### **c) The relationship between Meta and the providers of advertising intermediation services**

58. Since entering the market, Meta has developed relationships with third-party advertising service providers to advertisers to enhance the advertising campaigns run on its marketed inventories (Facebook, Instagram, Messenger, Meta Audience Network).
59. From 2012 to 2016, Meta offered DSPs, media agency trading desks and advertisers Facebook Ad Exchange (FBX) technology, to allow them to participate in ad auctions. Around [0-100] trading desks and DSPs were connected to FBX<sup>66</sup>. This technology was only available for campaigns on the Facebook website, specifically for retargeting campaigns, and for text and non-animated ads. FBX allowed advertisers to participate in real-time bidding and target ads at the user level. FBX relied (freely translated) "*on a targeting technique called cookie syncing. One of the advantages of this technique was that it used consumer intent data (based on cookies) to identify products in which a customer had already expressed interest.*"<sup>67</sup>
60. In the context of the rapid growth of mobile and video advertising, Meta took the decision to shut down FBX in 2016, due in part to difficulties with the use of cookies on mobile devices. It then proposed to demand-side intermediaries that they use the Marketing API, available since 2011 to advertisers who do not wish to use Ads Manager<sup>68</sup>. At the same time, Meta created a certification programme for service providers to advertisers on Meta, the "*Facebook Marketing Partners*" programme, which became "*Meta Business Partner*" ("MBP").
61. When advertisers use the services of an MBP, they are likely not to have a direct technological and financial relationship with Meta. As such, the advertisers had a direct relationship with Criteo, which provided them with services to access both Meta inventory and inventory sold through real-time bidding on other platforms<sup>69</sup>. Other FMPs indicated that in some cases their advertising clients could maintain a direct relationship with Meta in terms of billing<sup>70</sup>.
62. Below, we outline Meta's advertising APIs and the Meta Business Partners programme.

#### ***i- Meta's advertising APIs***

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<sup>65</sup> [https://developers.facebook.com/docs/marketing-api/insights?locale=en\\_US](https://developers.facebook.com/docs/marketing-api/insights?locale=en_US)

<sup>66</sup> Classification marks 292 and 293 VC (classification marks 1435 and 1436 VNC).

<sup>67</sup> Classification mark 289.

<sup>68</sup> Classification mark 285.

<sup>69</sup> As such, when (freely translated) "*Criteo invoices its services to advertisers (i.e., the services that are part of the "Criteo Marketing Solutions" offering), these services are not invoiced separately for each publisher, but in an aggregated manner. As a result, advertisers don't see the amount of money they spend on Facebook anywhere on their invoice. Moreover, Criteo does not provide its advertiser clients with reports on the allocation of their spend across different inventories. Therefore, Criteo's advertiser clients cannot know how much they are spending on Facebook other than through a customised report that Criteo can provide upon request*" (Classification mark 14 958).

<sup>70</sup> [confidential] (Classification mark 7 444 VC and 14427 VNC).

63. An API is a programming interface through which two software applications or programs can connect in order to interact and exchange data.<sup>71</sup>.
64. The Marketing API is a set of endpoints of the API Graph that can be used to serve ads on Facebook and Instagram. Meta has stated that (freely translated) "*Facebook's Marketing API is open to any third party who wants to create and manage campaigns for large audiences, as well as track ad performance across desktop and mobile/apps.*"<sup>72</sup> Meta specified that as with all of its advertiser services, access to the Marketing API is governed (freely translated) "*by Facebook's Terms of Service (TOS)*"<sup>73</sup>, which used to be *Facebook's Statement of Rights and Responsibilities (SRR), and Facebook's Data Policy*<sup>74</sup> and *Community Standards*<sup>75</sup>.<sup>76</sup>
65. The Graph API is the main interface through which apps can read and write to the Facebook social graph. All of Meta's SDKs and products interact with the Graph API. It is a tool that makes it possible to get data into and out of the Meta platform. This API is based on the HTTP protocol and allows applications to programmatically query data, post new stories, manage ads, upload photos, and perform a wide variety of other tasks. The Graph API is named after the idea of a "social graph" — a representation of the information on Meta. It is made up of "nodes", "edges" and "fields". Typically you use nodes to get data about a specific object, use edges to get collections of objects on a single object, and use fields to get data about a single object or each object in a collection<sup>77</sup>.
66. The Marketing API offers additional features compared to Ads Manager. Meta states that it "*gives businesses of any size the potential to build closer connections through smarter insights and precise measurement, gain greater reach through automation, and generate bigger returns through increased performance and workflow efficiency*"<sup>78</sup>. In particular, the Marketing API makes it possible to:
- automate ad management with the AdCopy API and Batch API, create multiple ad templates at once to test different creative, bidding, or tagging strategies;
  - leverage dynamic content by creating permutations allowing to find more efficient content;
  - create data-based audiences by integrating CRM systems<sup>79</sup> with the API, thus combining an advertiser's first-party data with Facebook's advanced targeting capabilities<sup>80</sup>;

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<sup>71</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, page 115.

<sup>72</sup> Classification mark 285.

<sup>73</sup> "A copy of the currently applicable TOS is available at: <https://www.facebook.com/terms.php>"

<sup>74</sup> "A copy of the currently applicable data policy is available at: <https://www.facebook.com/about/privacy>"

<sup>75</sup> "A copy of the currently applicable Community Standards is available at: <https://www.facebook.com/communitystandards/>"

<sup>76</sup> Classification mark 287.

<sup>77</sup> <https://developers.facebook.com/docs/graph-api/overview>

<sup>78</sup> [https://developers.facebook.com/products/marketing-api?locale=en\\_US](https://developers.facebook.com/products/marketing-api?locale=en_US)

<sup>79</sup> Customer Relationship Management. A CRM system helps companies interact with customers, in particular for contact management, sales, or productivity.

<sup>80</sup> <https://developers.facebook.com/docs/marketing-api/audiences/guides/custom-audiences/>

- optimise ads in real time, using rules-based ads management, to start and stop ads, adjust bids, and even reallocate spend at different thresholds;
  - obtain seamless reporting and analytics to retrieve statistics, thanks to the Ads Insights API, to identify which creative, targeting, and bidding combinations work best;
  - track conversion events, thanks to the Conversion API. This API creates a connection between an advertiser's marketing data and Meta's systems that optimise ad targeting and measure results<sup>81</sup>.
67. The Marketing API is an evolving API<sup>82</sup> and Meta offers specific APIs, including beta versions, to certain advertisers and intermediation service providers.
68. In this respect, after FBX was phased out, Meta developed the User Level Bidding API (ULB API) and Order Level Reporting API (OLR API), which it made available to a few players, including Criteo, through beta partnerships. The beta-version APIs make it possible to use the advertiser services developed by Meta that are restricted in use, for commercial purposes. These products are first tested internally (i.e. *alpha* testing) and then some are tested with potential users in a real environment (i.e. *beta* testing) before being offered in a definitive version. Meta states that (freely translated) "*beta versions are released to a limited number of end users of the product to get feedback from them, to reduce the risk of product bugs and increase quality through customer validation.*"<sup>83</sup>
69. The ULB API refers to two distinct products: User-Level-Bidding (ULB) and User-Level-Recommendation (ULR), the latter being integrated into the former. Meta had granted access to the ULB API to the following companies that signed the Beta Product Testing Addendum between 2013 and 2016: Criteo (2016), [confidential] (2015), [confidential] (2015), [confidential] (2015), [confidential] (2014), [confidential] (2015), [confidential] (2015), [confidential] (2014) and [confidential] (2013)<sup>84</sup>. This API makes it possible to individualise the amount of bids offered and to use proprietary product recommendation technologies for retargeting ads. Meta stated that the API did indeed offer [confidential]<sup>85</sup>.
70. The OLR API provided access to Meta user data to identify conversions made by web users who use multiple devices, and to attribute cross-device sales to a user based on their login details<sup>86</sup>. The MBPs that entered into an agreement with Meta to use this API were [confidential] (December 2016), [confidential] (November 2016), [confidential] (July 2016), [confidential] (May 2016), Criteo (June 2016), [confidential] (May 2016), [confidential] (January 2017), [confidential] (May 2016), [confidential] (May 2016), [confidential]<sup>87</sup> and [confidential] (December 2016)<sup>88</sup>. Meta stated the OLR API (freely translated) "*was a*

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<sup>81</sup> [https://developers.facebook.com/products/marketing-api?locale=en\\_US](https://developers.facebook.com/products/marketing-api?locale=en_US)

<sup>82</sup> V.13 of the Marketing API is currently available.

<sup>83</sup> Classification mark 3671 (classification mark 5662 VNC).

<sup>84</sup> Classification mark VC 15 VC 628 (classification mark VNC 17 149).

<sup>85</sup> Classification mark 286 VC (classification mark 1429 VNC).

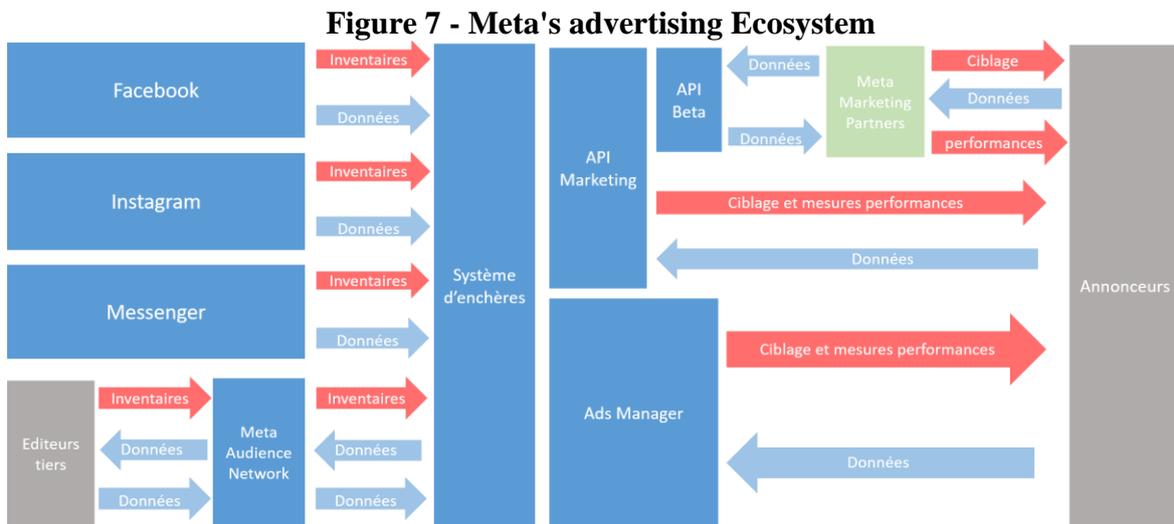
<sup>86</sup> This identification and attribution between different devices is impossible through the use of cookies alone. Indeed, a cookie is linked to a given environment (e.g. a mobile browser).

<sup>87</sup> Date of contract conclusion unknown by Meta.

<sup>88</sup> Classification mark 313 and 314 VC (classification mark 1456 and 1457 VNC).

reporting tool, the purpose of which was to test a method to improve the capacity of third parties to measure the performance of an ad or ad campaign they ran on behalf of their end customers, more effectively. Facebook proposed this tool to help companies move from an environment designed for computers to one designed for mobile and apps." As such, it made available (freely translated) "certain ad interaction data to see if it could improve their capacity to (i) measure multiscreen conversions, (ii) identify the success credit assigned to each screen type, and (iii) verify tracking data on views and clicks. In concrete terms, following an online purchase, the buyer generates at least two sets of data: a cookie identifier (linked to the user's screen) and an order identifier (i.e. an order form). In the context of Beta Testing, there were two fundamental steps. First, the co-contractor in the Beta Testing pilot program generally provided Facebook with the two above-mentioned anonymised identifiers. Then, Facebook would try to cross-reference the data provided by the third party (e.g., Criteo) with its own data and tell the relevant third party if and when the buyer connected to the order form had ever seen an ad that might be linked to the eventual online purchase."<sup>89</sup>

71. The following diagram provides a simplified illustration of Meta's advertising ecosystem.



Source: Autorité de la concurrence

FR	ENG
Editeurs tiers	Third-party publishers
Inventaires	Inventories
Données	Data
Système d'enchères	Bidding system
Ciblage	Targeting
Performances	Performance
Ciblage et mesures performances	Targeting and performance measurement
Annonces	Advertisers

<sup>89</sup> Classification mark 310 VC (classification mark 17 099 VNC).

## *ii- The Meta Business Partners programme*

72. In 2015, Meta created the Facebook Marketing Partners (FMP) program, now renamed Meta Business Partners (MBP)<sup>90</sup>, (freely translated) " *primarily to (i) help advertisers navigate the large number of existing ad management solutions, and (ii) to help ad campaign providers get the most out of the Facebook advertising platform for their clients.*"<sup>91</sup> According to Meta, "*Advertising Technology Partners work with businesses to scale and optimise campaigns. They help with creative, audience reach, budgets and scheduling as well as reporting and measurement.*"<sup>92</sup>.
73. Most of the social networks interviewed, including TikTok, Snapchat and Twitter, have developed a similar partnership ecosystem<sup>93</sup>. There are significantly fewer partners on these platforms compared to Meta, which has relationships with over 1,000 companies<sup>94</sup>. Indeed, Twitter only has around 10 partners, Snapchat around 50 and TikTok around 100. In 2019, [confidential]<sup>95</sup>.
74. There are various categories of MBPs. In 2016, there were six solutions within of the MBP programme: Ad Tech, Agency, Commerce, Creative Platform, Offline Conversion and Technical Services<sup>96</sup>. Currently, there are five solutions for which candidates can apply: Ad Tech, Agency, Commerce, Creative Platform and Messaging<sup>97</sup>.
75. In the MBP online search directory offered to advertisers, the categories have different titles than those for candidates, and are as follows:
- Campaign management: help manage, scale and optimise campaigns, including creative, audiences, budgets, scheduling, reporting and analytics;
  - Creative platforms: help create and curate images or video;
  - Feed platforms: help create product catalogues for use in ad products;
  - Measurement: help tracking performance on Meta;
  - Conversion data: can connect advertisers' actions, including offline and web activity, to Meta to help improve performance of ad campaigns<sup>98</sup>.
76. According to Meta, "*Advertising Technology Partners work with businesses to scale and optimise campaigns. They help with creative, audience reach, budgets and scheduling as well as reporting and measurement*"<sup>99</sup>. Ad Tech MBPs typically help an advertiser determine

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<sup>90</sup> References to Meta Business Partners refer to former Facebook Marketing Partners.

<sup>91</sup> Classification mark 294 VC (classification mark 1437 VNC).

<sup>92</sup> Classification mark 6095.

<sup>93</sup> <https://forbusiness.snapchat.com/partners>, <https://ads.tiktok.com/marketing-partners>.

<sup>94</sup> Classification mark 294 VC (classification mark 1437 VNC).

<sup>95</sup> Classification mark 294 VC (classification mark 1437 VNC)

<sup>96</sup> Classification mark 298.

<sup>97</sup> <https://www.facebook.com/business/marketing-partners/become-a-partner> (consulted on 17 March 2022).

<sup>98</sup> <https://www.facebook.com/business/marketing-partners> (consulted on 17 March 2022).

<sup>99</sup> <https://www.facebook.com/business/marketing-partners/become-a-partner/advertising-technology>

advertising purchasing volumes for campaigns on Meta, and optimise them. This assistance may involve working with advertisers to identify the relevant audience, budget, and creative component of the ad campaign. They can also help advertisers understand and quantify the performance of an ad campaign<sup>100</sup>.

77. Meta maintains that being an MBP is (freely translated) "*not a requirement or prerequisite for managing a Facebook ad campaign on behalf of an advertiser. Presumably there are a large number of third parties offering management solutions to advertisers who want to place ads on Facebook*"<sup>101</sup>. However, the responses from Meta, Criteo, and other MBPs indicate that membership in the MBP programme offers various benefits to the selected companies. In return, Meta partners are subject to a vetting process and are required to meet a number of commitments, including advertising spend, to maintain this status.

### ***The benefits of the MBP programme***

78. Meta touts the "*Meta Business Partner Program for Ad Tech*" on its site as a way to "*optimise campaigns*" and "*accelerate client success*"<sup>102</sup>. Meta also states the "*Listed advertising technology partners are visible to thousands of potential clients. They enjoy the credibility of the Meta Business Partners badge*"<sup>103</sup>. Meta states that when intermediaries become MBPs, they get access to "*technical support and training so they can make the best use of their products and adapt to the evolving technologies and solutions offered by Facebook and others. In particular, partners in the Ad Tech category typically benefit from technical support to increase the conversion rate of their clients*"<sup>104</sup>.
79. The MBPs interviewed by the case team consider that MBP status has an effect on the quality of services, the conditions of access to Facebook's APIs and the reputation with their clients. For example, Adobe states that having looked for [confidential]<sup>105</sup>. Kenshoo maintains that (freely translated) "*the FMP program, which involves Kenshoo accessing inventory and all targeting options through the Facebook API, is Kenshoo's preferred option. [...] Moreover, for some clients, FMP status is a must.*"<sup>106</sup>. According to Kamp'n, companies consider access to the MBP status and retaining it as (freely translated) "*a kind of label that reassures customers about your know-how in terms of managing Facebook Ads campaigns*"<sup>107</sup>. Armis stated that this status was (freely translated) "*a guarantee of quality for the company as regards its technical expertise, its technical ability to exploit Facebook's APIs and functionalities*", and an "*added value compared to the competition*"<sup>108</sup>, on account of the "*premium access to Facebook Support for API development*"<sup>109</sup>, the link with "*product*

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<sup>100</sup> Classification mark 296 VC (classification mark 1439 VNC).

<sup>101</sup> Classification mark 295.

<sup>102</sup> Classification mark 6095.

<sup>103</sup> Classification mark 6095.

<sup>104</sup> Classification mark 295.

<sup>105</sup> Classification mark 7450 VC (classification mark 14 433 VNC).

<sup>106</sup> Classification mark 13 773 and 13 774 VC (classification marks 17 083 and 17 084 VNC).

<sup>107</sup> Classification mark 13 801.

<sup>108</sup> Classification mark 6088.

<sup>109</sup> Classification mark 6088.

teams"<sup>110</sup> and the possibility to "be informed in advance of the release of new functionalities of Facebook & Instagram and to beta-test them".<sup>111</sup> According to NextRoll, [confidential]<sup>112</sup>. Criteo believes that joining the MBP programme (freely translated) "was essential [...] in order to continue offering a global solution to its clients covering all available online inventories, including and especially Facebook inventories. Such a portfolio effect was indeed crucial in terms of image and commercial communication for Criteo with its clients"<sup>113</sup>.

80. Regarding the consequences of the MBP badge being withdrawn by Meta, Kamp'n believes that it would be (freely translated) "a very strong negative signal to our customers and prospects. The loss of this badge would mean that we would lose most of the tenders we compete for, and would probably call into question some of our current contracts"<sup>114</sup>. Salesforce and Armis believe that a withdrawal of MBP status could damage their reputations. Salesforce also considers that the quality of its services would likely decrease and Armis adds the total absence of "support resources when these are necessary"<sup>115</sup>.
81. In this regard, the exchanges between Criteo and Meta suggest that companies that lose their MBP badge can generally no longer participate in the beta testing of new APIs and products<sup>116</sup>.

#### *The selection criteria and obligations of MBPs*

82. Meta stated that access to the program was conditional on meeting ad spend thresholds. It also generally considers that (freely translated) "the volume, quality and number of clients are fundamental requirements that Ad Tech FMPs must meet"<sup>117</sup>. In its opinion, these criteria have been (freely translated) "relatively stable over time"<sup>118</sup> " and they "are regularly updated to take into account changing market conditions and best practices for using Facebook's tools in response to these changes"<sup>119</sup>.
83. Several MBPs confirmed that they needed to make significant internal investments in order to comply with MBP status. Armis confirmed that without significant investments in technology development (€1 million) to achieve a stable version of the API operation<sup>120</sup>, they would not have been able to obtain MBP status. MediaMath stated it made significant human investments and was subject to significant infrastructure costs due to their use of APIs<sup>121</sup>. Salesforce stated that (freely translated) "maintaining FMP status demands

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<sup>110</sup> Classification mark 6088.

<sup>111</sup> Classification mark 6088.

<sup>112</sup> Classification mark 6740 VC (classification mark 13 956 VNC).

<sup>113</sup> Classification mark 17 and 18.

<sup>114</sup> Classification mark 13 803.

<sup>115</sup> Classification mark 6090.

<sup>116</sup> Classification mark 1288 VC (classification mark 17 103 VNC).

<sup>117</sup> Classification mark 302 VC classification mark 1445 VNC).

<sup>118</sup> Classification mark 302 VC classification mark 1445 VNC).

<sup>119</sup> Classification mark 284 VC (classification mark 1427 VNC).

<sup>120</sup> Classification mark 6089.

<sup>121</sup> Classification mark 6376.

*commitments in terms of products and operations and market access, as well as verifications, to facilitate the interoperability of the solutions.*"<sup>122</sup>

84. In order to become an MBP in the Ad Tech category, companies must pass three main categories of vetting: a "*general examination*" of the company's application (verification of the authenticity and legitimacy of the application, etc.), a "*specialisation examination*," and a "*regional examination*."<sup>123</sup>
85. The specialisation examination, in the Ad Tech category, includes a number of requirements to enter and remain in the programme including<sup>124</sup>:
  - Advertising spend: "Candidates must achieve a minimum advertising spend of \$100,000 (or its equivalent in local currency) on Facebook during the 60 days from the date of application;
  - Quality of spend: "to ensure that the applicant meets Facebook's quality standards, it must appear that at least 50% of the applicant's ad spend during the 60 days from the date of application is not directly associated with low-value actions such as Page Likes, Page Post Engagement and Link clicks"<sup>125</sup>; and
  - Number of clients: "Applicants must have at least 10 active clients, each representing more than \$1,000 (or its equivalent in local currency) of advertising spend during the 60 days from the date of application.
86. The purpose of the regional examination is to ensure that the applicant has an actual presence in the countries where it has declared being active, and that it has a real and effective local presence<sup>126</sup>.
87. In July 2018, Meta introduced an independent compliance check in the context of the specialisation examination when selecting MBPs. Meta states that [confidential]<sup>127</sup>.

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<sup>122</sup> Classification mark 6453 VC (classification mark 7402 VNC).

<sup>123</sup> Classification mark 299 to 301 VC (classification marks 1442 to 1444 VNC).

<sup>124</sup> Classification mark 300 VC classification mark 1443 VNC).

<sup>125</sup> "*Link clicks*" are defined by Meta as "*The number of clicks on links within the ad that led to advertiser-specified destinations, on or off Meta technologies.... This metric counts link clicks on the ad's text, media or call-to-action, that link to destinations or experiences specified by the advertiser. This metric excludes clicks on content or links in the comments section of a post. An ad may have multiple destinations specified by the advertiser. An ad's headline may link to one destination, while the call-to-action may link to another. These destinations may be on or off Facebook*" (<https://www.facebook.com/business/help/659185130844708>).

"*Post engagements are the total number of actions that people take involving your ads on Facebook. [...] Post engagement indicates that your ads are relevant to your target audience, which helps your ads perform better. When people see ads that are relevant to them, they're more likely to interact with those ads. This metric lets you measure these interactions and compare them to engagement from other ads or campaigns.[...] Post engagement includes all actions that people take involving your ads while they're running. Post engagements can include actions such as reacting to, commenting on or sharing the ad, claiming an offer, viewing a photo or video, or clicking on a link*" (<https://www.facebook.com/business/help/735720159834389>)

<sup>126</sup> Classification mark 300 and 301 VC (classification marks 1443 to 1444 VNC).

<sup>127</sup> Classification mark 3678 VC (classification mark 5669 VNC).

88. Meta states that (freely translated) "*all FMPs must also comply throughout their partnership with the rules of the Facebook program and other applicable Facebook terms and guidelines, which are publicly available on Facebook's website.*"<sup>128</sup>
89. Meta added that it provides a monthly report to MBPs, specifically relating to compliance with selection criteria regarding the volume and types of advertising spend by the MBP and its clients on Meta<sup>129</sup>. Meta provided the investigation with monthly reports that cover the activity of various MBPs during 2016, 2017, and 2018. They show the ad spend of MBPs across a variety of metrics, in the context of their use of Meta's ad APIs<sup>130</sup>. The extent to which these reports were actually communicated by Meta to the MBPs was unclear in the investigation<sup>131</sup>.
90. The monthly reports for the year 2017 first present and set out a series of metrics regarding the types of spend. These relate to Dynamic Ads, Meta Audience Network ads, video ads, lead ads, optimised placements on Instagram, the adoption of certain formats (Canvas, Collection), mobile advertising, as well as spending referred to as "Optimal DR" and "Optimal BR".
91. "*Optimal DR*" (*Direct Response*) spend is also called "*DR Revenue with high-quality signal tracking and optimization*"<sup>132</sup>.
92. "*High quality signals*" are defined as "*any Pixel event, app event, or custom conversion except for PageView, ViewContent, CONTENT\_VIEW, or ACTIVE\_App*". The reports also explain that the level of quality is high because they involve valuable information about people's actions both online and offline. Regarding optimisation, the reports state that they relate to campaigns optimised for "*the advertiser's veritable objective*" and takes as an example that "*ads for conversions on a website should be optimized for conversions.*"<sup>133</sup>
93. The reports then present a series of performance graphs pertaining firstly to the overall performance of the MBP and the achievement of the so-called vertical objectives<sup>134</sup>, and secondly to the performance compared<sup>135</sup> with that of the competitors, with regard to the various metrics defined by Meta.
94. In conclusion, the services provided by MBPs can compete with some of Meta's technologies, without replicating the full functionality of Meta's comprehensive offering, which combines inventory, the bidding system and the DSP. In this regard, in its 2019 annual

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<sup>128</sup> Classification mark 301 VC.

<sup>129</sup> Classification mark 229, for example.

<sup>130</sup> In its internal documents, Meta refers to "ad spend".

<sup>131</sup> Criteo stated that it had never received communication about these reports, except for the report disclosed when it was suspended from the MBP programme in 2018. Following requests from the case team, Meta was unable to provide an email showing that these reports had been sent, and stated that it had commissioned a third-party company to send these emails. In this regard, it stated that (freely translated) "*the monthly reports that the Autorité refers to were sent to the FMPs on a monthly basis through an automated email system, which was operated by a third-party communication service provider and not by Facebook directly. Facebook does not have access to copies of the automated emails through which the monthly reports were sent to Criteo* » (Classification mark 16 067 VC (classification mark 16 581 VNC)).

<sup>132</sup> Classification mark 231.

<sup>133</sup> Freely translated.

<sup>134</sup> Classification mark 233 VC (classification mark 2104 VNC).

<sup>135</sup> Classification marks 235 to 238.

report, Criteo noted that "We currently compete with large, well-established companies, such as Google, Amazon and Facebook, independent Demand-Side Platforms ("DSPs") such as The Trade Desk or MediaMath, as well as smaller, privately held companies."<sup>136</sup>

## 2. THE PROVIDERS OF ADVERTISING INTERMEDIATION SERVICES

95. Meta enables nearly 100 advertising technology providers for advertisers to offer their services through the Meta Business Partners programme. Some of these, such as Criteo, compete directly with Meta by offering a buying platform that makes it possible to run campaigns on social networks and in Open Display.

### a) The complainant: Criteo

96. Criteo is a French limited company founded in 2005 that provides advertiser services to advertisers and publishers of websites and mobile apps. Criteo is not a publisher of mobile sites and apps and does not have its own advertising inventory. Its turnover decreased between 2018 and 2020 from US\$2.3 billion to US\$2.07 billion, as shown in the table below<sup>137</sup>. In 2021, turnover rebounded, reaching US\$2.25 billion<sup>138</sup>.

**Table 5 - Evolution of Criteo's turnover (2018-2020)**

Year	Turnover in millions of US dollars		
	Worldwide	EMEA Region	France
2018	2,300	840	153
2019	2,262	806	144
2020	2072	750	133

Source: Criteo

### i- Criteo's services

97. Criteo's services are built on a technology platform consisting of four pillars<sup>139</sup>:

- *Criteo Shopper Graph*: a technology that combines three data bases, built through the collection of data from its clients, and made available to them within the platform.
- According to Criteo, its data assets include all insights derived from its clients' proprietary commerce data. This information includes browsing behaviour data, expressed shopping intent, and transactional data at individual product user levels. This data is collected via various trackers and comes from both advertisers and

<sup>136</sup> <https://criteo.investorroom.com/download/Criteo+10-K+2019.pdf>

<sup>137</sup> <https://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=115677129&type=PDF&symbol=CRTO&companyName=Criteo+S.A.&formType=10-K&dateFiled=2021-02-26&CK=1576427>

<sup>138</sup> <https://www.criteo.com/news/press-releases/2022/02/criteo-reports-strong-fourth-quarter-and-fiscal-year-2021-results/>

<sup>139</sup> Criteo Annual Report, page 3 (<https://criteo.investorroom.com/download/Criteo+10-K+2019.pdf>).

publishers using Criteo's collection tools. Criteo's databases are: i) the *Identity Graph*, which allows them to match user identifiers across devices and environments, including online and offline; ii) the *Interest Map*, which collects and organises consumer intent and product purchasing data to build a comprehensive shopper profile; iii) the *Measurement Network*, which provides sales attribution services.

- *Criteo AI Engine*: technology that consists of multiple artificial intelligence algorithms that leverage the data collected in the *Criteo Shopper Graph* to perform ad retargeting. *Criteo AI Engine* consists of *Predictive Bidding*, *Product Recommendations* and *Dynamic Creative Optimization* technologies.
- According to Criteo, *Predictive Bidding* technology is a set of algorithms that predict the probability and nature of a user's engagement with a given ad. They allow Criteo to determine the most appropriate price to pay for an ad impression and a consumer at any given moment. The data used are related to the evaluation of the publisher and its inventory, the evaluation of the product and the evaluation of the consumer. *Criteo Engine* selects the consumers most likely to engage with an ad and make a conversion, and then calculates how much each consumer is likely to spend. The *Product Recommendations* technology is used to create ads tailored to specific consumer interest and intent by determining the specific products or services to include in the ad. The added value lies in taking into account in its recommendations products that consumers have not viewed in the past but which are likely to interest them. This product recommendation technology leverages a large amount of information such as previous buyer interactions, most viewed products, and actions of similar users analysed by machine learning algorithms. Finally, *Criteo Creative Dynamic Optimization* technology is used to build personalised ads based on the buyer and the context.
- *Criteo Management Center*: a suite of software and services that provides Criteo clients with access to an integrated self-service customer interface - the *Criteo Media Platform*<sup>140</sup>;
- *Criteo Solutions*: includes services for advertisers<sup>141</sup> *Criteo Marketing Solutions* and services for e-commerce platforms *Criteo Retail Media*.

98. The added value of Criteo's advertiser services to advertisers lies in the fact that Criteo can offer advertisers an individualised retargeting service, which involves the calculation of a bid based on the characteristics of a given user. According to Criteo (freely translated), "*the main strength of the Criteo AI Engine is intrinsically linked to its ability to determine the best price to pay for a given ad impression for a given consumer, and to drive conversion of that consumer via the choice of product and format most suited to that user*"<sup>142</sup>.

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<sup>140</sup> On this interface, clients can use the various solutions, execute and manage advertising campaigns and have visibility on their investments. In other words, it is a self-service platform offered to Criteo's advertiser clients.

<sup>141</sup> Criteo's services for advertisers include: technical integration of its solutions on advertisers' sites and catalogues; collection of user profile data; identification of users on different digital devices; personalised recommendation of products or services by user; financial valuation of the user for each advertiser based on their profile; programmatic purchasing of advertising space; creation and assembly of creative elements of advertising banners; technical integration of advertising space and placement of advertising banners on devices; and provision of real-time performance analysis tools to advertisers.

<sup>142</sup> Classification mark 14 987.

99. Criteo's services for advertisers are invoiced as a package, not individually for each service. They are sold on a Cost Per Click (CPC) basis, which means that the advertiser is charged as soon as the user clicks on the banner. The purchase of ad space from publishers is paid on a Cost Per Thousand (CPT) basis, i.e. at a price expressed for the display of 1,000 advertising banners.
100. Criteo's services are based on access to several categories of advertising inventory<sup>143</sup>: inventory directly marketed by publishers who do not have technologies to sell their inventory, inventory marketed by SSPs and Ad exchanges, and inventory marketed by vertically integrated platforms such as Meta.
101. With regard to inventory directly marketed by publishers without intermediaries, Criteo has negotiated direct access with publishers, which allows it to select, purchase and price, on an impression-by-impression basis and in real time, inventory that a publisher would otherwise only be able to sell subject to minimum volume commitments and specific ad impressions before these impressions are made available to other potential buyers<sup>144</sup>.
102. With regard to the inventories marketed in Open Display by SPPs and Ad exchanges, Criteo's website lists around 60 players with whom it has relationships, including<sup>145</sup> Google Ad Manager, MoPub, Microsoft Ad Exchange, Appnexus, Rubicon Project, PubMatic, Taboola, Baidu and Yandex. These companies are SSPs or publisher ad networks that sell publisher ad inventory, typically through programmatic auctions.
103. Finally, with regard to access to the inventories of the vertically integrated platforms, Criteo has only forged commercial relationships for the purchase of advertising space with Meta, starting in 2012. Criteo's turnover generated from Meta's inventory was US\$[confidential] million in 2017 and US\$[confidential] million in 2018<sup>146</sup>.
104. Criteo stated that (freely translated) "*traditional SSPs follow the most common standard called Open RTB protocol. These partners are commonly defined as Open RTB partners. Other companies, especially "walled-garden" environments, operating in the social space, such as Pinterest, FB, LinkedIn and Snapchat, use custom APIs that stipulate how to create audiences on their platform, how to serve creative elements, how to perform user tracking etc. We generally define these partners as API partners. The way of working offered by Open RTB is very different from that with API partners. Indeed, for example, API partners do not transmit any real-time information on auctions. The decisions taken in terms of selecting advertisers and creative assembly is done directly by the API partners. API partners, as defined above, typically create sets of targeting criteria, with the result that Criteo uses pre-*

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<sup>143</sup> As such, "*the Criteo Platform leverages the extensive scale and user reach of our Publisher Network across both the open Internet and some closed publisher environments*". Criteo Annual Report, page 3 (<https://criteo.investorroom.com/download/Criteo+10-K+2019.pdf>).

<sup>144</sup> Criteo adds that it purchases inventory in real time, so generally does not buy any impressions in advance, and does not commit to a minimum volume of impressions, except in certain limited cases related to its "*Criteo Retail Media*" solution. In addition to technologies that make it possible to directly integrate publishers, Criteo has developed its own *header-bidding* technology called *Criteo Direct Bidder*. In recent years, publishers have switched to header-bidding technology, which allows them to make their inventory available to multiple bidders simultaneously, including on RTB marketplaces.

<sup>145</sup> Criteo Annual Report, page 28 (<https://criteo.investorroom.com/download/Criteo+10-K+2019.pdf>).

<sup>146</sup> Classification mark 31.

*created segments to segment and serve its ads, as opposed to using its own data to target those ads.*"<sup>147</sup>

### ***ii- Services on Facebook***

105. From 2012 to 2015, Criteo used the Facebook Ad Exchange service, which it said made it possible to (freely translated) "*access user-level information and buying inventory on Facebook using that data.*"<sup>148</sup> Criteo stated that the technology allows it to take all decisions regarding inventory purchases, bidding prices, ad style and more, in real time<sup>149</sup>. For example, when a consumer who had already visited the website of Criteo's client, browsed to the page of a publisher connected to FBX, to which Criteo was also connected, Criteo would in principle receive a bid request for this consumer. Criteo then used its algorithms to determine which inventory to bid on and at what price. If Criteo won the auction, its technology would then determine which product to display to the consumer, in real time, and in which format<sup>150</sup>.
106. After FBX was phased out, from 2016 to 2018, Criteo used Meta's marketing API while enjoying access to two specific APIs, the ULB API and the OLR API.

### ***The use of the ULB API***

107. Criteo's access to the ULB API is governed by the agreement of 2 April 2016<sup>151</sup>. Meta stated that [confidential]<sup>152</sup>. Criteo was able to use this API until November 2018.
108. Unlike auctions via FBX up until 2015, the ULB API does not allow a bid to be made at the level of a specific user but allows a form of individualisation of this bid, with a "*User Level Factor*" or "*ULF*"<sup>153</sup> coefficient sent by Criteo to Facebook, and a product recommendation provided through Criteo's proprietary technologies.
109. With the ULB API, when a user visited the site on which the trackers were placed (Onetag for Criteo and Pixel for Meta), Criteo sent two pieces of information to Meta.
110. Firstly, Criteo sent a bid multiplier/factor to take into account the most recent user information (ULF). This information was used to adjust a bid amount that was sent hourly by Criteo to Meta, and determined at the audience group level and not at the individual user level. Specifically, Criteo calculated a maximum bid for a specific group of users (*Adset bid*)

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<sup>147</sup> Classification marks 15 662 VC (classification mark 15 714 VNC) et 15 663.

<sup>148</sup> Classification mark 16.

<sup>149</sup> Advertisers are only requested to provide minimum guidelines to Criteo regarding, inter alia, the objectives of their campaigns, the maximum price they are willing to pay per impression, and their total budget on an hourly, daily or weekly basis, etc.

<sup>150</sup> Classification mark 14 988.

<sup>151</sup> Meta states that "*the development of the ULB was done in the context of the standard Beta Product Testing Addendum contract, which provided the legal framework upon which Criteo and other testers were able to test new products or features*". Classification mark 14 750 VC (classification mark 17 147 VNC).

<sup>152</sup> Classification mark 286 VC (classification mark 1429 VNC).

<sup>153</sup> The "User Level Factor" was "*essentially a value between 0.1 and 1.0 used as a bid multiplier at the ad group level.*" Classification mark 14 990 VC (classification mark 15 730 VNC). The ULF was a tool specific to the Facebook social network.

and then used the individualisation parameter to adjust the bid for each user (*ULF*). This final bid was then taken into account by Meta in its CPC bidding.

111. Criteo believes that the *ULF* allowed it to (freely translated) "*refine its bids at the individual user level, not as accurately as outside of Facebook, but in a more efficient way than using the Adset bid alone*"<sup>154</sup> [...]. For each ad served, an individualisation parameter at the user level was calculated by Criteo and sent to Facebook in order to adapt the bid vis-à-vis that specific user. This parameter was updated every time Criteo was able to identify the user as they logged in"<sup>155</sup>. According to Criteo, this solution was also less efficient in terms of bidding than *FBX*, on which it could use its prediction algorithms at a more granular level, at the user level and in real time.
112. Secondly, Criteo sent a personalised product recommendation to the user based on the user's behaviour, which was tracked on the advertiser's site by Criteo Onetag and by Facebook Pixel. Criteo then calculated a product recommendation using its algorithms and the product recommendations would then be sent to Meta and stored for the specific user and the specific ad account involved. These data were updated every time Criteo was able to identify the user as they logged in"<sup>156</sup>.
113. Schematically, the process was as follows:
  - when a user visited the website of a Criteo advertiser client, the Criteo Onetag and Facebook Pixel tracking tools were activated to track the user's behaviour. Using its algorithms, Criteo then automatically calculated a product recommendation.
  - Criteo's recommendation engine identified 10 products for each user, weighted according to their value to that user. At Meta's request, the products were weighted according to an index between 0 and 1.
  - the product recommendations were then sent to Meta and set aside immediately for the user and the specific ad account involved. These data were updated every time Criteo was able to identify the user as they logged in, in a similar way to what was done with the *ULF* coefficient, via the same *ULB* API.
114. Criteo stated that the switch from *FBX* to the *ULB* API in 2016 did not affect its product recommendation capability to the extent that it could still send its own product recommendations to Meta for the latter to use.
115. Criteo disclosed internal business documents from 2016 illustrating [confidential]<sup>157</sup>.

#### *The use of the OLR API*

116. Criteo used the *OLR* API from January until April 2018<sup>158</sup>, in the context of the beta partnership of 4 August 2016 (Product Beta Testing Agreement for "*New Fields in Ad Reports*")<sup>159</sup>.

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<sup>154</sup> "*Adset bid*": Bidding at the ad group/audience level.

<sup>155</sup> Classification mark 14 990 VC (classification mark 15 730 VNC).

<sup>156</sup> Classification mark 14 991 VC (classification mark 15 731 VNC).

<sup>157</sup> Classification mark VC 15 667 (classification mark VNC 15 750).

<sup>158</sup> Classification mark 16 749.

<sup>159</sup> Classification mark 7547 VC (classification mark 14 680 VNC).

117. According to Meta (freely translated) "*Beta Testing was a reporting tool, the purpose of which was to test a method to improve the capacity of third parties to measure the performance of an ad or ad campaign they ran on behalf of their end customers, more effectively. Facebook proposed this tool to help companies move from an environment designed for computers to one designed for mobile and apps.*" It provided (freely translated) "*certain ad interaction data to see if it could improve their capacity to (i) measure multiscreen conversions, (ii) identify the success credit assigned to each screen type, and (iii) verify tracking data on views and clicks. In concrete terms, following an online purchase, the buyer generates at least two data sets: a cookie identifier (linked to the user's screen) and an order identifier (i.e. an order form). In the context of Beta Testing, there were two fundamental steps. First, the co-contractor in the Beta Testing pilot program generally provided Facebook with the two above-mentioned anonymised identifiers. Then, Facebook would try to cross-reference the data provided by the third party (e.g., Criteo) with its own data and tell the relevant third party if and when the buyer connected to the order form had ever seen an ad that might be linked to the eventual online purchase.*"<sup>160</sup>
118. Criteo, meanwhile, stated that Meta provided the following information:
- conversion information: Order ID<sup>161</sup>, sale timestamp (the timestamp of the transaction according to Meta), App ID, Pixel ID, device used for conversion, etc. ;
  - attribution information<sup>162</sup>: [confidential]<sup>163</sup>.
119. This ability to "*identify conversions that occur across devices at a significant level of granularity*"<sup>164</sup> was used by Criteo for purchasing inventory and campaign measuring performance, among other things. Criteo holds that "*the ability to effectively measure the performance of an ad is highly dependent on the ability to identify the amount of sale that can be attributed to a particular ad. [...] For Criteo, since its solution is based on individual evaluation and bidding at the user level, data must be provided at a granular level, i.e. at the individual level, to make it possible to measure the performance of the solution. Moreover, information on the complete purchase path, i.e., providing a complete view of the customer's purchasing path across different devices and channels, will allow for more accurate attribution of sales to a given ad and therefore better measurement of a campaign's*

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<sup>160</sup> Classification mark 310 VC (classification mark 17 099 VNC).

<sup>161</sup> Order IDs are unique identifiers for conversion and can therefore be created by either the seller, Meta or Criteo.

<sup>162</sup>See Decision 21-D-07 of March 17, 2021 regarding a request for interim measures submitted by the associations Interactive Advertising Bureau France, Mobile Marketing Association France, Union Des Entreprises de Conseil et Achat Media, and Syndicat des Régies Internet in the sector of advertising on mobile apps on iOS., paragraph 12. "*The attribution function consists in determining a causal link explaining a given event, which meets various objectives, in particular, that of measuring the efficiency of advertising (measuring the efficiency of targeted advertising impressions for example). Attribution is all the more important in the current modus operandi of online advertising, as it now determines the terms and levels of remuneration of the various actors in the ecosystem. For example, some ads are only charged if a certain event occurs (e.g., a visit to a site or purchase of a product, based on the "cost per click" principle) (Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraphs 25 and 30) or the "cost per install" for a downloaded app. In addition, the fee paid by the advertiser can also vary significantly depending on the efficiency of the advertising*".

<sup>163</sup> Classification mark 14 997 VC (classification mark 15 737 VNC).

<sup>164</sup> Classification mark 1831.

*performance. This is why access to granular data across devices is also very important to measure and report on the performance of the Criteo solution".*<sup>165</sup>

120. According to Criteo, the API improves its capabilities in measuring campaign performance. Without the OLR API, it is (freely translated) "*not informed when Facebook serves an ad to a user based on product recommendations and a bid amount provided by Criteo. Facebook would only transmit cumulative impressions data at the campaign level and every hour without detailing information on each impression individually.*"<sup>166</sup>
121. However, Criteo maintains that (freely translated) "*only campaigns from January to April 2018 used the OLR API, so it is difficult to accurately quantify the contribution of this solution, except for the percentages for performance [...] which show a 20-60% better sales performance.*"<sup>167</sup>
122. In conclusion, Criteo's ability to fully utilise its own advertising technologies depends on the conditions of access to the Meta Marketing API and the ULB API and OLR API. However, during the course of 2018, Meta withdrew Criteo's access to these two APIs, which impaired the latter's ability to offer personalised advertiser services across all of the ad inventories to which it had access.

#### **b) Other intermediaries**

123. Various technical intermediaries provide advertiser services to advertisers and media agencies. The services, features and technologies vary significantly from one player to another and according to the advertising ecosystem in which they are provided.
124. Some intermediaries are only active in Open Display and their offerings do not extend to purchasing advertising space on vertically integrated platforms and in particular on social networks. [Confidential], which is one of the leading DSPs in Open Display, has indicated that it is no longer providing services on social networks due to [confidential].<sup>168</sup> [confidential].
125. Others, such as the MBP Nanigans, only provide their services on social networks. Finally, a last category of players, including Criteo, provides services on both types of inventories.
126. The case team questioned various MBPs in the Ad Tech category: Adform, Adobe, Armis, Criteo, Kamp'n, Kenshoo, Mediamath, Nanigans, NextRoll, Salesforce. Some of these have provided services using Facebook Ad Exchange and are now MBPs. Mediamath, for example, used FBX from 2012 to 2015 and then joined the MBP program until 2017<sup>169</sup>. In this regard, it stated that (freely translated) "*the main difference between the FMP and FBX programs was in the buying process of a marketer. Within FBX, buyers could buy individual users in real time using their own data for targeting purposes [...] Within FBX, the buyer had the ability to control the frequency of ads across their complete media plan (on and off Facebook) and across other platforms. As an FMP, buyers are required to purchase through controls and targeting that only Facebook provides. Using the example of Peugeot, you*

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<sup>165</sup> Classification mark 14 969 and 14 970.

<sup>166</sup> Classification mark 14 996.

<sup>167</sup> Classification mark 16 749.

<sup>168</sup> Classification mark 16 400 VC (classification mark 16 926 VNC).

<sup>169</sup> Classification mark 6374.

*could not and would not be as effective in targeting the uses that were made of the Peugeot site. In the FMP program or on the FB console (or API), a brand can only control the frequency on Facebook and not on its complete media plan.*"<sup>170</sup>

127. Some of them have a competitive positioning close to that of Criteo. This is the case, for example, with NextRoll (AdRoll) which provides retargeting services on Facebook, LinkedIn and on ad exchanges in the Open Display. In this regard, NextRoll highlighted the differences between the two types of ecosystems by stating that (freely translated) "*on Facebook bidding optimisation strategies [...] are delegated to Facebook's bidding algorithms*" while on "*the inventory accessible via programmatic buying, this functionality is managed by NextRoll's bidding and segmentation systems.*"<sup>171</sup>
128. Other FMPs interviewed have a competitive positioning further away from Criteo's. For example, Armis (freely translated) "*has developed a SaaS platform that relies on AI to transform retailers' paper flyers into digital ads on Google, Facebook / Instagram, Display optimised locally for each store.*"<sup>172</sup> Salesforce provides data analysis services complementary to DSP services. Among other things, its offering makes it possible to build audience segments on Facebook from CRM data and to target and leverage audience segments at scale<sup>173</sup>.
129. Criteo and other MBPs stated that Meta is a direct competitor to their services to advertisers. [confidential]<sup>174</sup>. In this regard, Criteo claims that Meta restricted the use of certain APIs in order to promote the development of its own services, which compete with Criteo's. In its complaint, Criteo states that it had "*no choice but to develop its integration with Facebook's APIs to continue buying inventory on the social network. At the same time, Facebook continued to develop and improve its own competing DPA solution. Nevertheless, Criteo was still able to provide its retargeting solution on the social network thanks to its access to privileged APIs, including the OLR API and the ULB API, via the beta partnership and its FMP status*"<sup>175</sup>.
130. In conclusion, since the phasing out of Facebook Ad Exchange in 2015, Meta has continued its vertical integration by providing intermediaries with access to the Marketing API, and then removing access to specific APIs that make it possible to use third-party advertising technologies. In this context, some MBPs have provided services that compete directly with the technologies that Meta makes available to advertisers.

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<sup>170</sup> Classification marks 6374 and 6375 VC.

<sup>171</sup> Classification mark 6736.

<sup>172</sup> Classification mark 6084.

<sup>173</sup> Classification mark 6447.

<sup>174</sup> Classification mark 6746 VC (classification mark 13 962 VNC).

<sup>175</sup> Classification marks 19 and 20.

## D. THE REPORTED PRACTICES

131. In its complaint, Criteo reports various practices related to (1) the withdrawal of its MBP status, (2) the behaviour of Meta's sales teams in the context of the withdrawal of its MBP status and (3) the withdrawal of its access to the ULB API and OLR API.

### 1. THE WITHDRAWAL OF CRITEO'S MBP STATUS

132. Criteo obtained its MBP status in June 2016, and it was withdrawn in July 2018. In its complaint, Criteo criticizes the conditions under which Meta withdrew its MBP status (a), the reasons for this withdrawal (b) and the demands that Meta reinstate it (c).

#### a) The conditions for withdrawing MBP status

133. First, Criteo contests the conditions under which it was informed of Meta's decision to withdraw its MBP status and initiate a six-month notice period. For example, while Meta claims that it announced its decision to initiate a notice period for Criteo, also known as a "probation period," on 19 January 2018, by email, Criteo states that it never received this message<sup>176</sup> and was only informed that it had been placed on probation status on 27 April 2018.
134. In principle, Meta conducts an evaluation of MBPs every six months, to ensure that their performance is in line with Meta's objectives. If an MBP does not meet one of the criteria, Meta puts it on a probation period. This information is then sent to the MBP in question<sup>177</sup>. It was in this context that, according to Meta, a Meta employee sent an email concerning Criteo's probation period on 19 January 2018, to the following email addresses: [confidential]<sup>178</sup>. However, it is clear from the documents in the file that the email was sent to [confidential]<sup>179</sup>, who is not on this list. Furthermore, with respect to the Criteo contact emails mentioned above, internal Meta correspondence indicates that "[Confidential] had quit Criteo many months ago [...] *FB@criteo.com* is the generic email at Criteo that all people working with Facebook are added" and "I'm not sure about the last person [Confidential]"<sup>180</sup>. This internal correspondence also reveals that there was no

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<sup>176</sup> No-one at Criteo had received the original notice allegedly dated 19 January 2018. In the phone records prepared by Criteo, it appears that the Facebook team members themselves acknowledged the fact that Criteo "did not receive the original email" and therefore a possible extension of the notice period granted to Criteo should be considered in that light. Date of minutes: 3 May 2018. Classification mark 97. See also classification mark 8885 VC (classification mark 17 143 VNC) from which it appears that the email of 27 April 2018 was sent to [facebook@criteo.com](mailto:facebook@criteo.com) while the email of 19 January 2018 was sent to a different address.

<sup>177</sup> Classification mark 8885 VC (classification mark 17 143 VNC).

<sup>178</sup> Classification mark 8883 VC (classification mark 17 141 VNC).

<sup>179</sup> Classification mark 8885 VC (classification mark 17 143 VNC).

<sup>180</sup> Classification mark 8882 VC (classification mark 17 140 VNC).

reliable acknowledgement system in place when an email concerning a probation period was sent<sup>181</sup>.

135. On the other hand, it is established that Criteo received an email on 27 April 2018, at a new address (facebook@criteo.com), referencing and reproducing the notice message allegedly sent on 19 January 2018, and reiterating the six-month notice period: *"As noted in our message from January 19, 2018 (copied below), you are not meeting the performance requirements we have set for our Facebook Adtech Partners. Since then, you have been on a six-month probation period. If you continue to not meet program program quality metrics, you will be removed from the partner program in July 2018. For help on how to meet these requirements, please reach out to your Partner Manager or ask for support by creating a "Marketing Partner: Badging Support" question at <https://business.facebook.com/direct-support>. Thank you for your attention to this important matter"*.<sup>182</sup> It can be seen from this that Meta was unable to prove that Criteo did receive notice of its probation status as of 19 January 2018.

#### **b) The reasons for withdrawing MBP status**

136. A version of the email of 19 January, as reproduced in the email from 27 April 2018, is shown below:

*"Subject: Changes to Ad Tech Specialty status, as result of H2 2017 Partner Performance Process*

*As you know, every 6 months we look at Partner performance vs our goals, and make changes to a Partner status based on this performance. This is done to keep the quality bar of the Facebook Marketing Partner program high, to be fair to all partners, and to help clients find the best Partners for their needs.*

*This message is to inform you that as of December 2017, you are not meeting the performance metrics we have set for our Facebook Adtech Partners.*

*You can find these criteria in your :*

*Monthly PerformanceRreport, and*

*<https://facebookmarketingpartners.comtners.com/join/>.*

*What this means:*

*Effective immediately, you are being placed into a Probation period for 6 months.*

*Here's a recap of what Probation status means:*

*It means you are not currently meet the quality metrics we want our partners to be at. This could be advertising volume, product adoption, or performance versus your peers. It also means that we are know that this is an important area for you and we want to work with you to achieve the level of performance that we know you are capable of.*

*If during H1 2018, you continue to not meet program quality metrics, you will be removed from the Partner program in July 2018.*

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<sup>181</sup> Classification marks 8881 and 8882 VC (classification marks 17 139 and 17 140 VNC). For example : *"I think we should add an acknowledgement from impacted partners when we send probation notices" or "I need to ask Salesapps about acknowledgement of receipt/read, but I do think this is a feature responsys has"*.

<sup>182</sup> Classification marks 99 and 100.

*We want to help as much as possible to meet these requirements so please reach out to Your Partner Manager, or you can ask for a specific advice and support by creating a "Marketing Partner: Badging Support" question at <https://business.facebook.com/direct-support>.*

*Note, this will not lead to any changes on your profile at [facebookmarketingpartners.com](https://facebookmarketingpartners.com) or other external properties. It is an internal only change, but should be taken seriously.*

*Based on the monthly reports that you have been receiving, we anticipate this update should not come as a surprise.*

#### *FAQ*

*Q: Why is this change happening?*

*A: This is part of our regular 6 month performance process for the Ad Tech Specialty. We are making this update because of your performance during H2 2017.*

*Q: Will this affect our API access?*

*A: No. You are still a valued Partner and API access will remain unchanged.*

*Q: Will this affect our access to partner support?*

*A: No. We want to help as much as possible so access to all of your existing support will remain in place for another 6 months.*

*Q: Where can I ask for more specific guidance on this?*

*A: You can discuss with your partner manager or by creating a "Marketing Partner: Badging Support" question at <https://business.facebook.com/direct-support>"<sup>183</sup>.*

137. The email also states that if "you continue to not meet program quality metrics, you will be removed from the Partner program in July 2018."<sup>184</sup>

138. In parallel, and contrary to what is stated in the email above, namely that "access to all existing support will remain in place for another 6 months", Meta decided to withdraw the assistance of a *Partner Manager*, the dedicated support for badged MBPs, from Criteo. Meta decided to offer only standard support from the *Technical Partner Manager* (TPM) team, for the following reasons: (freely translated) "Why this is happening? We have to focus on working on strategic initiatives with Partners that have synergies with our goals, currently Criteo's business model is not meeting our strategies/goals. Also, partner management team is a small team and on regular basis, we evaluate our partners who needs the most help on driving growth in certain areas, currently Criteo is focused on an important but relatively narrow area that we can help through our technical team. TPM team will be walking you through the support they can provide (similar to the webinar they hosted). You can ask questions and provide feedback to the team. Let me know what time best works for you and I can set that up. Let me know if you have any questions, I am available for a call if needed."<sup>185</sup>.

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<sup>183</sup> Classification marks 100 and 101.

<sup>184</sup> Classification mark 100.

<sup>185</sup> Classification mark 87. See also another internal email from Meta, dated 17 January 2018, which also states, "we think it makes sense for Criteo to use TPM support as we are not working on strategic initiatives, so we will be focusing on partners that are engaging with ths strategies that have synergies with our goals." (classification mark 7632 VC (classification mark 17 113 VNC)).

139. The email informing of the probation status cited above indicates that Criteo was not meeting the quality metrics that MBPs are required to follow. Meta adds that the reason "*could be advertising volume, product adoption, or performance versus your peers.*" The emails do not contain any other information regarding Criteo's performance, but a link to the monthly performance reports. This document shows that Criteo's "product adoption rate" (from Meta) was 0% in the previous month for the following quality metrics: "Optimal BR", "Optimal DR", "Video", "Audience Network", "IG", "Lead Ads", "Canvas", "Collection", and "Mobile Video". Criteo's rate was 100% for Dynamic Ads and 82.4% for Carousel Ads<sup>186</sup>. Its overall Placement Optimisation rate was approximately 42%. In order to calculate these rates, Meta uses the total spend of FMPs on the Marketing API over the past 30 days<sup>187</sup>.
140. Meta said it removed Criteo's badge on account of (freely translated) "*its failure to meet the objective and transparent criteria of Facebook's partner program. In particular, Criteo's strategy consist of relying on an outdated, click-based business model instead of optimising direct user reactions for the benefit of its clients*"<sup>188</sup>. As a result (freely translated), "*Criteo has consistently failed to meet the quality requirements that are integral to the value proposition that Facebook-recommended marketing partners must offer to their clients*"<sup>189</sup>."
141. Meta claims that Criteo's business model, which does not allow the use of (freely translated) "*sophisticated, conversion-based solutions available on Facebook*"<sup>190</sup> but uses "*simple clicks*"<sup>191</sup> that "*are low-value actions in the context of running ad campaigns on Facebook*"<sup>192</sup>, " does not meet the criteria of the MBP programme. Meta adds that (freely translated), "*What sets Facebook apart from its competitors is that Facebook allows advertisers to efficiently optimize high-value actions, such as purchases or app downloads, which creates value for advertisers by improving their ROI/ROAS. On Facebook, a strategy that consisted of optimising with a view to clicks, such as the one implemented by Criteo, is suboptimal to what can be achieved by running Facebook ad campaigns, namely conversions*"<sup>193</sup>.
142. In particular, Criteo is alleged to have not made any "Optimal DR"<sup>194</sup> investments. On this subject, Meta stated that [confidential]<sup>195</sup>.
143. Meta explains that (freely translated) "*this criterion takes into account, among other things, the percentage of spend on high-value actions such as app downloads or user purchases (conversions) as a result of user interactions with an ad. Criteo failed to meet this criterion,*

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<sup>186</sup> Classification mark 235.

<sup>187</sup> The documents relating to the performance of FMPs provide the following information on how these rates are calculated: [confidential] (classification mark 645 VC and 1 763 VNC).

<sup>188</sup> Classification mark 284 VC (classification mark 1427 VNC).

<sup>189</sup> Classification mark 284 VC (classification mark 1427 VNC).

<sup>190</sup> Classification marks 7550 and 7551 VC (classification marks 17 105 and 17 106 VNC).

<sup>191</sup> Classification marks 7550 and 7551 VC (classification marks 17 105 and 17 106 VNC).

<sup>192</sup> Classification marks 7550 and 7551 VC (classification marks 17 105 and 17 106 VNC).

<sup>193</sup> Classification marks 7550 and 7551 VC (classification marks 17 105 and 17 106 VNC).

<sup>194</sup> The monthly reports sent to MBPs contain a page with the definition of "Optimal DR" ("Direct Response") investments called "*DR Revenue with high-quality signal tracking and optimization*" (classification mark 231).

<sup>195</sup> Classification mark 16 068 VC (classification mark 16 582 VNC). Meta wrote the definitions of Optimal DR in English in its French response.

*meaning that Criteo's bids were not sufficiently optimised for conversions or high-value actions.*"<sup>196</sup>

144. However, analysis of Criteo's monthly activity reports<sup>197</sup> shows that Criteo had an Optimal DR rate of [confidential]. In subsequent reports, this dropped to [confidential] %.
145. Depending on which report is taken into account, there are also significant differences in Optimal DR rates for the same given period. [confidential]<sup>198</sup>.
146. To account for these apparent anomalies, Meta states that the definition of Optimal DR changed from the second half of 2017, to include only conversion objectives (excluding clicks). Since this change was mentioned in the reports, Meta infers that Criteo would have made the deliberate choice [confidential]<sup>199</sup>. [confidential]<sup>200</sup>.
147. Finally, according to Criteo, it was impossible to meet the new "Optimal DR" criterion, since it (freely translated) "*did not use any Facebook product that would be a competitor to its own solution, and the adoption of which would have made its activity virtually non-existent on the social network*"<sup>201</sup> (see paragraphs 105 to 122). In Criteo's opinion, the criteria used by Meta did not reflect Criteo's level of "performance" per se. From the moment the "Optimal DR" criteria were changed from the second half of 2017, its performance reports became zero. As such, the criteria used by Meta would be (freely translated) "*used to measure the rate of use of Facebook products by its partners, regardless of whether these products are products that directly compete with the partner's products and whether their adoption could result in any added value disappearing for the partner.*"<sup>202</sup>
148. In conclusion, from January 2018, Meta withdrew Criteo's dedicated *Partner Manager* support, before placing it on probation status with a view to excluding it from the MBP programme in July 2018. The reasons for this withdrawal are based on the fact that Criteo no longer met the quality criteria set by Meta for its MBP partners.
149. In particular, and following Meta's change in its definition of optimisation objective criteria in 2017, Criteo no longer met the "Optimal DR" criterion. Meta explains that Criteo's business model would have prevented it from making high-value investments, since the model was based on optimising clicks, not conversions.

### **c) Meta's requirements in order to regain MBP status**

150. Criteo initiated discussions with Meta after receiving the email of 27 April 2018, with the goal of regaining its status. Criteo claims that, in order to maintain its MBP status, Meta required it to:

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<sup>196</sup> Classification mark 7552 VC (classification mark 17 107 VNC).

<sup>197</sup> Classification marks 1017 VC to 1283 VC (classification mark VNC 1812).

<sup>198</sup> Classification marks 16 064 and 16 065 VC (classification marks 16 578 and 16 579 VNC).

<sup>199</sup> Classification mark 16 068 VC.

<sup>200</sup> Classification mark 16 067 VC.

<sup>201</sup> Classification mark 1834.

<sup>202</sup> Classification mark 1834.

- stop predictive bidding optimised at the user level and product recommendations level<sup>203</sup>;
- use Facebook's conversion optimisation solution, ("oCPM"), going forward, to increase the Optimal DR investment rate. According to Criteo (freely translated), *"Facebook's main demand was that Criteo adopt the Facebook oCPM conversion optimiser instead of accessing Facebook via the ULB API"*.<sup>204</sup> Meta agrees having [confidential]<sup>205</sup> [confidential].
- stop inserting the Facebook Pixel through Criteo's own tag (Onetag) and instead integrate the Facebook Pixel directly into the brands and websites of Criteo's advertising clients, who are also Meta clients. In this regard, Meta states that [confidential]<sup>206</sup>. Nevertheless, Meta states that Pixel and Onetag can be installed and run in parallel on the same site. Criteo wished to keep the option to install only Onetag since (freely translated) *"by integrating only Facebook pixel on Criteo's clients' sites, it is easier for Facebook to offer its services directly to Criteo's clients while replicating the settings originally configured by Criteo, thereby offering its competing solution instead of Criteo's"*<sup>207</sup>. It also believes that *"Facebook pixel is designed to work on third-party websites alongside other tags"*.<sup>208</sup> According to Criteo, Meta apparently expressed the view that [confidential]<sup>209</sup>;
- in parallel with the installation of Pixel, to return ownership of the data to the advertisers. Meta therefore believes that the [confidential]<sup>210</sup>.

151. From 11 July 2018, at a meeting with Meta, Criteo discussed the negative effects of the withdrawal of the MBP badge<sup>211</sup> and indicated that it agreed with increasing its Optimal DR investments, with its goal of reapplying<sup>212</sup> for the badge at the end of 2018<sup>213</sup>. Criteo made the necessary changes to its services (including adopting the oCPM solution) so it could rejoin the programme as of 14 November 2018<sup>214</sup>. According to Criteo, this may have affected the value of its *retargeting service*, as it would now act as a (freely translated)

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<sup>203</sup> Classification mark 135.

<sup>204</sup> Classification mark 29 VC (classification mark 1941 VNC). See also classification mark 8122 VC (classification mark 17 131 VNC), which tends to show that the switch to the oCPM was indeed a condition for maintaining and then regaining the MBP badge.

<sup>205</sup> Classification mark 7554 VC (classification mark 14 687 VNC).

<sup>206</sup> Classification mark 7560 VC (classification mark 14 693 VNC).

<sup>207</sup> Classification mark 1836 VC (classification mark 3572 VNC).

<sup>208</sup> Classification mark 2119 VC (classification mark 3617 VNC).

<sup>209</sup> Classification mark 7554 VC (classification mark 14 687 VNC).

<sup>210</sup> Classification mark 7554 VC (classification mark 14 687 VNC). The requirements described by Criteo in its complaint can be confirmed by an internal email to Meta dated 12 July 2018, in which it states *"they [Criteo] should optimize for conversion, they should fire pixel unconditionally, they should use placement optimization etc"* Classification mark 7933 VC (classification mark 17 123 VNC).

<sup>211</sup> Classification mark 7931 VC (classification mark 17 121 VNC).

<sup>212</sup> Classification mark 7937 VC (classification mark 17 125 VNC).

<sup>213</sup> Classification marks 7929 VC (classification mark 17 119 VNC).

<sup>214</sup> Classification mark 8261 VC (classification mark 17 133 VNC).

*"simple reseller of Facebook's retargeting products for inventory purchased on behalf of its clients."*<sup>215</sup>

152. However, Criteo was never reinstated in the MBP programme. On 29 August 2019, Criteo applied for the MBP programme one last time and Meta rejected its application on 5 December 2019, on account of [confidential]<sup>216</sup>. In effect, Criteo failed to pass the compliance test carried out by a third party. Specifically, the message of 5 December 2019 justifies the rejection for the following reasons: the citation of Criteo SA in a 2016 lawsuit brought by Steelhouse, a company active in advertising intermediation, for *"false advertising, intentional interference with contract, intentional interference with prospective economic advantage and unfair competition over allegations that over 50% of its revenue come from fraudulent sources according to public media sources [...] Criteo inflates its performance through fraudulent click practices"*<sup>217</sup>. Furthermore, *"Facebook decertified them as an FMP in 2018"*<sup>218</sup>.
153. Meta states that MBP applicants [confidential]<sup>219</sup> and cites the terms and conditions for MBPs, which stipulate that (freely translated) *"MBPs must also comply with all Facebook policies"*.<sup>220</sup> Meta states that (freely translated) *"a number of these policies, including the SRR<sup>221</sup>, include the obligation not to deceive or defraud anyone"*.<sup>222</sup>
154. However, prior to December 2019, (i) Criteo had initially filed a complaint against Steelhouse, and then both companies agreed to drop their complaints<sup>223</sup>, and (ii) Criteo publicly disputed the allegations brought by Gotham City Research<sup>224</sup>.
155. As such, despite the fact that Criteo had adapted its services to meet the requirements imposed by Meta (stopping the ULB and implementing the optimal DR via the transition to the oCPM), Criteo was not reinstated in the MBP programme, as it failed the compliance check.

## **2. THE CONDUCT OF META'S SALES TEAMS IN THE CONTEXT OF THE WITHDRAWAL OF CRITEO'S MBP STATUS**

156. In its complaint, Criteo also complains about the conduct of Meta's sales teams when its MBP status was withdrawn. The file shows that Meta had been approaching Criteo's clients directly, for its own benefit or for the benefit of other MBPs, as well as making negative

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<sup>215</sup> Classification mark 30.

<sup>216</sup> Classification mark 304 VC classification mark 1447 VNC).

<sup>217</sup> Classification mark 392 VC (classification mark 17 101 VNC).

<sup>218</sup> Classification mark 392 VC (classification mark 17 101 VNC).

<sup>219</sup> Classification mark 3697 VC (classification mark 5688 VNC).

<sup>220</sup> Classification mark 3697 VC (classification mark 5688 VNC).

<sup>221</sup> Statement of Rights and Responsibilities.

<sup>222</sup> Classification mark 3697 VC (classification mark 5688 VNC).

<sup>223</sup> <https://www.businessinsider.com/criteo-vs-steelhouse-case-dropped-2016-11?r=US&IR=T>

<sup>224</sup> <https://www.thedrum.com/news/2017/09/21/criteo-counters-fraud-claims-made-infamous-short-seller-gotham-city-research>

statements about Criteo to Criteo's own clients. These practices, which started in 2017 and continued during the probation period, impaired Criteo's ability to regain its MBP status.

157. For example, Criteo was informed by one of its clients, before the first email of 19 January 2018 was sent (see paragraphs 133 to 135) "*that Facebook had informed them of its intention to terminate the partnership with Criteo and, in particular, to terminate the provision of any support to the Company and to cut off all its access to the Facebook API*"<sup>225</sup>.
158. Subsequently, in May 2018, Meta sent emails to clients of Criteo, telling them that Criteo was no longer providing value and that they should either switch to Meta's in-house solution or to another MBP, even though the probation period had not ended. Internal exchanges at Meta reveal that the sales team no longer wanted to work with Criteo<sup>226</sup>. Following this correspondence, Meta's sales teams felt that reinstating Criteo would harm Meta's reputation.
159. In an email from Meta to a client of Criteo, forwarded to Criteo<sup>227</sup>, Meta explains that Criteo has been "*deprioritized*," that it is no longer actively managed by Meta and that there are risks to the advertiser of losing all of its campaign data, in particular if the MBP changes. Meta therefore recommends that the client change MBPs, providing a list of six possible MBPs and adding that Meta can assist in this process (freely translated): "*We understand switching partners can be difficult, so we've done our best to simplify this effort for you.*"<sup>228</sup>
160. Meta considers that advertisers using Criteo would be (freely translated) "*locked into their relationship with this provider to the extent that such practices create artificial barriers to switching partners*"<sup>229</sup>. As such, according to Meta (freely translated), "*Advertisers wishing to switch providers or manage their ad campaigns in-house risk losing access to all their data history, and the underlying systems or algorithms will need to be re-trained, which may have consequences for performance*".<sup>230</sup> If an advertiser links all of their Meta assets to their own Facebook Business Manager account, this allows them to freely switch ad solution providers if they wish, as they control their own data, which is not the case if they go through a third-party ad solution provider such as Criteo. However, [confidential]<sup>231</sup>.
161. Meta's actions penalising Criteo continued into September 2018, when Criteo had agreed to implement Meta's requirements with regard to the phasing out of the ULB and the migration to oCPM. For example, in an email from September 2018 from Meta to a client of Criteo, a Meta employee states that he appeared to have found a "*strong correlation*" between ads purchased from Criteo and negative returns identified by Meta and "*noticed that your ads running with Criteo are under delivering. After an internal analysis, we've identified that*

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<sup>225</sup> Classification mark 21 VC (classification mark 1934 VNC). In June 2018, Meta also informed a client of Criteo that Criteo was about to have its badge withdrawn (classification mark 8020 VC (classification mark 17 129 VNC)).

<sup>226</sup> For example, on 31 May 2018, an email stated "*Sales is aware that Criteo may lose their badge and they are concerned about the right comms to a client from a legal standpoint. I'm happy to go down the optimal solution route with [confidential] to communicate to the client but reading between the lines here, Sales don't want Criteo on the business and are looking for ammunition [...]*" (classification marks 7754 to 7756 VC (classification marks 17 115 to 17 117 VNC)).

<sup>227</sup> Classification marks 131 and 132 VC (classification marks 2031 and 2032 VNC).

<sup>228</sup> Classification mark 132 VC (classification mark 2032 VNC).

<sup>229</sup> Classification mark 7557 VC (classification mark 14 690 VNC).

<sup>230</sup> Classification mark 7557 VC (classification mark 14 690 VNC).

<sup>231</sup> Classification marks 7553 and 7554 VC (classification marks 14 686 and 14 687 VNC).

*Criteo is not running DPA following the best practices<sup>232</sup> for driving the best returns. This led to Criteo being unbadged by Facebook and they are no longer a managed partner [...] Recommended action: switch all Criteo Facebook remarketing efforts to in-house / agency managed. On average, retailers who use other Facebook Marketing Partners or running Dynamic Ads internally are seeing: at least 15x higher RoAs<sup>233</sup>, 8x increase in online sales, 3x lower cost per click, 50% increase in click-through rate, 50% decrease in cost-per-action than retailers using Criteo for DPA [dynamic product ads]"<sup>234</sup>.*

162. According to Meta, advertisers who invest in ad campaigns (freely translated) "*expect these ads to generate high-value user actions, also known as conversions, such as product purchases or app downloads*"<sup>235</sup>. However, Criteo's model is click-based<sup>236</sup>.
163. Finally, the conduct of Meta's sales teams vis-à-vis the clients of Criteo may have affected Criteo's chances of regaining its MBP status. Indeed, in late November 2018, internal exchanges with Meta indicate that despite the fact that Criteo had complied with the "*stopping of the ULB*" and "*Optimal DR implementation*" criteria, by switching to oCPM, with all of their advertisers, "*there is some resistance from internal teams on bringing Criteo back into our ecosystem. As we are aware, reputation of Criteo is not quite good amongst our sales team. There was a lot of sales communication done in August when we unbadged Criteo.. There is a concern of losing our credibility amongst the sales team if we bring back Criteo to partnerships so soon again*"<sup>237</sup>.
164. As such, Criteo's removal from the MBP programme in the summer of 2018 was accompanied by a strategy whereby Meta disparaged Criteo's solutions, and actively canvassed Criteo's clients, in order to get them to switch providers and/or offer them Meta's in-house solutions, among other things.

### **3. THE WITHDRAWAL OF ACCESS TO THE ULB AND OLR APIS**

#### **a) The conditions and consequences of the withdrawal of the ULB API**

165. Starting in January 2018, Meta criticised Criteo for not wanting to use the tools developed by Meta with its advertisers. At the same time, Meta decided to withdraw Criteo's access to

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<sup>232</sup> Criteo interprets this comment as follows (freely translated): "*Our understanding of this allegation is that we refused to use ocpm*" (classification mark 1824 VC (classification mark 2087 VNC).

<sup>233</sup> The calculation of RoAs ("Return On Ad Spend") makes it possible to evaluate the margin generated in relation to the cost or expenses incurred to run an advertising campaign.

<sup>234</sup> Classification mark 160.

<sup>235</sup> Classification mark 7556 VC (classification mark 14 689 VNC).

<sup>236</sup> Regarding click-based models, Criteo stated that its clients (freely translated) "*like its model because they don't need to pay for ads that haven't generated any particular interest, expressed as a click, from the customer. Criteo believes that conversions (sales) are more likely with customers who have expressed an interest by clicking on an ad, rather than with customers who have simply seen an ad impression*" (classification mark 15 659).

<sup>237</sup> Classification mark 8284 VC (classification mark 17 135 VNC).

the ULB API, a tool considered essential to be able to use and offer its advertiser services to its advertising clients<sup>238</sup> (see paragraphs 107 to 115).

166. The aim of sidelining Criteo is apparent from an email from Meta dated 27 June 2018: [confidential]<sup>239</sup>. Meta's goal was to put Criteo in an awkward situation vis-à-vis its clients, as the rest of the email indicates: *"My main goal is to distill for our clients that Criteo does not have any special tech that better powers Facebook (outside of access to alpha/beta features that Ilesh referenced is being removed). The enhancement on the FB Pixel would be the only thing that I could think of that would allow Criteo to differentiate itself on our platform as it relates to Dynamic Ads."*<sup>240</sup>
167. Whereas [confidential]<sup>241</sup>, on 26 June 2018, Meta told Criteo that losing the MBP badge usually also means denial of beta access, but that Criteo had been granted an exception, to allow for *"a smooth transition"*<sup>242</sup>. As such, Meta removed Criteo's access to the ULB API on 7 November 2018, and Criteo used the API for the last time on 11 November 2018.
168. Meta contends that [confidential] which it could withdraw access to at any time, [confidential]<sup>243</sup>. As stated above (see paragraph 69), this API was nevertheless granted to other MBPs and several large advertisers, and continued to be used by certain companies after 2018. The MBP [confidential]<sup>244</sup> and [confidential]<sup>245</sup>.
169. Since the withdrawal of the ULB API, the only API that Criteo can now access is the conventional Meta API (the Marketing API). Criteo is therefore still able to purchase inventory on Meta but can no longer refine the bid amount at the user level and offer value-added ad intermediation services. It can only do this at an audience level (i.e., a group of users with common characteristics). As such, using the Marketing API no longer allows Criteo to optimise its own services and technologies on Meta's platforms, although it can use Meta's in-house technologies and services to provide retargeting services. In particular, Criteo claims that it is no longer able to provide Meta with User Level Factor (ULF) data and User Level Recommendation (ULR) data. In this regard, Meta confirms that, in the context of an ad campaign via the tools available in the Marketing API (freely translated), *"it is not possible to submit a bid for a specific Facebook user"* or to *"use its recommendation engine at the user level"*<sup>246</sup>.

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<sup>238</sup> In an internal exchange dated 18 January 2018, a Meta employee wrote: *"Criteo is optimizing for clicks, and will only build any product that offers ULB, this has been causing friction with sales teams and the partnership team as well, as Criteo is not willing to engage with other products. By pulling the plug on ULB we will have them moving to other products to deliver better results, strengthening the partnership, turning them into a more complete solution for FB clients and moving away from factors that have been blocking this partnership to grow such as the engine automation."* (classification mark 7591 VC (classification mark 17 109 VNC)).

<sup>239</sup> Classification mark 7877 VC (classification mark 14 711 VNC).

<sup>240</sup> Classification mark 7954 VC (classification mark 17 127 VNC).

<sup>241</sup> Classification mark 14 753 VC (classification mark 15 085 VNC).

<sup>242</sup> Classification mark 1288 VC (classification mark 17 103 VNC).

<sup>243</sup> Classification mark 7553 VC (classification mark 14 686 VNC).

<sup>244</sup> Classification mark 15 936 VC (classification mark 16 444 VC).

<sup>245</sup> Classification mark 15 949 VC (classification mark 15 958 VNC).

<sup>246</sup> Classification mark 14 751 VC (classification mark 15 083 VNC).

170. Moreover, the preliminary assessment indicates that since the withdrawal of the ULB API, Criteo is obliged to use Meta's technologies, services and metrics, and is less able to differentiate itself from Meta, but also from intermediaries such as media agencies<sup>247</sup>.
171. Nevertheless, Criteo claims in its complaint that *"the results obtained with the solution in H2H tests<sup>248</sup> were very good and outperformed those of other competitors, including Facebook's direct solutions. It should also be noted that during the partnership, Criteo was not allowed to share information about the H2H tests which demonstrated that Criteo's solution was superior to Facebook's. Following the removal of FMP status, Facebook subsequently began adding various requirements for implementing Criteo/Facebook H2H tests, and demanded that the settings of both parties were aligned, in order to achieve the most favourable outcome for its solution"*<sup>249</sup>. For its part, Meta was unable to produce any information on the results of these tests<sup>250</sup>.
172. Finally, Criteo claims that once its access to the ULB API was removed, its revenue generated from Meta's inventory appeared to have steadily declined (freely translated): *"between Q1 2018 and Q1 2019, Criteo's revenue generated from Facebook's inventory declined by [60-70]%, [...]; Between 2017 and 2018, Criteo's revenue generated from Facebook's inventory declined by [30-40]%, [...]; Between the first half of 2017 and the first half of 2018, Criteo's revenue generated from Facebook inventory decreased by [30-40]%; and by [50-60]% between the first half of 2017 and the first half of 2019"*<sup>251</sup>.
173. As such, by removing Criteo's access to the ULB API, Meta significantly curtailed Criteo's ability to provide value-added services on the ad inventory marketed by Meta. As a result of this withdrawal, Criteo's revenue from Meta decreased substantially.

#### **b) The conditions and consequences of the withdrawal of the OLR API**

174. Meta only offered access to the OLR API starting in January 2018, for one quarter, while the ULB API had been used since 2016.
175. Nevertheless, it can be seen from internal exchanges between Meta teams in February 2018 that the use of the OLR API may have had a positive effect on the campaigns run by Criteo. For example, in internal correspondence, a Meta employee states that (freely translated) *"recently, Criteo also shared data after launching OLR on 2,500 customers and they are already showing 20% more revenue."*<sup>252</sup> He adds that *"the availability of some of this metrics data is considered one of the most important requests from our key partners ([confidential])"*

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<sup>247</sup> Classification mark 17 234.

<sup>248</sup> Criteo states that (freely translated) *"H2H tests are tests performed between two ad accounts to compare the performance of two competitors, including Facebook. H2H tests compare the basic settings of two competitors against each other by splitting the audience between the two ad accounts and comparing the results. The basic requirements for setting up an H2H test on Facebook are provided at the following link: <https://developers.facebook.com/docs/marketing-api/guides/lift-studies>".* Classification mark 36 VC (classification mark 1948 VNC).

<sup>249</sup> Classification mark 36 VC (classification mark 1948 VNC).

<sup>250</sup> Classification marks 7562 and 7563 VC (classification mark 14 695 VNC).

<sup>251</sup> Classification mark 31 VC (classification mark 1944 VNC).

<sup>252</sup> Classification mark 7624 VC (classification mark 17 111 VNC).

*Criteo, Smartly, [confidential], etc.). They also highlighted these needs quite clearly at our partner roundtable."*<sup>253</sup>

176. However, Meta [confidential]<sup>254</sup>. The reasons given by Meta [confidential]<sup>255</sup>. As a result, [confidential]<sup>256</sup>.
177. The suspension of the OLR API came a few days before Criteo discovered in the email of 27 April 2018 that it had had probation status since 19 January 2018.
178. As such, even though using the OLR API seemed to have a positive effect on Criteo's campaigns, Meta decided to cut off its access [confidential]. Criteo only had access to this API for one quarter, from January to April 2018.

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<sup>253</sup> Classification mark 7624 VC (classification mark 17 111 VNC).

<sup>254</sup> Meta stopped the test (freely translated) "*when it became clear that the data was not or could not be accurate enough for the advertising community to adopt OLR for reporting or measurement purposes. The supply of OLR data to partners did not provide sufficient additional benefits in terms of measuring attribution*" (classification mark 7547 VC (classification mark 14 680 VNC)).

<sup>255</sup> Classification mark 14 747 VC (classification mark 17 145 VNC).

<sup>256</sup> Classification mark 3691 VC (classification mark 5682 VNC).

## II. The implementation of the commitments procedure

### A. THE PRELIMINARY ASSESSMENT

179. On 2 April 2021, the case team sent Meta a preliminary assessment, the main elements of which are summarised below and which pertain to: the applicability of European Union law (1), the delineation of the relevant markets (2), Meta's dominant position on these markets (3) and the competition concerns identified (4).

#### 1. THE APPLICABILITY OF EU LAW

180. Three elements must be present for practices to be capable of appreciably affecting trade between Member States<sup>257</sup>:

- the existence of at least potential trade between Member States in the services in question;
- the existence of practices likely to affect such trade;
- the appreciability of this possible effect on trade.

181. Meta is a company active throughout the European Union and among a significant part of the global population. Moreover, the practices in question are implemented throughout France and are likely to foreclose a major player in online non-search advertising.

182. The practices in question are likely to limit the offering of advertiser services by advertising intermediaries on the inventories of a major player in the Display industry, active at the global level. They may at least potentially make it more difficult for intermediaries from other Member States to penetrate and develop the French market, thereby contributing to the partitioning of markets. They are therefore likely to affect intra-Community trade.

183. The appreciability of this potential effect on trade can be established if the turnover from the sale of advertising inventory on Facebook, Instagram and the MAN exceeds €40 million and Meta's market share exceeds the 5% threshold set by the European Commission in its Communication No. 2004/C 101/07 of 27 April 2004<sup>258</sup>, and the Court of Justice of the European Union.

184. The practices at issue are therefore likely to have an appreciable effect on trade between Member States within the meaning of Article 3 of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 of the TFEU), and must be examined not only in the light of national law but also in the light of EU competition law.

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<sup>257</sup> See the European Commission's Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty [now Articles 101 and 102 of the Treaty on the Functioning of the European Union].

<sup>258</sup> Point 52.

## 2. THE RELEVANT MARKETS

185. According to Criteo, the practices are organised around two related relevant markets:
- the market for social networking services, in which Meta is active as a service provider to various users, including individuals and advertisers, and in which it would have a dominant position;
  - the market for intermediation and ad serving services on social networks, where Meta and Criteo are active on the service offering side.
186. Criteo believes that if the Autorité were to adopt a narrower segmentation of the relevant market, limited to the sale of advertising space to advertisers, Meta's market power on the other sides of the market, and in particular on the side concerning users, should also be taken into account insofar as it is a multisided market.

### a) Principles

187. The definition of product market and geographic market, in the context of the application of Articles 102 TFEU and L. 420-2 of the French Commercial Code (Code de commerce), is used in order to determine whether the undertaking in question holds a dominant position and whether this position enables it to prevent effective competition on the relevant market, by giving it the power to behave to an appreciable extent independently of its competitors and customers and of consumers.
188. The concept of the relevant market in fact implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned<sup>259</sup>.
189. An examination for this purpose cannot be limited to the objective characteristics of the products and services concerned. The competitive conditions and the structure of supply and demand in the market must also be taken into account<sup>260</sup>.
190. The identification of relevant product markets is implied from the existence of competitive constraints. Companies are subject to three sources of competitive constraints: demand-side substitutability, supply-side substitutability, and potential competition. From an economic perspective, for the definition of the relevant market, demand substitutability is the most immediate and effective disciplining factor vis-à-vis suppliers of a given product<sup>261</sup>.
191. Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional

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<sup>259</sup> Decision 85/76 *Hoffmann-La Roche v Commission*, EU: C: 1979:36, paragraph 28. See also Commission Notice on the definition of the relevant market for the purposes of Community competition law (Commission Notice) OJ No C 372, 9.12.1997, page 5.

<sup>260</sup> Decision 322/81 *Nederlandsche Banden Industrie Michelin v Commission*, EU :C :1983 :313, paragraph 37; Decision T-556/08 *Slovenská pošta v Commission*, EU :T :2015 :189, paragraph 112.

<sup>261</sup> Decision 322/81 *Nederlandsche Banden Industrie Michelin vs Commission*, EU :C :1983 :313, paragraph 37; Decision T-556/08 *Slovenská pošta vs Commission*, EU :T :2015 :189, paragraph 112.

costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved<sup>262</sup>.

192. In France, the Autorité has recalled that "*a relevant market is defined as the area where the supply and demand of a specific product or service meet. [...] Full substitutability between products or services rarely occurs. The Conseil therefore considers as substitutable and on the same market any products or services that can reasonably be considered by consumers as alternatives that they can choose between to meet the same demand*"<sup>263</sup>.
193. The geographical market is the territory where the companies are engaged in the relevant supply and demand and where competition conditions are uniform.
194. The definition of markets in the digital economy, which is characterised by the existence of numerous platforms, is likely to present certain specificities. In its Opinion 18-A-03 on data processing in the online advertising sector the Autorité recalled that "*analysis must take into account the two-sided nature of many markets and any connections between these markets*". The Autorité's Merger Control Guidelines also state that "*[i]n the case of two-sided markets, the economic equilibrium in one market cannot be assessed independently of the conditions prevailing in another market. The two markets, although distinct, operate in an interdependent manner, a specificity that can be taken into account both at the market delineation stage and in the analysis of the effects of the transaction on competition and efficiency gains*"<sup>264</sup>. In its Decision 18-DCC-18, the Autorité reiterated that the examination of a two-sided market can therefore be made by defining a single market with two inseparable sides, or by analysing the two separate sides as two related markets<sup>265</sup>.
195. In this case, the preliminary assessment took into account Meta's presence in the markets for social networking services and online non-search advertising.

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<sup>262</sup> Commission Notice on the definition of the relevant market for the purposes of Community competition law, 9 December 1997, paragraph 20.

<sup>263</sup> See in particular Decision 10-D-19 of June 24, 2010 regarding practices implemented in the markets for the supply of gas, heating installations and the management of heating networks and collective boiler rooms, paragraphs 158-159 (French only); Decision 10-D-13 of 15 April 2010 on the practices implemented in the handling sector for the transport of containers in the harbor of the Le Havre, paragraph 220 (French only); ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 20 January 2011, Perrigault, No. 2010/08165.

<sup>264</sup> Autorité de la concurrence Merger Control Guidelines.

<sup>265</sup> Decision 18-DCC-18 of 1 February 2018 relating to the acquisition of sole control of the company Concept Multimedia by the Axel Springer Group, paragraph 23.

## b) The markets for social networking services

196. Various decisions by European competition authorities concern social networks and the relevant markets to which they belong.
197. In the Facebook/WhatsApp merger decision (2014)<sup>266</sup>, the Commission considered that social network services could be defined, "*while there is no established definition,*" as "*services which enable users to connect, share, communicate and express themselves online or through a mobile app.*" Meta had indicated that "*the Facebook social networking service consists of the following core functionalities: user profile, newsfeed, and timeline*"<sup>267</sup>. The Commission's analysis focused on the substitutability between social networks and communications services and concluded that "*while consumer communications apps like Facebook Messenger and WhatsApp offer certain elements which are typical of a social networking service, in particular sharing of messages and photos, there are important differences.*" Meta told the Commission that in any event WhatsApp is not in competition with Facebook. This is notably due to the lack of core social networking functionalities in WhatsApp.<sup>268</sup>
198. In the Microsoft/LinkedIn decision (2016)<sup>269</sup>, the Commission defined a market for professional networking services<sup>270</sup>. The Bundeskartellamt, in its decision on Meta's practices, also considered that there was a specific demand from the users' point of view for social networking services<sup>271</sup> and proposed segmenting this market according to the users' profile, considering that the demands of the group of personal users were not similar to those of the group of professional users.
199. The investigation did not result in a consensus among the players interviewed on the definition of social networks and the scope of the relevant markets to be taken into account.
200. Meta maintains that it (freely translated) "*is in competition with many services to attract and retain the attention of users by providing them with appropriate services, and considers that it is not possible to rely on differences in functional characteristics to draw relevant conclusions on the degree of substitutability between different platforms, for the purpose of determining a possible segmentation of the market definition*"<sup>272</sup>. It believes that (freely translated) "*regardless of exactly how a service (or content provider) attracts users - whether by offering similar features to what Facebook currently offers or different features - it is a competitor to Facebook to the extent that it seeks to capture the limited attention time of users.*"<sup>273</sup> Finally, Meta reiterates that (freely translated) "*in order to adapt to the highly competitive, dynamic and constantly changing environment in which they operate, each of the services provided by Facebook, including the Facebook Service and Instagram, have*

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<sup>266</sup> European Commission, Decision of 3 October 2014, Facebook / WhatsApp, COMP/ M.7217, point 46.

<sup>267</sup> . European Commission, Decision of 3 October 2014, Facebook / WhatsApp, COMP/ M.7217, point 48.

<sup>268</sup> European Commission, Decision of 3 October 2014, Facebook / WhatsApp, COMP/ M.7217, point 50.

<sup>269</sup> European Commission, decision of 6 December 2016, Microsoft / LinkedIn, COMP/M.8124.

<sup>270</sup> European Commission, decision of 6 December 2016, Microsoft / LinkedIn, COMP/M.8124, point 125.

<sup>271</sup> Decision of the Bundeskartellamt, 6 February 2019, B6-22/16, Facebook. Freely translated.

<sup>272</sup> Classification mark 10 638.

<sup>273</sup> Classification mark 10 612.

*evolved significantly over time.*"<sup>274</sup> Meta cites various new services such as: Instagram Direct (2013), Live Video on Facebook and Instagram (2016), Stories (2016 on Instagram and 2017 on Facebook), Facebook Marketplace (2016), Facebook Watch (2017) and Instagram TV (2018)<sup>275</sup>.

201. Twitter considers itself to be (freely translated) "*in competition with Facebook, Instagram, Whatsapp, YouTube, Snap, Pinterest, TikTok, Reddit and LinkedIn*"<sup>276</sup>, while Google considers that "*YouTube does not have the range of features typical of a social networking service*" but is "*a video content sharing platform that brings together creators, viewers and advertisers.*"<sup>277</sup>
202. While Snapchat argues that the market definitions of the European Commission remain relevant<sup>278</sup>, LinkedIn believes that there is no need to distinguish between professional and personal social networks<sup>279</sup> and that the segmentations that exist in the decisional practice are not well-founded<sup>280</sup>. In its opinion (freely translated), "*consumers use Facebook to socialise and share content with friends but also use Facebook for professional purposes.*"<sup>281</sup>
203. Twitter argues that (freely translated) "*regardless of the use (private or professional) for which the social network was originally conceived, there are commonalities in their functionality and the purposes of the intended uses may overlap. For example, while some people may use LinkedIn as a "professional" network to discuss their career paths and promotions, some parts of the population, in particular journalists, may use Twitter for the same purpose, and others, in particular lawyers, may prefer Facebook groups for this purpose. For this reason, it is difficult to describe any of these networks as a "professional" social networking service.*"<sup>282</sup>
204. According to the preliminary assessment, which acknowledged in particular the lack of consensus among the responses to the market test on the services that can be considered as social networks and on the substitutability between the different services, the exact definition of the market for social network services can be left open as this does not affect the relevant conclusions.

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<sup>274</sup> Classification mark 10 613.

<sup>275</sup> Classification marks 10 614 and 10 615.

<sup>276</sup> Classification mark 11 432 VC (classification mark 14 075 VNC).

<sup>277</sup> Classification mark 11 767.

<sup>278</sup> Classification mark 6895 VC (classification mark 13 825 VNC).

<sup>279</sup> Classification marks 11 079 to 11 084.

<sup>280</sup> Classification mark 11 079.

<sup>281</sup> Classification mark 11 080.

<sup>282</sup> Classification mark 11 435.

### c) The markets for online advertising

205. Meta asserts that advertising on social networks belongs to the same market as other forms of advertising and believes that the segmentation between search advertising and display advertising made by the decision-making practice is no longer justified.
206. The following discussion focuses on the distinction between search and non-search advertising (i) and the various forms of non-search advertising (ii).

#### *i- Online search advertising and non-search advertising*

207. According to Meta, all forms of advertising have the ultimate goal of increasing sales. As such, the intermediate marketing objectives (e.g., brand awareness, interactions with apps, etc.) achieved by search and display advertising would overlap<sup>283</sup>. For example, Meta believes that both display advertising and search advertising achieve objectives such as brand awareness<sup>284</sup>.
208. In its Google/AdSense decision of 20 March 2019, the European Commission considered that search advertising belongs to a separate market from online non-search advertising<sup>285</sup>. In its Decision of 19 December 2019<sup>286</sup> regarding practices implemented in the online search advertising sector, the Autorité de la concurrence also found that search advertising belonged to a separate market from online advertising, for the following reasons:
- Online search advertising is distinct from other forms of online advertising. It is based on an active search by the internet user;
  - Online search advertising has particular features in terms of format;
  - The degree of substitutability between search advertising and other forms of online advertising is also limited from the point of view of the suppliers.
209. In particular, the Autorité de la concurrence considered that "*although other forms of online advertising offer better targeting features, particularly through contextual or behavioural ads and ads on social networks, they cannot target ads as precisely as online search advertising. Regarding contextual and behavioural advertising, and advertising targeted to an internet user's social networking profile, analysing the content of the pages they have viewed, their browsing history, and social media reveals the focus of the internet user's interests, but not an immediate need revealed by an active search with a keyword. There is no demand expressed by the internet user at a specific moment, and the ad content may not correspond to the internet user's true current interests when they view a website. These advertisements are therefore less likely to be converted into purchases*"<sup>287</sup>.

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<sup>283</sup> Classification mark 10 641.

<sup>284</sup> Classification mark 10 641.

<sup>285</sup> Commission Decision of 20 March 2019 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union TFEU and Article 54 of the EEA Agreement, AT.40411 - Google Search (AdSense).

<sup>286</sup> Decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector.

<sup>287</sup> Decision 19-D-26 of 19 December 2019 regarding practices implemented in the sector of online search advertising sector, paragraph 293.

210. According to the preliminary assessment, a large majority of the companies interviewed also consider that online search and non-search advertising have important differences, and that they do not belong to the same relevant markets.
211. For example, Publicis stated that (freely translated) "*search is fundamentally different from other levers because:*
- *It is above all a service provided to users. It allows users to find the content they are looking for on the internet (editorial, shopping, entertainment, apps, etc.);*
  - *When advertising is displayed here which is targeted to queries, we are in a "pull marketing" approach and not "push marketing" like the other levers;*
  - *Search is also distinguished by its formats, text links, titles and descriptions compared to Display, native or video formats on other levers".<sup>288</sup>*
212. Havas believes that these two forms of advertising (freely translated) "*are completely different levers, businesses, and modes of purchase*"<sup>289</sup>.
213. It can be seen from the decision-making practice and the preliminary assessment that a majority of companies consider that non-search advertising does not exert a sufficient competitive constraint for it to be included in the same market as online display advertising.

#### ***ii- Online non-search advertising***

214. As explained above, non-search advertising space is sold either directly by the publisher or through intermediaries. Social networks market their advertising space directly through their own technologies in the area of bidding, buying, targeting, display and campaign performance measurement. The largest social networks also allow media buying platforms for advertisers to provide services that enhance some of the functionality also provided by social networks, such as bid settings, product recommendations and conversion metrics. Some shopping platforms, such as Criteo's, make it possible to run advertising campaigns linked on social networks and in Open Display.
215. The following discussion relates to the demand-side platforms for advertising space and then to the sale of online non-search advertising space.

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<sup>288</sup> Classification mark 3353 VC (classification mark 6315 VNC).

<sup>289</sup> Classification mark 2983.

*Demand-side platforms for online non-search advertising*

216. In its Google/Fitbit decision (2020), the European Commission defined several markets for advertising technology services (Ad Tech), although the results of its market test were inconclusive on the exact delineation of the markets: search advertising network services; Display advertising network services; Display advertising SSP services; Display advertising DSP services<sup>290</sup>; Display advertising server services for publishers; Display advertising server services for advertisers; and data analytics services. It considers that, in geographic terms, there is no evidence to challenge the decision-making practice, at least regarding the European dimension of these markets<sup>291</sup>.
217. Criteo is active in the Display DSP services market. Criteo's services are unique in that they combine access to the inventories accessible via the real-time bidding of Open Display, with access to Meta's advertising inventory.
218. According to Criteo (freely translated), "*the conditions for buying ad space offered by Open RTB, i.e. most Ad exchanges, are still generally different from those offered by API partners, and in particular Facebook. In the first instance, the modalities for communicating data between Criteo, Facebook and the Ad exchanges is different. On Ad exchanges, Criteo receives information about each auction triggered by the browsing activity of users, so that it can participate in real time. Conversely, Facebook does not send any real-time information about individual auctions held at the level of each inventory. Through the APIs, Criteo provided information to Facebook to refine its inventory buying strategy. Secondly, unlike the Ad Exchanges where the bidding procedure rules are clearly laid down and known to the participants, decisions regarding the selection of advertisers are made by Facebook itself. Finally, due to the vertical integration of Facebook's ad serving and advertising intermediation services, the creative process (i.e., assembling images, logos and text that make up the ad displayed to the user) is performed directly by Facebook. In open RTB, the creative process is generally not handled by the Ad exchange, whose role is limited to organising the ad auctions.*"<sup>292</sup>
219. In the same vein, Nanigans considers, for example, that (freely translated) "*search, social and display [...] are distinct segments [...] on account of the structures of teams*" at clients and "*technical buying modalities that differ for each segment*"<sup>293</sup>. According to Kenshoo (freely translated), "*campaigns on social networks are rolled out in an environment where Facebook has complete control over ad bidding, targeting and delivery and only allows its own pixel in the ads themselves. More traditional display or RTB campaigns involve ad auctions that are controlled by the publisher, a supply-side partner ("SSP") or another intermediary.*"<sup>294</sup>
220. The scope of the market for DSP services remains uncertain due to the specificities of the two ecosystems, and it cannot be ruled out that there is a DSP market for buying Display ad space on social networks. Indeed, from the perspective of DSPs, which seek to access a range of advertising inventories in order to then offer services to advertisers, the sale of online ad

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<sup>290</sup> DSPs are defined by the Commission as platforms that allow advertisers to purchase ad inventory from various sources (ad exchanges, ad networks and SSPs). See European Commission decision, Google / Fitbit, case M.9660, 17 December 2020.

<sup>291</sup> European Commission decision, Google / Fitbit, case M.9660, 17 December 2020.

<sup>292</sup> Classification marks 15 839 and 15 840 VC (classification marks 16 776, 16 777 VNC).

<sup>293</sup> Classification mark 6862 VC (classification mark 14 035 VNC).

<sup>294</sup> Classification mark 13 772 VC (classification mark 17 082 VNC).

space on social networks could be considered as complementary and not as a substitute for the advertising inventories sold via SSPs in Open Display.

221. Not many players provide services that make it possible to buy advertising space in a linked way on social network inventories and in Open Display. In this respect, the preliminary assessment indicates that in Open Display, the various DSPs compete in auctions organised by the SSPs and are not, in this context, in direct competition with Meta or with players such as the MBPs. When an advertiser runs a campaign on Meta, it does not participate in the open RTB organised by the SSPs and the advertiser can choose between using only Meta's technologies or using the services of an MBP.
222. In conclusion, the practices reported by Criteo are likely to have an impact on its DSP service offering, which competes with Meta's vertically integrated service offering for advertisers and the offerings of DSPs in Open Display. However, the scope of the market for DSP services can be left open as this does not affect the conclusions.

#### *The sale of online non-search advertising space*

223. The practice of competition authorities on the question of whether advertising on social networks constitutes a separate market from other forms of online non-search advertising is not well developed.
224. In 2010, in an opinion on online advertising, the Autorité addressed the question of substitutability between search advertising and advertising on social networks, considering that "*offers closely targeting the profiles of social network users do not appear to be regarded as a credible alternative to search-based ads, mainly because they do not satisfy users' active queries*".<sup>295</sup> The Commission upheld this position in its Google AdSense decision in 2019, stating that "*the ability of online search ads to respond to a precise interest of the user distinguishes them from other forms of online non-search advertising that offer enhanced targeting capabilities, including contextual ads, behaviourally targeted ads and ads placed on social networks*"<sup>296</sup>.
225. As regards the substitutability between different forms of Display advertising, on and off social networks, the European Commission indicated that the responses to its market test were not uniform and left this question open in the Facebook/WhatsApp (2014) and Microsoft/LinkedIn (2016) decisions<sup>297</sup>. In the Google/Fitbit decision (2020)<sup>298</sup>, it considered the relevant product markets to be those for the provision of online Display advertiser services with a potential segmentation relating to the provision of online Display advertiser services outside of social networks<sup>299</sup>.
226. In its Online platforms and digital advertising, Market study final report of 2020, the Competition and Markets Authority (CMA) conducted a competitive analysis of the Display advertising market, without isolating social networks. It considered that compared with search advertising, there is significantly greater differentiation in the types of display

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<sup>295</sup> Opinion 10-A-29 of 14 December 2010 on the competitive operation of online advertising, paragraph 170.

<sup>296</sup> European Commission decision of 20 March 2019, AT.40411 - Google Search (AdSense), paragraph 141.

<sup>297</sup> European Commission, decision of 3 October 2014, Facebook / WhatsApp, COMP/ M.7217 and decision of 6 December 2016, Microsoft / LinkedIn, COMP/M.8124, paragraph 163.

<sup>298</sup> European Commission decision, Google / Fitbit, case M.9660, 17 December 2020, paragraph 240.

<sup>299</sup> Idem.

inventory that can be bought by advertisers. It added that Display advertising on social networks is sometimes treated as a separate segment<sup>300</sup>. In its competitive analysis, the CMA stated that *the platforms most commonly mentioned and ranked highest [in its market test] were Facebook, Google DV360 (Google's demand-side platform for purchasing advertising in open display) and Twitter*".<sup>301</sup>

227. The Australian Competition and Consumer Commission (ACCC) also conducted a competitive analysis of the Display advertising market, without isolating social networks<sup>302</sup>. Nevertheless, it highlighted the *"significant advantages that advertising on social networks (and, in particular, advertising on Facebook) provides to advertisers, which are differentiated from other websites and apps, not just by the size of the audience, but also the level of user engagement on the platform."* In its opinion, *"the advertising inventory on social media platforms is a specific kind of display advertising [...] which is differentiated from other kinds of display advertising. For instance, users of social media platforms can interact with advertising – for example, by 'liking' advertisements"*<sup>303</sup>.
228. In its opinion on online advertising issued in 2018, the Autorité had indicated that *"the responses of stakeholders suggest that the specificities of social networks, especially Facebook, are mainly related to the data generated on these services, which is then used to offer targeting options to advertisers. According to a significant proportion of stakeholders, the detail and relevance of data for advertising purposes are one of the specificities of advertising on social networks. Other stakeholders underlined the very competitive advertising rates on social networks and the quality of ad integration within the social network environment, in the form of native advertising"*<sup>304</sup>.
229. In this case, the preliminary assessment leaves open the question of the definition of a specific market for advertising on social networks, due in particular to the responses to the market test, which show a wide variety of viewpoints. It defines a market for online non-search advertising that includes the sale of advertising inventories from social networks and the inventories of other categories of publishers who sell their display advertising space, either directly or via technical intermediaries for publishers and advertisers.
230. In the first instance, the preliminary assessment reiterates that Meta's inventory offering is not limited to advertising on social networks, to the extent that Meta markets the proprietary inventories of its two social networks, Facebook and Instagram, but also those of its Messenger service, which is not a social network, and finally, those of third-party publishers using its Meta Audience Network intermediation service.
231. Secondly, the preliminary assessment puts into perspective some of the arguments put forward by the respondents regarding the specificities of social networks, including: the use of social networks mainly on mobile devices<sup>305</sup> and a significant amount of time spent on

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<sup>300</sup> Online platforms and digital advertising, Market study final report, 1 July 2020, Competition and Markets Authority, page 243.

<sup>301</sup> Online platforms and digital advertising, Market study final report, 1 July 2020, Competition and Markets Authority, page 248.

<sup>302</sup> Digital Platforms Inquiry, Final Report, June 2019, page 98.

<sup>303</sup> Digital Platforms Inquiry, Final Report, June 2019, page 98.

<sup>304</sup> Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraph 177.

<sup>305</sup> Classification marks 3225, 3020.

social networks<sup>306</sup>; a better quality of targeting<sup>307</sup>, in particular on socio-demographic criteria<sup>308</sup>; the possibility of using certain specific and highly diverse formats<sup>309</sup>; the possibility of putting in place numerous interactions with the advertising<sup>310</sup>; the possibility of using a large number of key performance indicators<sup>311</sup>, making it possible to work on all of the objectives<sup>312</sup>.

232. With regard to the size of the audience and the time spent, the preliminary assessment notes that certain social networks have lower audiences in France than some services with different themes. With regard to data analysis and ad targeting capabilities in logged environments, other stakeholders that are not social networks have developed this type of environment<sup>313</sup>. According to the preliminary assessment, it was not established that Google has less effective targeting capabilities than other social networks. Similarly, regarding the diversity of campaign objectives and key performance indicators, the preliminary assessment cites the Google Display Network, which offers an equally wide range of objectives to develop "sales", "leads", "website traffic", "interest" for a brand or product, "audience and brand awareness," and "app promotion." It adds that while Meta offers one of the most varied and innovative ranges of formats, including Image, Video, Carousel, Slideshow and Collections ads, other players who are not social networks provide extensive ranges of formats<sup>314</sup>. With regard to performance indicators, the preliminary assessment notes, for example, that Google's DV360 DSP offers at least six indicators (CPA<sup>315</sup>, CPC, CPIAVC<sup>316</sup>, CPM, CTR<sup>317</sup>, % visible).
233. Some advertisers interviewed emphasised the fact that there is no major difference<sup>318</sup> between social network advertising and other forms of display advertising, in particular as regards ad targeting methods<sup>319</sup> and the data used<sup>320</sup>, the campaign performance

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<sup>306</sup> Classification marks 2938 VC (classification mark 2952 VNC) and 2941.

<sup>307</sup> Classification mark 3065 VC (classification mark 3143 VNC).

<sup>308</sup> Classification mark 2938 VC (classification mark 2952 VNC).

<sup>309</sup> Classification mark 3066.

<sup>310</sup> Classification mark 3882.

<sup>311</sup> Classification marks 3192 VC (classification mark 3206 VNC) and 3942.

<sup>312</sup> Classification mark 3398 VC (classification mark 6020 VNC).

<sup>313</sup> This is the case in particular for Google, above all via the Gmail account of users of its services, Amazon, or audiovisual actors such as TF1, France Télévisions and M6.

<sup>314</sup> It is also the case, for example, of Verizon Media, which offers Carousel advertising formats, or native ads, which are integrated into the graphic and editorial environment of the site or app.

<sup>315</sup> Cost Per Action. CPA (Cost Per Action) is an online advertising payment model in which payment is based solely on qualifying actions such as sales or registrations. The actions defined in a cost-per-action agreement relate directly to some type of conversion, with sales and registrations among the most common. This does not include deals based solely on clicks, which are referred to specifically as cost-per-click or CPC" ([https://www.marketingterms.com/dictionary/cost\\_per\\_action/](https://www.marketingterms.com/dictionary/cost_per_action/))

<sup>316</sup> Cost per impression audible and visible at completion.

<sup>317</sup> Click Through Rate.

<sup>318</sup> Classification mark 4037 VC (classification mark 5992 VNC).

<sup>319</sup> Classification mark 3164 VC (classification mark 3911 VNC) and 3882.

<sup>320</sup> Classification mark 3246.

measurement<sup>321</sup>, and the functionality of the buying platforms<sup>322</sup>. Pinterest<sup>323</sup>, Meta<sup>324</sup>, LinkedIn<sup>325</sup>, Twitter<sup>326</sup> and TikTok<sup>327</sup> also consider that it is unjustified to define a market for online advertising on social networks, in particular with regard to the targeting capabilities of stakeholders, the possibility of targeting the same audiences on and off social networks, and the categories of advertisers who buy ad space.

234. Thirdly, the preliminary assessment highlights certain differences between the sale of advertising space on social networks, which relate to, firstly, the conditions for buying ad space and the services provided by DSPs to advertisers, and secondly, the conditions of competition.
235. As such, it indicates that there are significant differences in the structure of offerings and the conditions of competition outside and on social networks.
236. Therefore, ad space is purchased on social networks entirely via programmatic technologies, whereas, according to the SRI, nearly 40% of advertising revenue outside of social networks is not generated with programmatic technologies. Furthermore, among the different programmatic buying methods, the role of auctions in display advertising on social networks appears to be significantly more important than for other forms of display advertising<sup>328</sup>.
237. The social network offering to advertisers also has a much greater degree of vertical integration than in other forms of advertising. Apart from social networks, the sale of ad space for the vast majority of publishers relies on the intervention of a wide range of independent intermediaries on both the supply and demand side that are interconnected with them.
238. Furthermore, to assess the degree of substitutability between online advertising on social networks and ads displayed outside social networks, it is advisable to consider the situation from the perspective of the different categories of requesters. In this respect, while an

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<sup>321</sup> Classification marks 3193 and 3882.

<sup>322</sup> Classification mark 3892.

<sup>323</sup> Classification mark 14 220.

<sup>324</sup> Classification mark 10 630.

<sup>325</sup> LinkedIn considers that (freely translated) "*advertisers are able to target specific users (or user characteristics) across the internet, regardless of the websites or apps on which the user has viewed their ads*" (classification mark VC 11 089, classification mark VNC 11 369).

<sup>326</sup> Twitter maintains that (freely translated) "*while there are distinctions between online advertising on social networks and online advertising on other websites, we do not believe these distinctions are relevant from the perspective of a market definition*" (classification mark VC 11 436).

<sup>327</sup> TikTok does not consider (freely translated) "*that there are significant differences between online non-search advertising on social networks and other online non-search advertising, as there is likely to be crossover between the users and consumers targeted, the advertisers, the purposes and types of use, and how the ad functions*" (classification mark VC 14 151, classification mark VNC 15543).

<sup>328</sup> Meta stated that (freely translated) "*the vast majority of ad inventory sold by Facebook worldwide is purchased via auctions on AdsManager*," although it does offer an alternative method called "*Reach and Frequency*" buying for select advertisers. Twitter also stated that its ads (freely translated) "*are served to users via a bidding mechanism*" (classification mark 11 426). SnapChat stated that its ads are (freely translated) "*priced at auction*" (classification mark VC 6889, classification mark VNC 13 819), similarly to LinkedIn, which states on its site that ads are also sold at auction. Pinterest also stated that (freely translated) "*advertising inventories are sold through auctions*" (classification mark 14 174). However, TikTok offers auctions and sales by reservation (classification mark VC 14 130, classification mark VNC 15 522).

advertiser is likely to achieve the same objectives for a campaign on both categories of advertising inventories, access to Meta's inventories for certain intermediaries is essential, so that they can offer a complete range of inventories, including Open Display and social networks, and compete with a player such as Meta, whose offering to advertisers makes it possible to run campaigns on its proprietary inventory and on the inventories of publishers using Meta Audience Network.

239. With regard to the geographical dimension of the market, the decisional practice generally defines markets for online advertising as national in scope<sup>329</sup> due to the importance of language in the campaigns and the scope of advisers' purchases of advertising space.
240. In conclusion, the preliminary assessment identifies a market for online non-search advertising, but leaves open the question of whether there is a relevant market for online Display advertising on social networks. This market would be national in scope.

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<sup>329</sup> Commission decision of 6 September 2018, case M.8788 – Apple/Shazam, paragraphs 138-140; Commission decision of 6 December 2016, case M.8124 – Microsoft/LinkedIn paragraphs 163-164; Commission decision of 3 October 2014, case M.7217 – Facebook/WhatsApp, paragraphs 44 and 83.

### 3. META'S POSITION ON THE MARKETS

241. In its opinion on online advertising, the Autorité stated that "*The user services markets on which Google and Facebook are active appear to present many types of significant barriers to entry and expansion, which will now need to be taken into consideration for analysis of the competitive situation of the overall online advertising market and legal qualification of the stakeholders' positions. Barriers to entry and expansion on the user services markets are likely to impact the capacity of stakeholders to increase their advertising revenue and market shares*"<sup>330</sup>.

#### a) Social networking services

242. Among social networks, Facebook and Instagram are the services with the largest audience, far ahead of any other social networks.

243. According to Médiamétrie, in August 2020 Facebook, after Google Search, was the second most visited site in France with 28.2 million unique visitors per day, against 17.9 million for the video-sharing platform YouTube. In terms of unique visitors per month, YouTube was just ahead of Facebook, with 46.1 million visitors, compared to 45.9 for Facebook. Add Instagram and Meta's audience becomes much larger than that of YouTube. Instagram had a total of 32.4 million monthly unique visitors and 14.2 million unique visitors per day<sup>331</sup>.

244. According to Médiamétrie, the audience of the other social networks competing with Facebook is significantly lower, and has been so for several years. In terms of unique visitors per month (August 2020), Snapchat, LinkedIn, Twitter and Pinterest were, according to Médiamétrie, the 13<sup>th</sup>, 27<sup>th</sup>, 35<sup>th</sup> and 38<sup>th</sup> most visited sites in France, respectively. Meta's primary competitor, Snapchat, had an audience approximately three times smaller than the combined audience of Facebook and Instagram. As of November 2021, the respective audiences and positions of the different networks had not changed significantly. The audience in the table below, which reproduces Médiamétrie's data, is measured in unique visitors per month and unique visitors per day. These indicators are also used in the annual and financial reports of social networks.

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<sup>330</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraphs 226 et seq..

<sup>331</sup> [https://www.mediametrie.fr/sites/default/files/2020-10/2020%2010%2002%20-%20CP%20Audience%20Internet%20Global\\_Ao%C3%BBt%202020.pdf](https://www.mediametrie.fr/sites/default/files/2020-10/2020%2010%2002%20-%20CP%20Audience%20Internet%20Global_Ao%C3%BBt%202020.pdf)

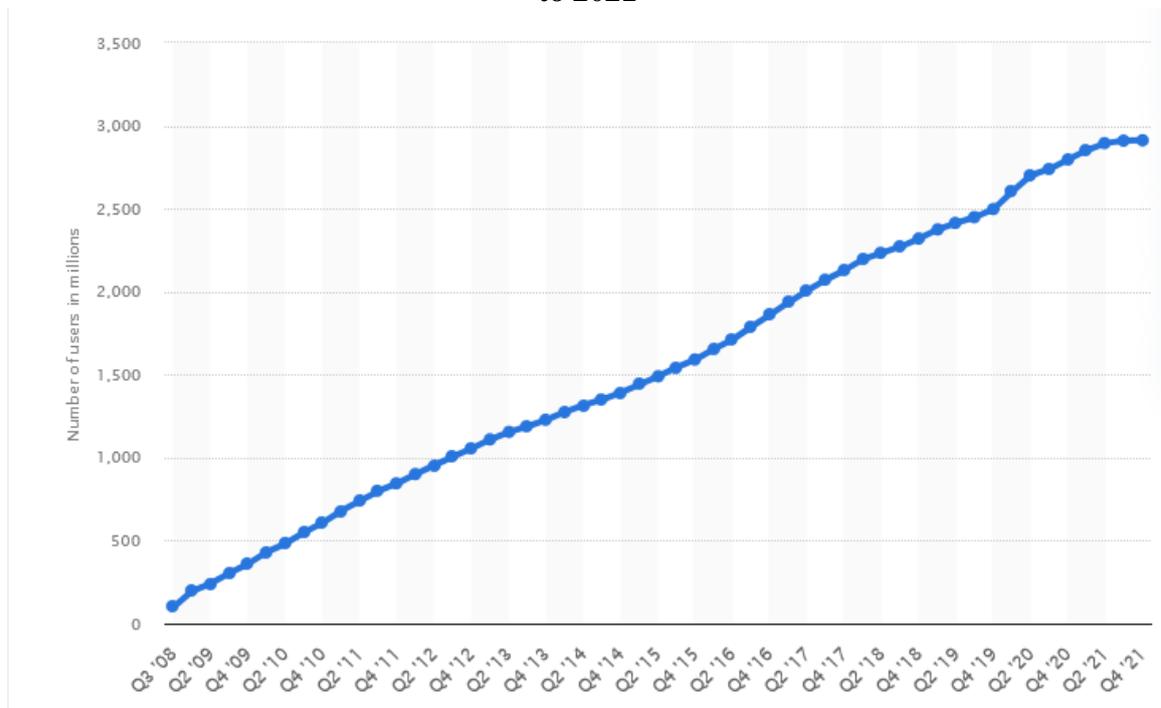
Médiamétrie states that "*The Total Internet Audience measurement is based on a unique panel of more than 25,000 individuals aged 2 years and older, of whom 6,200 are web users with two or three screens (computer and/or mobile phone and/or tablet), allowing the total audience of over 7,000 brands and 1,000 apps to be measured "natively". The measurement benefits from innovative hybridisation methodologies developed by Médiamétrie which combine panel data and Big Data. This total measurement provides audience results for each screen: computer, telephone, mobile and tablet. The measurement takes into account the internet browsing of web users regardless of the location, connection method (3G/4G/WiFi or protocol (http/https), for all of the websites and apps*".

**Table 6 - Médiamétrie audience measurements of the main social networks active in France among the 50 most visited brands in France (August 2020 and November 2021)**

	August 2020		November 2021	
	Unique visitors per month	Unique visitors per day	Unique visitors per month	Unique visitors per day
<b>Facebook</b>	45,954,000	28,275,000	46,931,000	28,782,000
<b>Instagram</b>	32,409,000	14,242,000	32,727,000	15,995,000
<b>Snapchat</b>	22,851,000	16,178,000	24,376,000	17,716,000
<b>LinkedIn</b>	17,235,000	2,919,000	18,193,000	3,549,000
<b>Twitter</b>	16,314,000	4,878,000	15,940,000	5,298,000
<b>Pinterest</b>	15,671,000	2,457,000	NA	NA

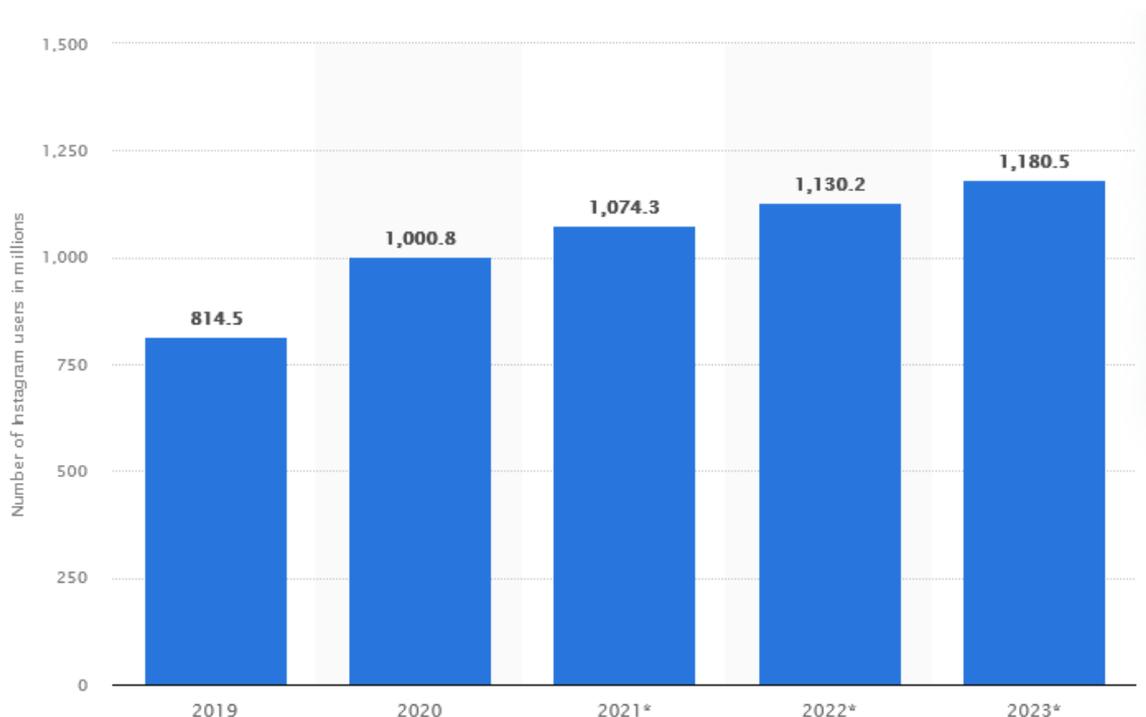
245. Since their launch, the number of users of Facebook and Instagram has also continued to grow.

**Figure 8 - Evolution of the number of monthly Facebook users worldwide from 2008 to 2021**



Source: Statista

**Figure 9 - Evolution of the number of monthly Instagram users worldwide from 2019 to 2023<sup>332</sup>**



Source: Statista

246. Furthermore, between 2016 and 2019, the time spent on Facebook and Instagram each day also rose<sup>333</sup>.

**Table 7 - Evolution of the average time spent each day (in minutes) on Meta services (2016-2019)**

	2016	2017	2018	2019
<b>Facebook</b>	[confidential]	[confidential]	[confidential]	[confidential]
<b>Instagram</b>	[confidential]	[confidential]	[confidential]	[confidential]
<b>Messenger</b>	[confidential]	[confidential]	[confidential]	[confidential]
<b>WhatsApp</b>	[confidential]	[confidential]	[confidential]	[confidential]

Source: Meta

247. Social media platforms compete for users' attention through a combination of parameters including: size and type of user network, content, innovative features, Ad load and quality of advertising, privacy, platform 'governance', and price<sup>334</sup>. To the extent that social

<sup>332</sup> The graph takes into account Internet users of any age who access their Instagram account via any device at least once per month. (<https://www.statista.com/statistics/183585/instagram-number-of-global-users/>)

<sup>333</sup> Classification marks 7568, 7569 VC (classification marks 14 701, 14 702 VNC).

<sup>334</sup> Online platforms and digital advertising, Market study final report, 1 July 2020, Competition and Markets Authority, page 117.

networking services offer content, services and technologies that are characterised by significant differentiation, many Internet users use multiple services that can be considered complementary. This market characteristic is likely to contribute to the stability of Meta's market position.

248. Certain competitive advantages enjoyed by Meta were highlighted in 2018 by the Autorité de la concurrence in its opinion on online advertising, including access to data, network effects, technological innovations, vertical integration, audience and advertising inventories<sup>335</sup>.
249. Given its audience, Meta is likely to benefit from direct and indirect network effects<sup>336</sup> that are larger than those of some of its competitors, allowing it to attract new users, advertisers, developers and content providers. These effects are likely to significantly increase the barriers to entry and expansion in the social networking and advertising markets.
250. Meta can also take advantage of the complementary nature of Facebook, Instagram and its Messenger and WhatsApp services and the large number of services available on Facebook (ads, games, messaging, videos, news). Its offering allows it to meet a wide range of consumer needs in a market where Meta's competitors all offer more specialised products. For example, TikTok is mainly used to create and share short music clips, and appears to be in competition with Facebook Watch. LinkedIn's offering seems to compete with Facebook Jobs. Twitter appears to be the closest competitor to Facebook's features that allow its users to consume news and other media, such as Newsfeed.
251. Meta's large audience and range of services also allows it to benefit from significant economies of scale and to leverage more data to improve its services to Internet users and advertisers. By offering better recommendation and personalisation features, a platform can become more attractive to consumers and prompt them to spend more time using its services. The platforms with larger quantities of consumer data can target the advertising more effectively and can better monetise their services. In this regard, various players interviewed during the investigation, including Pinterest<sup>337</sup> and [confidential]<sup>338</sup>, indicated that Meta is of such a size that it can collect an unrivalled amount of data.
252. In conclusion, Facebook is an "essential" platform for users as it has a larger consumer network than other platforms and can meet a wider range of needs. Meta is likely to have significant market power in the market for social networking services. In this regard, it is striking that some of privacy-related controversies surrounding Meta do not appear to have had a lasting impact on its image, and have had little effect on the growth of its user base.

## **b) The sale of online non-search advertising space**

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<sup>335</sup> Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector.

<sup>336</sup> A product market exhibits network effects when the overall utility of the product to the customers who use it depends not only on their personal use of it, but also on the number of other customers who use the product. Such a network effect is a direct network effect. The existence of network effects, if positive (i.e., if the utility of the product rises with the number of other customers who use it), can be a difficult barrier for a new entrant to overcome. An indirect network effect occurs when the value of a good to a user rises as the number and variety of complementary products or the number of other types of users increases (Autorité de la concurrence Merger Control Guidelines).

<sup>337</sup> Classification marks 14 183, 14 185.

<sup>338</sup> Classification mark 6894 VC (classification mark 13 824 VNC).

253. The preliminary assessment presents an evaluation of Meta's market share in the Display advertising segment and in the Social advertising segment, based on information provided by the players interviewed and the firm Oliver Wyman.
254. The table below reproduces the figures published in the 'Observatoire de l'e-pub' from 2018 to 2019.

**Table 8 - The online advertising market in France (2018-2019)**

<b>Turnover in millions of euros</b>	<b>2018</b>	<b>2019</b>
<b>Display</b>	1,034	1,165
<b>Social</b>	1,197	1,447
<b>Total Display and Social</b>	2,231	2,612
<b>Search</b>	2,275	2,478
<b>Other levers (affiliate marketing, emailing &amp; price comparison sites)</b>	721	772
<b>Total</b>	5,228	5,862

255. The estimate of Meta's market share in the preliminary assessment was based on Oliver Wyman's estimate of the overall size of the market and information provided by the various players interviewed. Oliver Wyman provided details on the different categories of online

advertising and the players<sup>339</sup>, the sources and data used<sup>340</sup>, and the geographic revenue allocation criteria<sup>341</sup> considered in the analysis.

256. Based exclusively on the data used in the 'Observatoire de l'e-pub', Meta's market share in 2019 in the French online non-search advertising market was 49% in 2018 and 50% in 2019. On the online advertising on social networks market, Meta's market share was around 90% in 2019, and 75% when including YouTube in that market.
257. Oliver Wyman's estimates<sup>342</sup> of Meta's revenues and its competitors' revenues in France are similar to Meta's reported revenues, in particular based on the billing addresses of advertisers<sup>343</sup>. These data are consistent with the turnover data collected during the investigation, which means that Meta's market share can be estimated at approximately 50% in the online non-search advertising market.

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<sup>339</sup> Classification mark 6193: "*Social*":

- *Definition: advertising revenue from sites considered to be social networks (not the use of social network tools, such as FB Audience Network)*
- *Players:*
- *Traditional: Facebook including Instagram, Twitter, LinkedIn, Pinterest, Twitch, etc.*
- *Video: Facebook including Instagram, Twitter, Snapchat, LinkedIn, Tik Tok, etc."*

*"Display"*:

- *Definition: advertising revenue from all formats (traditional, instream/outstream video, audio, OPS), all devices (PC, mobile, IPTV) and all selling forms (programmatic and non-programmatic) - excluding advertising revenue from social networks*
- *Players:*
- *Traditional: SRI, Retail media, players in the area of 'native', Webedia, Unify, etc.*
- *Instream video: SRI, YouTube, Digiteka, etc.*
- *Outstream video: SRI including Teads, Amazon, etc.*
- *Audio: SRI, Deezer, Spotify, etc.*
- *OPS: SRI, Webedia, Veepee, Konbini, Amazon, Reworld, etc."*

<sup>340</sup> Classification mark 6192: *(Freely translated) "For reporting agencies that are part of SRI, the data comes from these agencies, which transmit it to SRI via an online platform that collects and consolidates the data (Individual agency data are not available, neither to Oliver Wyman nor SRI). They are then sent -aggregated- to Oliver Wyman. Two types of members: reporting agency members, and non-reporting partners (including Google and Facebook) (see here the list of 2020 members). For data provided by the agencies: The UDECAM collects the data from agencies, and a bailiff ensures that the agencies' feedback is anonymised and sent to Oliver Wyman. For the other data, from agencies outside SRI, the data is estimated by Oliver Wyman, based on cross-referencing of public data and interviews with around 50 players. By triangulating the data, Oliver Wyman makes its best estimate of the market. We measure the revenues of the agencies, so the supply side or "first seller". For example, we count what Teads earns for its advertising partners (we don't take into account the margin), and we do the same for Outbrain or Taboola, to name a few. The data is fairly comprehensive, as we estimate it player by player, but we present it consolidated."*

<sup>341</sup> Oliver Wyman indicated that (freely translated) for "*SRI members: the data communicated to Oliver Wyman only relates to France and does not contain any detailed information (advertiser's billing address, location of the click, IP address)*" (classification mark 6208)

<sup>342</sup> Classification mark 6214 VC (classification mark 13 765 VNC).

<sup>343</sup> Classification marks 7566 and 7567 VC (classification marks 14 699 and 14 700 VNC).

258. The following table presents the data from the 'Observatoire de l'e-pub' on advertising revenues generated in France.

**Table 9 - Advertising revenues generated in France**

Turnover in millions of euros	Turnover in the 'Observatoire de l'e-pub' <sup>344</sup>	
	2018	2019
<b>Social networks</b>		
Meta	1,092	1,315
LinkedIn	[confidential]	[confidential]
Snapchat	[confidential]	[confidential]
Twitter	[confidential]	[confidential]
TikTok	[confidential]	[confidential]
Pinterest	[confidential]	[confidential]
Twitch	[confidential]	[confidential]
YouTube	[confidential]	[confidential]
<i>Total social networks excluding YouTube</i>	[confidential]	[confidential]
<i>Total social networks including YouTube</i>	[confidential]	[confidential]
<b>Total market (Display and Social)</b>	<b>2,231</b>	<b>2,612</b>

259. The estimates in the preliminary assessment as regards Meta's market share are similar to those made by the CMA<sup>345</sup> for the UK market and the ACCC<sup>346</sup> for the Australian market in their recent reports on online advertising. The ACCC estimated Meta's market share in the display advertising market to be 51% in 2018 and 62% in 2019. According to the CMA, Meta's market share in 2019 was between 45% and 55%.

260. Meta's main competitor in the online non-search advertising market is Google. In its Google/Fitbit decision (2020), the Commission estimated that Google's market share in France was between 20% and 30%, as in the majority of EU Member States. Around two-thirds of its Display advertising revenue in 2019 was generated via sales of advertising space

<sup>344</sup> Classification marks 6211 VC et seq.

<sup>345</sup> See page 246 of the report, available at: [https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final\\_report\\_Digital\\_ALT\\_TEXT.pdf](https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf)

<sup>346</sup> See page 37 of the report, available at: <https://www.accc.gov.au/system/files/Digital%20Advertising%20Services%20Inquiry%20-%20Interim%20report.pdf>

from third-party publishers using its intermediation services, and one-third from sales of its own advertising space, primarily YouTube. Google's competitive position in this respect differs to a significant extent to that of Meta, for whom more than 95% of its revenue comes from sales of its own advertising space (Facebook, Instagram, Messenger), which is six times larger than YouTube's revenue.

261. The revenues of the social networks competing with Meta are significantly lower than Meta's own revenues, with approximately [confidential] times the advertising revenues of [confidential], who has the largest revenue after Meta<sup>347</sup>.
262. In this regard, the market for online non-search advertising is characterised by significant barriers to entry and expansion, which result primarily from the substantial network effects enjoyed by Meta<sup>348</sup>.
263. First, the need for providers of display advertising inventory to expand their user base in order to gain access to consumer attention and data means that the largest barriers to entry are on the user side. In this regard, Meta's combined audience and the extent of the services it provides allow it to generate more advertising revenue than its competitors. According to LinkedIn (freely translated), "*the volume of customer engagement and the ability to reach the target audience with greater frequency [...] is Facebook's key advantage in display advertising. Facebook, Instagram and WhatsApp have much higher user engagement compared to other social media platforms, as their combined users represented around 1,800 minutes on average spent on their platforms in July 2019, while LinkedIn users represent less than 2% of that on average (32 minutes) on LinkedIn.*"<sup>349</sup> In order to compete with Meta in a meaningful way, it is necessary to offer improvements and relevant content to keep consumers engaged, but this requirement is even more difficult to fulfil since the current market situation is characterised by the presence of differentiated offerings, which regularly incorporate new features and innovations.
264. Second, the investment and fixed costs required to develop and maintain an advertising platform are likely to generate significant economies of scale, thereby creating a cost advantage for larger competitors.
265. Third, Meta has data analysis capabilities for targeting and campaign performance measurement that are superior to those of its competitors<sup>350</sup>, which can allow it to sell its ad inventory at higher prices.
266. Fourth, the transaction costs faced by advertisers when using multiple advertising platforms are likely to benefit Meta and create a barrier to entry for smaller players, to the extent that using the self-service Ads Manager interface makes it possible to reach the largest audience along with that of Google<sup>351</sup>.

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<sup>347</sup> Classification mark 11 053 VC (classification mark 11 337 VNC).

<sup>348</sup> See in this regard the decision of the Competition Market Authority, "completed acquisition by Facebook, Inc (Now Meta Platforms, Inc) of Giphy, Inc, 30 November 2021", paragraph 5.192.

<sup>349</sup> Classification mark 11 087.

<sup>350</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraphs 125 et seq.; Decision of the Competition Market Authority, "Completed acquisition by Facebook, Inc (Now Meta Platforms, Inc) of Giphy, Inc, 30 November 2021", paragraph 5.192

<sup>351</sup> Autorité de la concurrence Opinion 18-A-03 of 6 March 2018 on data processing in the online advertising sector, paragraphs 117 et seq.

267. Meta's market power can be illustrated by the evolution of various financial indicators:

- Meta's global advertising revenue grew from US\$26.8 billion to US\$117.9 billion between 2016 and 2021, with annual growth of between 25% and 30%. This growth is significantly larger than the growth in the online advertising sector and, in particular, the growth in the online non-search advertising sector;
- Meta's has very high levels of profitability. In 2016, its worldwide net income (US\$10 billion) represented approximately 37% of its revenues. This was 39% in 2017 and 2018, 26% in 2019, and 33% in 2020 and 2021<sup>352</sup>;
- Revenues per user also follow a continuous growth curve, both worldwide and in France, both for Facebook and Instagram. Between 2016 and 2019, Facebook's average worldwide monthly revenue per user grew from [confidential] to [confidential] US dollars, and Instagram's from [confidential] US dollars<sup>353</sup>.

268. The preliminary assessment concludes that Meta is likely to hold a dominant position on the French market for online non-search advertising. On a market restricted to online advertising on social networks, Meta, with its significantly larger market share, would also be likely to hold a dominant position.

#### 4. THE LIKELY HARM TO COMPETITION

269. The practices identified above, concerning the withdrawal of Criteo's MBP status, the actions taken to disparage Criteo, and the withdrawal of its access to the ULB and OLR APIs are likely to constitute practices prohibited by Articles L.420-2 of the French Commercial Code (Code de commerce) and 102 of the TFEU.

##### a) Principles

270. In its judgment of 7 April 2022 in the *Gibmedia* case, the Cour d'appel de Paris (Paris Court of Appeal) recalled well-established European case-law, according to which "*the existence of a dominant position is characterised by the position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on a relevant market, by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers whilst the finding that a dominant position exists does not in itself imply any reproach to the undertaking concerned, the latter has a special responsibility [...] not to allow its conduct to impair genuine undistorted competition*"<sup>354</sup>.

271. According to the Court of Justice, "[...]the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the

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<sup>352</sup> <https://investor.fb.com/investor-news/default.aspx>

<sup>353</sup> Classification mark 7569 VC (classification mark 14 702 VNC).

<sup>354</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022, companies of the Google group (issued on decision 19-D-26 of 19 December 2019 regarding practices implemented in the online search advertising sector, paragraph 149. See also Judgment of the Court of 9 November 1983, *Michelin v Commission* aff. 322/81, ECR 3461, paragraph 57 and Judgment of the Court (Fifth Chamber) of 14 November 1996, *Tetra Pak v. Commission*, C-333/94 P, ECR I-5951, paragraph 24.

*structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*"<sup>355</sup>. The Court of Justice held that Article 102 TFEU "covers not only abuse which may directly prejudice consumers but also abuse which indirectly prejudices them by impairing the effective competitive structure"<sup>356</sup>.

272. It follows from established European case-law under Article 102 TFEU, as recalled in the judgment of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022 in the *Gibmedia* case, that "it is not necessary to demonstrate that abusive conduct of the undertaking with a dominant position had a concrete anti-competitive effect on the markets concerned". It is sufficient in that respect to demonstrate that the abusive conduct "is capable of having, or likely to have, such an [anticompetitive] effect. (judgements of the Court of 17 December 2003, *British Airways*, C-322/81, paragraph 293, of 3 September 2003, *Michelin II*, T-203/01, paragraph 239 and of 9 September 2010, *Tomra T-155/06*, paragraph 289"<sup>357</sup>. The Cour d'appel de Paris (Paris Court of Appeal) concluded that (freely translated) "while it is necessary to demonstrate the existence of at least a potential anticompetitive effect, proof of an actual and quantifiable disruption of the functioning of the markets concerned does not have to be provided"<sup>358</sup>. Furthermore, in order to qualify a practice as an abuse of a dominant position, competition authorities are not bound to demonstrate the existence of an anticompetitive intent on the part of the company<sup>359</sup>.
273. The practices of the company in a dominant position must be likely to produce effects either on the market it dominates or on related markets, as recalled by the Cour d'appel de Paris (Paris Court of Appeal) in the above-mentioned *Gibmedia* case (freely translated): "case law accepts that an undertaking with a dominant position on a given market may be reproached for an abuse, the effects of which affect other markets, provided that the market on which it is dominant and the markets on which the abuse has its effects are sufficiently connected (CJEU 6 March 1974, *Istituto Chemioterapico Italiano*, C-6/73, paragraph 22; 3 October 1985, *Centre belge d'études de marché*, C-311/84, paragraph 26)"<sup>360</sup>.
274. In the *Navx*, *Amadeus* and *Gibmedia* decisions, the Autorité de la concurrence either accepted commitments or imposed injunctions relating to the conditions under which Google defined and applied the rules that users of the Google Ads service had to respect in order to

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<sup>355</sup> Judgment of the Court (Fifth Chamber) of 3 July 1991, *Akzo v. Commission*, C-62/86, ECR I-3359; see also Judgment of the Court of First Instance (Third Chamber) of 7 October 1999, *Irish Sugar v. Commission*, T-228/97, ECR II-2969.

<sup>356</sup> Judgment of the Court of 13 February 1979, *Hoffmann-La Roche v. Commission*, 85/76, Rec. P. 461, point 125, and *Irish Sugar v. Commission*, point 229 above, point 232.

<sup>357</sup> (Paris Court of Appeal) of 7 April 2022, cited above, point 285.

<sup>358</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022, cited above, point 286.

<sup>359</sup> See the judgment of the Court of 19 April 2012 (*Tomra* case, C-549/10).

<sup>360</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022, cited above, point 295. See also judgment of the Court of First Instance of the EU of 12 December 2000, *Aéroports de Paris v. Commission*, case T-128/98; see also judgment of 14 November 1996, *Tetra Pak v. Commission*, cited above, point 27; CFI, 17 December 2003, *British Airways v. Commission*, case T-219/99.

access and use this service. In particular, it considered that the Google Ads rules were imprecise and that changes to the rules were not communicated to the websites. In addition, it found changes in the interpretation of the rules and discriminatory application of the rules.

275. As such, in its above-mentioned Decision 19-D-26, the Autorité considered that Google had "*infringed the provisions of Articles L. 420-2 of the French Commercial Code (Code de commerce) and 102 of the TFEU, by defining and applying the Rules of the Google Ads platform [...] in a non-transparent, non-objective and discriminatory manner*". The Cour d'appel de Paris (Paris Court of Appeal) confirmed in this case that proving unfair trading conditions involves assessing whether the dominant undertaking's conduct was carried out to a "*reasonable extent*" and on the basis of an "*objective justification*" by verifying that the conduct was both necessary and proportionate to achieve the objective of the dominant undertaking<sup>361</sup>. In addition, the Cour d'appel de Paris (Paris Court of Appeal) confirmed that the Autorité does not have to establish that the dominant company would benefit from the practices it implements in order to demonstrate the existence of unfair trading conditions<sup>362</sup>.
276. Finally, in its past decision-making practice, the Autorité de la concurrence has already had occasion to recognise that a strategy of disparagement<sup>363</sup> implemented by pharmaceutical companies, publicly discrediting a particular generic drug, may constitute an abuse of a dominant position insofar as such disparagement (i) is not based on objective conclusions, but on unverified assertions and (ii) is likely to influence the structure of the market due to its potential or actual effects on commercial partners and customers<sup>364</sup>.
277. As such, in the first instance, the Autorité verifies whether the commercial discourse made by the dominant undertaking is based on objective findings or on unverified assertions<sup>365</sup>. The Cour d'appel de Paris (Paris Court of Appeal), in a ruling dated 11 July 2019, Janssen-Cilag SAS, recalled that (freely translated) "*the disclosure of information which is likely to discredit a product constitutes disparagement, unless the information in question relates to a matter of general interest and has sufficient basis in fact, and provided that it is expressed with a certain degree of restraint.*"<sup>366</sup>
278. Second, in order to determine whether the company's commercial discourse is likely to influence the market structure, the Autorité examines the expected or actual effects of such

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<sup>361</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022, cited above, point 130.

<sup>362</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 7 April 2022, cited above, points 131 and 132.

<sup>363</sup> Disparagement is defined as the act of publicly discrediting an identified person, product or service ((French only) Autorité de la concurrence Decisions 13-D-11, paragraph 365; 13-D-21, paragraph 360; 17-D-25, paragraph 530 and 20-D-11, paragraph 770).

<sup>364</sup> Autorité de la concurrence Decision 13-D-11 of May 14, 2013 regarding practices implemented in the pharmaceutical sector and Decision 20-D-11 of 9 September 2020 regarding practices implemented in the treatment of Age-related macular degeneration (AMD) sector. See also the ruling of the Cour d'appel de Paris (Paris Court of Appeal) issued in the AMD case on 11 July 2019.

<sup>365</sup> Autorité de la concurrence Decision 07-D-33, paragraph 305; No. 13-D-11, paragraph 367; 13-D-21, cited above, paragraph 362; 17-D-25, cited above, paragraph 532 and Decision 20-D-11, cited above, paragraph 772

<sup>366</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal), 11 July 2019, Janssen-Cilag SAS and Johnson & Johnson, (issued on Decision 17-D-25 of 20 December 2017), point 353.

discourse on the business partners or potential customers of its competitors<sup>367</sup>. In this context, the brand recognition and trust that the players in the sector place in the disparaging company make it easier to establish the link between the dominant position of the company and the practice of disparagement, as it is likely to significantly reinforce the impact of the disparagement.

#### **b) Analysis of the practices**

279. According to the preliminary assessment, whereas Meta was about to launch its own *retargeting* service which would compete with Criteo's, thereby completing its vertical integration, it decided to diminish the quality of the offering to intermediaries.
280. To this end, Meta applied various practices described in paragraphs 131 to 178:
- the impairment of the conditions of access to advertising inventories and data on advertising campaigns on its social network under conditions that are neither transparent nor objective;
  - the use of disparaging conduct and differential treatment of MBPs with respect to an intermediary offering a service that competes with its own service.
281. The preliminary assessment indicates that these practices would likely have the effect of strengthening Meta's dominant position on the market for online non-search advertising, where Meta and Criteo are in competition with each other. In effect, these practices would likely diminish the ability of intermediaries to provide advertisers with value-added services on the Facebook social network based on their own advertising technologies, and could weaken their position on this market. Meta's practices are also likely to put some MBPs at a disadvantage compared to other MBPs in the Ad Tech category that are selected by advertisers.
282. The competition concerns identified in the preliminary assessment relate to the MBP programme, the conduct of Meta's sales teams, and the withdrawal of the ULB API.

#### ***i- The MBP programme***

##### *Withdrawal of the support service before the start of the probation period*

283. First, the Autorité notes that the withdrawal of the support service before and during the probation period raises competition concerns.
284. Indeed, with the withdrawal of access to dedicated support in January 2018, Criteo was only able to access TMP support, which was available to advertisers and was unsuitable for Criteo's needs. This decision by Meta was likely to put Criteo at a disadvantage in terms of running campaigns, and lower the quality of its services, even though it was in a probation period as far as Meta was concerned. However, one of the advantages of technical support is that a company can benefit from assistance "*to increase the conversion rate*" of clients (see paragraph 78), a rate whose low level was precisely the reason Meta had reproached Criteo. Furthermore, the triggering of the probation period should not have changed the existing support provided to MBPs.

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<sup>367</sup> Autorité de la concurrence Decision 10-D-32, cited above, paragraph 307; 13-D-11, cited above, paragraph 368; 13-D-21, cited above, paragraph 363; 17-D-25, cited above, paragraph 537 and 20-D-11, cited above, paragraph 777.

*The late and opaque nature of the notification to Criteo that their MBP status would be withdrawn*

285. The conditions in which Criteo was informed of the decision to withdraw its MBP status, as well as to withdraw the support service, raise concerns in terms of the duration of the notice period, the transparency and the objectivity of the reasons for the withdrawal.
286. As such, prior to the actual withdrawal of MBP status, Criteo did not have the benefit of a 6-month notice period, as it does not appear to have received the above-mentioned email of 19 January 2018, due to the lack of a reliable sending and acknowledgement procedure within Meta's services (see paragraphs 133-135).
287. Moreover, the information provided by Meta regarding the reasons for the withdrawal of the support service and MBP status to Criteo lacks transparency and objectivity.
288. Indeed, the email of 19 January 2018 remains very unclear as to the reasons for the withdrawal of the dedicated support service (*Partner Manager*) from Criteo, as it mentions the need for Meta to focus on (freely translated) "*strategic initiatives with Partners that have synergies*" with Meta's objectives, while Criteo was apparently active in a "*narrow area*".
289. Subsequently, with regard to the triggering of the notice period, the email of 27 April 2018, which cites examples of violations that could lead to the withdrawal of MBP status, does not specify the acts that Criteo has allegedly committed, such as the investment categories affected by the poor performance. Nor does the correspondence of 19 April 2018 explain Meta's demands made to Criteo several months after the email of 19 January 2018, to regain its MBP status (see paragraphs 150-155). Similarly, while the correspondence of 19 January contains a link to a monthly performance report, it does not indicate which investment categories of MBPs would meet the objectives set by Meta.

*The intervention of a third party in the application evaluation process*

290. The intervention of third party companies in the MBP selection process is also likely to raise competition concerns, insofar as the third party company in question, Accenture (via Adaptly), is also active in the online advertising sector as a media agency, media audit provider and a MBP. This situation is likely to create conflicts of interest, differential treatment, and unjustified denial of access to MBP status.

*The requirements imposed on MBPs in terms of spend*

291. Finally, the requirements imposed on MBPs raise competition concerns, due to a lack of objectivity and transparency of the rules and their application, their instability, and the possible existence of differential treatment.
292. First, Criteo may have been treated differently than other MBPs in terms of the spend taken into account. It can be seen from an internal Meta email that violation of quality criteria, including Optimal DR investments, was not normally grounds for withdrawal of MBP status, and that the withdrawal of the status from Criteo was a "*one-off*" because it had been "*debadged*" from the Meta ecosystem on account of its "*optimal investment obligations*" and not on account of its "*minimum investment obligations*."<sup>368</sup>
293. Second, the conditions of access to monthly reports by MBPs are characterised by a lack of transparency and the contents of these monthly reports also lack objectivity. Indeed, Criteo

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<sup>368</sup> Classification mark 8293 VC (classification mark 17 137 VNC).

indicated to the investigation services that it had never been provided with the monthly reports, except for the one attached to the email relating to the probation period of 19 January 2018 (see paragraphs 89 and 134), and Meta was unable to prove that these reports had indeed been supplied. Furthermore, the reports also lack objectivity and transparency. For example, certain terms such as "*high-quality signal*", "*optimization*" and "*optimal DR*" are not defined in a sufficiently objective and transparent manner (see paragraph 91). Similarly, the concept of "*low-value action*" (see paragraph 85), which according to Meta is taken into account for calculating whether investment objectives have been achieved, is not defined. With regard more specifically to "*Optimal DR*" spend and the "*optimization*" of this spend, the reports do not allow MBPs to understand why campaigns would not be "*optimized for the advertiser's actual objectives*". The same applies to the graphs that are supposed to illustrate the breakdown of MBP spend (see paragraphs 90 to 93), which do not explain the respective position and importance of the products taken into account in assessing the quality of the spend. In this case, the sudden drop in Criteo's Optimal DR rate is not explained in an objective and transparent manner by Meta (see paragraphs 146 to 149), to the extent that it states both that (freely translated) "*Criteo's spend characteristics may have evolved over time*" and that "*Criteo optimized for clicks, not conversions, which did not correspond to the definition of Optimal DR in the second half of 2017*"<sup>369</sup>. The suddenness of the drop in Criteo's Optimal DR investment rate is in itself evidence of the lack of objectivity of the criteria relating to spend quality. Criteo stated that (freely translated) "*regarding possible explanations for the change observed in July 2017, the only change that Criteo believes occurred at that time is that Criteo stopped advertising on the Facebook Audience Network (i.e. the Facebook network outside of Facebook's own properties). However, it seems that this criterion is taken into account in another category of the monthly report. Nevertheless, Criteo is unable to provide any further explanation for the observed change in Optimal DR in July 2017, nor for how this criterion is calculated by Facebook.*"<sup>370</sup>

294. Moreover, the modified requirements imposed by Meta on MBPs raises competition concerns. While it is legitimate for Meta to allow the objectives of its programme to evolve, these evolutions must be implemented under objective, transparent and non-discriminatory conditions. They must also ensure that MBPs have predictability in their activities on Meta. In this regard, the introduction of the "*investments optimised for the advertiser's actual objectives*" requirement in the second half of 2017 (see paragraph 142) may have made Meta's requirements even less transparent.
295. A partner cannot therefore understand, just by reading the reports, what the charges are, and cannot therefore effectively modify their behaviour in order to meet Meta's requirements and keep their MBP status.
296. Beyond the level of Optimal DR investments, Meta's reasons for withdrawing MBP status, which are based on the fact that Criteo's "*click-based*" business model was obsolete and that it was unable to optimize "*for conversions*", are not objectively justified. As such, in its response to the CMA's report on digital advertising, Meta indicated that it considers CPC and CPA (cost per action) to be the best metrics to reflect ROI compared to CPM<sup>371</sup>. The

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<sup>369</sup> Classification mark 16 068.

<sup>370</sup> Classification mark 16 748.

<sup>371</sup> CMA, Online platforms and digital advertising Market study, final report, 1 July 2020, point 5.194: Facebook submitted that *CPM is not an appropriate measure of price to use in our assessment as it does not accurately reflect return on investment (ROI), which is the objective that advertisers ultimately care about. It*

"click-based" model is not explicitly prohibited by the successive rules imposed on MBPs as such, and Meta itself proposes to advertisers that they run campaigns using "link clicks," which "measure interest" in an ad<sup>372</sup>. Furthermore, it appears from the documents in the file that Meta wanted Criteo to adopt a solution similar to CPM, the oCPM.

297. Ultimately, the criteria used by Meta do not reflect the level of performance expected from MBPs, which should actually be based on objective notions such as performance in terms of actual spend, number of ad spaces purchased, conversion rate, etc.
298. In conclusion, the conditions of access and the requirements imposed by Meta on FMPs in order to benefit from the status and the services associated with it are characterised by a lack of stability, transparency, objectivity and by the fact that different parties are treated differently.

#### *ii- The conduct of the sales teams*

299. The lack of objectivity and the unfair conditions regarding the withdrawal of the MBP status are also illustrated by the fact that Meta staff made disparaging remarks about Criteo, which prompted the latter's clients to stop using its services (see paragraphs 156 to 164).
300. First, Meta's disparagement of Criteo prevented Criteo from regaining its MBP status following its suspension in 2018, even though Criteo, in the context of its negotiations with Meta, had agreed to allow its business model to evolve by phasing out the use of the ULB API in the context of product recommendations, and using Meta's conversion optimisation solution to increase the Optimal DR investment rate. Indeed, the withdrawal of the MBP status could be regarded as definitive, owing to the "*resistance within the internal teams to reinstate Criteo*" in Meta's ecosystem, and the risk, according to Meta, of tarnishing the "*credibility of the sales team*" if Criteo had been quickly reinstated (see paragraph 163).
301. Second, the conduct of Meta's sales teams, which had disparaged Criteo's services, claiming that Criteo's tags were mismatched with Meta's, and suggesting to certain advertisers that they stop using Criteo's services from the end of 2017, was likely to benefit Criteo's competitors and tarnish Criteo's image and client portfolio. This conduct occurred even before the probation period had expired, which also made it more difficult for Criteo to achieve its objectives during that period<sup>373</sup>.
302. Finally, having excluded Criteo from the MBP programme, Meta did not want to reinstate it. Besides the lack of objectivity, the reasons for rejecting Criteo's application to the MBP programme were based on mere allegations, and Meta's sales teams never wanted Criteo to be reinstated in the MBP programme, believing that it would harm Meta's reputation (see paragraph 163).
303. In conclusion, this conduct by Meta reinforced the lack of objectivity and transparency in the withdrawal of MBP status and the subsequent refusal to reinstate Criteo in the programme.

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said that a better proxy for measuring ROI is CPA, which measures the cost of achieving a given action, eg a sale, or CPC."

<sup>372</sup> The "Link Click" is one of the objectives offered by Meta to advertisers, which are: "Offline Conversion", "Post Engagement", "Page Likes", "App Installs", "App Engagement", "Event Responses", "Lead Generation", and "Video views".

<sup>373</sup> Once again in this regard, it cannot be ruled out that Criteo received less favourable treatment, insofar as an internal email from Meta indicates that Meta does not generally communicate to advertisers about the fact that an MBP is in a probation period, except in the case of Criteo which was apparently special (classification mark 7754 VC (classification mark 17 115 VNC)).

*iii- The withdrawal of the ULB API*

304. The withdrawal of the ULB API raises competition concerns, in particular due to the fact that an intermediary's ability to provide services via its own advertising technologies was restricted. Whereas Meta criticised Criteo for failing to optimise its campaigns for conversions to justify the withdrawal of MBP status, the phasing out of the ULB API was in fact likely to diminish Criteo's ability to optimise for conversions, in the context of auctions and product recommendations.
305. Access to the ULB API was, however, the only way for this intermediary to use its product recommendation technologies and partially roll out its user-level bidding solution for the benefit of its clients on the social network. Indeed, using the traditional API is inadequate, insofar as part of Criteo's added value lies in its ability to predict the individual behaviour of a consumer, in order to determine the best bid and recommend the best products.
306. Furthermore, certain MBPs, including Nanigans, were given the opportunity to use this API in 2019, without Meta deciding to shut it down for all the companies that benefited from it. For example, some advertisers, including [confidential] from 2015, still use this API today, which tends to prove that this API is still operational. In this regard, phasing out access to the ULB API for a given intermediary is likely to limit the latter's added value and its ability to stand out in a context where advertisers, who are potential customers, have access to this same technology.
307. Finally, the competition concern relating to the ULB API is all the more serious because Criteo had used this API since 2016, following the phasing out of Facebook Ad Exchange.
308. In conclusion, the phasing out of the API access came three years after the shut-down of Facebook Ad Exchange in 2015, at which point Meta reinforced its vertical integration by ceasing the operation of this ad exchange. Phasing out access to this API prevented Criteo from optimising its predictive bidding and product recommendation technologies, despite the fact that these are key elements of the added value of its retargeting offering. Facebook's practices are likely to have had foreclosure effects by weakening Criteo's competitive pressure on Meta.

### c) Conclusion

309. It should be emphasised, as regards the importance of Meta in the business models of FMPs, that Meta constituted a relatively small share of Criteo's overall revenue in 2017. However, it seems justified to take into consideration the exceptional growth of Meta's turnover, which in the space of three years grew from US\$40.6<sup>374</sup> to 85.9 billion in 2020 worldwide<sup>375</sup>. Meta is the leading global player in non-search advertising, with revenues significantly higher than Google's in this sector. The growth of advertising on social networks is also higher than other forms of non-search advertising. Moreover, many MBPs do not have a size comparable to that of the complainant, and several of them only provide services on social networks, or even only on the Facebook social network. As such, Meta's practices are likely to have even more significant effects on these players.
310. In this context, the competition concerns relate to (i) the conditions of competition between MBPs and (ii) the competition between Criteo and Meta, on the one hand, and to the closing off of Meta's ecosystem of advertising technologies and products, on the other.
311. In the first instance, the conditions of access and the requirements imposed by Meta on MBPs in order to benefit from this status and the services associated with it are characterised by a lack of stability, transparency, objectivity, and by the fact that different parties are treated differently. This primarily concerns the transparency and objectivity of the criteria for defining the obligations of MBPs, the conditions under which Meta modifies these requirements, Meta's communication with MBPs regarding compliance with these requirements, and the conditions for suspending MBP status and associated services. They also concern the conditions of the probation period, during which the complainant did not benefit from favourable conditions, due to the consequences of having the support service withdrawn, the disparaging remarks made by Meta's sales teams, and the withdrawal of the OLR API.
312. Meta's practices have had the effect, at least potentially, of creating a competitive environment characterised by a lack of security and predictability for MBPs. Furthermore, the requirements imposed on MBPs in terms of their spend, which can be changed abruptly, likely limited their commercial freedom and innovation, as they favoured certain types of investments, formats, inventories and advertising products developed by Meta.
313. Second, Meta's practices, in particular the withdrawal of the ULB API, following the phasing out of Facebook Ad Exchange in 2015, had the effect of preventing an intermediary from optimising its predictive bidding and product recommendation technologies, even though these are key elements of the added value of its *retargeting* offering, which was in competition with an equivalent offering from Facebook. Meta's practices are therefore likely to have had the effect of weakening the competitive pressure on Meta from an intermediary that plays a unique role in stimulating competition. They are also likely to strengthen Meta's position in the market.

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<sup>374</sup> <https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx>

<sup>375</sup> <https://investor.fb.com/investor-news/press-release-details/2022/Meta-Reports-Fourth-Quarter-and-Full-Year-2021-Results/default.aspx>

## **B. THE INITIAL OFFER OF COMMITMENTS**

314. Following the notification of the preliminary assessment, Meta requested the benefit of the negotiated procedure and on 1 June 2021, it sent an initial offer to the Autorité comprising three types of commitments that aimed in particular to:
- "maintain" the objectivity, clarity and non-discriminatory application of the Ad Tech MBP<sup>376</sup> performance criteria;
  - provide compliance training to its sales teams; and
  - develop and make available "recommendation functionality" to Ad Tech MBP partners who have the Ad Tech MBP badge<sup>377</sup>.
315. The proposed commitments applied to suppliers of advertising technology involved in advertising campaigns which target users of the Facebook and Instagram services identified by Meta as being located in France.
316. The following discussion pertains to the definitions and scope of the initially proposed commitments (1), followed by the commitments relating to the Ad Tech MBP programme (2), sales communication (3), the recommendation functionality (4), and the review and monitoring of compliance with the commitments (5).

### **1. THE DEFINITIONS AND SCOPE OF THE COMMITMENTS INITIALLY PROPOSED**

317. In the first part of the initial document, Meta proposed various "definitions" that reiterated fundamental elements of the commitments, in particular as regards the definitions of "Facebook", Ad Tech MBP Status and Badge, and the recommendation functionality. This first part also included a general presentation of the commitments, concerning their duration and scope.
318. As such, in a section entitled "*General Presentation of the Commitments*," Meta proposed limiting the duration of the commitments to the following periods: three years from the date of implementation of the commitments relating to the Ad Tech MBP programme and sales communication, and two years for the commitments relating to the recommendation functionality. The date of implementation for the commitments relating to sales communication and the Ad Tech MBP programme was set at six months from the notification of the decision as regards the commitments relating to the MBP programme and sales communication, and three months for the commitments relating to the recommendation functionality.
319. Meta subsequently stated that the geographic scope of the commitments was limited to (freely translated) "*Ad Tech service providers participating in advertising campaigns targeting users of the Facebook and Instagram services identified by Facebook as being*

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<sup>376</sup> "Ad Tech MBPs" are companies with Meta Business Partner status in the "advertising technology" category.

<sup>377</sup> Under certain conditions, MBPs can have an "Ad Tech MBP badge". They are then privileged partners of Meta.

*located in France*". This paragraph was to be read in conjunction with the one defining the recommendation functionality.

320. Finally, with regard to the material scope of the commitments, Meta made a distinction between the commitments relating to the MBP programme and sales communication on the one hand, and those relating to the recommendation functionality on the other. Indeed, the recommendation functionality did not apply to Dynamics Ads campaigns based on a "product" catalogue on Instagram, but only on a "product" catalogue on facebook.com or the Facebook app.

## 2. THE INITIAL OFFER OF COMMITMENTS REGARDING THE MBP PROGRAMME

321. The first type of commitments relating to the MBP programme, which were intended to address the competition concerns relating to this programme, were structured around five themes:

- a commitment to "*maintain the objectivity, clarity and non-discriminatory application of the Ad Tech MBP Performance Criteria*", which would have been developed on quantitative thresholds based on one or more of these parameters: (i) the volume of the advertising activity of the MBP on Meta's Advertising APIs, (ii) the quality of ad spend on the Advertising APIs, in that this is directed toward defined objectives to help optimize advertisers' sales results on Meta's products and services (e.g., conversion objectives), or (iii) the extent of the use of Meta's products and services by the MBP, related to its advertising activity on the Advertising APIs. Meta also committed to making the Performance Criteria Description<sup>378</sup> publicly available and to providing access to the *Partner Center* to allow MBPs to track their performance and interpret and apply the Performance Criteria in a non-discriminatory manner. Meta specified that compliance with the Performance Criteria by an MBP would be independent of their use of the Recommendation Functionality;
- While indicating that it could implement any changes to the Ad Tech MBP Performance Criteria, Meta agreed that it would not do so more than once every six months, except as required by law, and that it would systematically notify the MBPs and the Autorité of any changes to the "*Performance Criteria Descriptions*" resulting from a "*Modification to the Ad Tech MBP Performance Criteria*." The notification must have taken place at least two months prior to the entry into force of the Modification and must have accurately described the Modification in relation to the previous version of the Performance Criteria Descriptions;
- Meta proposed a commitment on compliance and due diligence assessments for Ad Tech MBP. Meta committed to (i) conduct Compliance and Due Diligence Assessments for MBP in an objective, clear and non-discriminatory manner, (ii) ensure that the Assessments are based on established facts and objective reasons, (iii) ensure that the Ad Tech MBP Programme Rules include an indicative list of objective reasons that Meta will take into account when conducting Assessments, (iv) provide

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<sup>378</sup> « *Ad Tech FMP Performance Criteria Description: Explanatory description of the applicable Ad Tech FMP Performance Criteria and concepts used therein, including, where applicable, the types of Facebook objectives or placements that meet the Ad Tech FMP Performance Criteria, as well as, where applicable, references to commonly used terms in Facebook's Ads Manager and examples of best practice for fulfilling the Ad Tech FMP Performance Criteria* ».

any company that has failed an Assessment with a summary of the reasons for the failure (v) not to treat any applicant for MBP status or any MBP less favourably when evaluating the outcome of the Assessments in the context of obtaining Status and/or a Badge, (vi) to establish a procedure whereby applicants for MBP status may request a one-time review of the facts and reasons given by Meta in the event that they have failed the Assessment. The applicant concerned would have had two weeks from the Notification of Non-Compliance to request this review and provide evidence to support its objection. The review would have been conducted by a separate team within Meta and finally (vii) to promptly inform the Autorité of the request for review and to conduct the review within one month;

- Meta envisaged that an MBP who failed to meet the applicable Performance Criteria during a Status and/or Badge review would be placed on probation. In this respect, it committed to (i) inform individually and without delay the MBPs placed in Probation Period, specifying the Criteria that have not been met, (ii) start the Probation Period on the date on which the Notification of Probation Period is communicated and make it last at least 3 months (iii) terminate the Probation Period upon any Modification of Performance Criteria occurring during the Probation Period and re-initiate a new Probation Period, (iv) provide resources and technical support to all MBPs granted Status and/or Badge during the Probation Period, and (v) notify MBPs of withdrawal at the end of the Probation Period. The Notification would have included information about the Criteria that were not met. Finally, Meta committed to allowing MBPs to reapply following a withdrawal. However, MBPs would not have been able to apply for up to six months from the date of the Notification of Withdrawal;
- Finally, on the fifth theme relating to the MBP programme, in the event that Meta chose to work with External Providers to assess compliance with the Performance Criteria by MBPs or conduct Compliance and Due Diligence Assessments for Ad Tech MBP, Meta committed to obtain a written and binding confirmation from such providers that they would comply with the relevant commitments and implement appropriate compliance procedures and assessments to prevent a conflict of interest arising from any current or future activity in relation to the provision of Ad Tech Services by the relevant External Provider or an entity owned or acquired by the External Provider.

### **3. THE INITIAL OFFER OF COMMITMENTS REGARDING SALES COMMUNICATION**

322. Meta subsequently proposed a series of commitments relating to sales communication, which were intended to address the competition concerns regarding disparagement.
323. Meta therefore committed to "*provide regular compliance training to relevant sales teams on sales communication to advertisers regarding the performance of Ad Tech FMP Partners*".
324. The training would have focused on compliance with French and EU competition law and on the risks of distortion of competition that could result from Meta's external communication. In particular, sales teams would have been trained not to inform any advertiser of a possible withdrawal of Ad Tech MBP status before or during the Probation Period.

#### **4. THE INITIAL OFFER OF COMMITMENTS REGARDING THE RECOMMENDATION FUNCTIONALITY**

325. In order to address the competition concerns regarding the ULB API, Meta committed to developing a new API, called the Recommendation Functionality, and to allow Ad Tech MBPs who had the Ad Tech MBP Badge to use it. Meta committed to developing and providing access to this functionality within three months of receiving a complete application. The MBP would have had to agree to a *"Standard Addendum to Meta's Terms and Conditions and Rules for Beta Functionality Testing"* and a confidentiality agreement would have been signed with the Ad Tech MBP, which would have benefited from access to this new API.
326. The initial offer of commitments relating to the recommendation functionality was structured around three themes: eligibility criteria, criteria for retaining access to the recommendation functionality, and conditions for withdrawing such access.
327. On the first point, Meta proposed four eligibility criteria for the recommendation functionality: (i) the applicant would have had to have (freely translated) *"historical and proven experience operating recommendation and bidding algorithms,"* (ii) demonstrate having spent a minimum of \$10 million via Meta's advertising APIs on Dynamic Ads products on Meta's Services, including ads during the past 180-day period, (iii) be sufficiently integrated with its advertising clients' CRM (Customer Relationship Management) in that it could access and interact with standard information and finally (iv) be able to serve advertising data across multiple publishers in that it used its product recommendation and bidding algorithm. The latter two criteria specified that the applicant must have had an activity in which only two advertisers or two publishers accounted for more than 25% of the activity. Historical and proven experience could be acknowledged on the basis of two cumulative criteria (point 41 of the initial commitments).
328. Meta subsequently provided criteria for retaining access to the recommendation functionality, including one that implied that the Ad Tech MBP must have created added value by using the recommendation functionality. Meta specified that for the purposes of these commitments, an Ad Tech MBP Partner would have added value by using the recommendation functionality (freely translated) *"when the total number of conversions weighted by the value of each conversion on ads served using the recommendation functionality is larger than the total number of conversions weighted by the value of each conversion from Facebook for the same ads."* In this regard, Meta (freely translated) *"may conduct performance tests"*.
329. Finally, Meta reserved the right to withdraw access to MBPs (freely translated) *"whose use of the recommendation functionality has led to serious or repeated incidents relating to the privacy of Facebook users or the integrity and security of Facebook's services in violation of Facebook's Terms and Policies."* In addition, there was no possibility for an MBP to make a new access request when their access to the recommendation functionality had been withdrawn. Meta could also decide to withdraw access to the recommendation functionality in case of external events.

#### **5. THE INITIAL OFFER CONCERNING A REVISION OF THE COMMITMENTS AND MONITORING COMPLIANCE WITH THEM**

330. With regard to the revision of the commitments, Meta proposed that in the event of a (freely translated) "*significant change in the environment which would make all or part of the commitments impossible to maintain as they stand or contrary to other applicable rules*", that they should approach the Autorité "*in order to find the best way of adapting the commitments so that they can be maintained*". Furthermore (freely translated), "*Facebook and the Autorité may meet to discuss the relevance of maintaining or adapting all or part of the commitments until their expiry, in particular in light of changes in the structure of competition, the functioning of the market, technological innovations and changes in usage in the market(s) concerned*".
331. Moreover (freely translated), "*temporary unavailability of the Partner Center, the Recommendation Functionality, or any other service available to eligible Ad Tech FMP Partners due to privacy or security breaches of Facebook's services, scheduled maintenance outages, and/or unforeseen technical problems shall not constitute a breach of the commitments. Facebook shall use its best efforts to remedy any temporary unavailability as soon as possible and shall inform the Autorité without delay if the unavailability is likely to last more than two (2) weeks*".
332. Finally, Meta proposed submitting a report on the implementation of the commitments to the Autorité within six months of the notification of the decision, and then submitting a follow-up report every year thereafter.

### **C. THE MARKET TEST**

333. In accordance with Article R. 464-2 of the French Commercial Code (Code de commerce), the initial offer of commitments was communicated to the parties to the proceedings and to the Representative of the Minister of the Economy, as well as to third parties, for consultation.
334. In the context of the present proceedings, the market test submitted the proposed commitments to the parties and relevant third parties for feedback, between 3 June 2021 and 5 July 2021.
335. Meta's initial offer of commitments was the subject of remarks from Criteo and the Representative of the Minister of the Economy, which were taken into account by Meta.

## **D. THE COMMITMENTS PROPOSED ON 11 FEBRUARY 2022**

336. Following the market test, Meta submitted a new version of the commitments on 30 September 2021. The hearing before the Board of the Autorité opened on 13 October 2021, and was suspended. Meta filed a new version of the commitments on 29 October 2021, and the hearing resumed for the first time on 10 November 2021. It was once again suspended. Meta then filed two new versions of the commitments on 2 December 2021 and 4 February 2022. The hearing resumed and ended on 8 February 2022. Finally, a note was appended to the file, containing the final commitments dated 11 February 2022. These final commitments are attached to the present decision.

## **III. Assessment**

### **A. REGARDING THE IMPLEMENTATION OF THE COMMITMENTS PROCEDURE**

337. Article L. 464-2 of the French Commercial Code (Code de commerce) stipulates that the Autorité de la concurrence can (freely translated) "*accept commitments of a limited or unlimited duration proposed by companies or trade associations which are likely to put an end to its competition concerns which may constitute prohibited practices referred to in Articles*

*L. 420-1 to L. 420-2-2 and L. 420-5 or contrary to the measures taken pursuant to Article L. 410-3*".

338. In the present case, the investigation revealed competition concerns (see paragraphs 279 et seq. above), which can be resolved through a commitment procedure.

339. Moreover, the Cour d'appel de Paris (Paris Court of Appeal), in its ruling of 19 December 2013, *Cogent Communications France*, noted that (freely translated) "*the commitments procedure is one of the tools that allows a competition authority to carry out its mission of guaranteeing the functioning of competition on the markets, this mission of defending economic public order empowering the said authority to issue commitment decisions, not to satisfy the request of a complainant party but to put an end to situations that are likely to harm competition.*"<sup>379</sup>

340. It is therefore up to the Autorité in the context of the present decision, to ensure that, in accordance with Article L. 464-2(I) of the French Commercial Code (Code de commerce) and paragraphs 34 and 41 of the procedural notice on the commitments<sup>380</sup>, the commitments proposed by the parties are sufficiently relevant, credible, verifiable and proportionate to put an end to the competitive risks identified.

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<sup>379</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 19 December 2013, *Cogent Communications*, No. 2012/19484, pages 9 and 10, confirmed by the ruling of the Cour de Cassation (French Supreme Court) of 12 May 2015, No. V 14-10.792.

<sup>380</sup> Procedural notice of 2 March 2009 on competition-related commitments.

341. As the Cour d'appel de Paris (Paris Court of Appeal) recently recalled in a ruling dated 21 April 2022, Sony Interactive Entertainment France S.A., while I. of Article L. 464-2 of the French Commercial Code (Code de commerce) (freely translated) "*allows the Autorité to accept commitments proposed by companies, which are likely to put an end to its competition concerns, the companies do not have a right to commitments, as the Autorité enjoys discretionary power in this matter*".<sup>381</sup>

## **B. DESCRIPTION OF THE THREE COMMITMENTS OFFERED BY META**

### **1. REGARDING THE COMMITMENTS RELATING TO THE MBP PROGRAMME**

342. Meta has made a commitment to offer access to a partnership programme called the *Meta Business Partner* programme (hereinafter "MBP"), to companies active in the speciality "*Advertising Technology*" ("Ad Tech"). Furthermore, Meta has committed to ensure the objective, clear and non-discriminatory application of the criteria for accessing and remaining in this programme.

343. The programme has two levels of partnership: Ad Tech MBP Status (hereinafter "Status") and the Ad Tech MBP Badge (hereinafter "Badge"). According to Meta, the first level of partnership is designed to enable Ad Tech service providers to innovate and improve their quality of service for the benefit of advertisers. Meta also believes that the two partnership levels ensure that the companies eligible for the Badge are carefully selected<sup>382</sup>.

344. Under the terms of the commitments, Status provides access to documentary resources, online training and operational support<sup>383</sup>. Furthermore, the Badge also entitles the relevant companies to incorporate the Badge logo in their commercial documents, to be listed in Meta's partner directory and receive dedicated technical support regarding the operation of Meta's APIs<sup>384</sup>.

345. The commitments relating to the Ad Tech MBP programme are proposed for a period of five years from the date of implementation of the commitments, which will occur three months after the notification of the present decision<sup>385</sup>.

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<sup>381</sup> Ruling of the Cour d'appel de Paris (Paris Court of Appeal) of 21 April 2022, Sony Interactive Entertainment France S.A., No. RG 20/16953, paragraph 26 (this ruling has been the subject of an appeal on points of law). See also ruling of the Cour de Cassation (French Supreme Court) of 2 September 2020, Umicore, n° 18-18.501 and others.

<sup>382</sup> See explanatory note dated 30 September 2021.

<sup>383</sup> See the "Definitions" section of the commitments of 11 February 2022.

<sup>384</sup> Ibid.

<sup>385</sup> Paragraph 3.1 of the commitments of 11 February 2022.

### a) The conditions of access to the Status and the Badge

346. To be eligible for the Status, Ad Tech service providers must demonstrate that they have generated worldwide Material API Spend <sup>386</sup> in excess of US\$50,000 in the previous 180 days. The various methods by which the purchase of advertising space and the services of these intermediaries are invoiced to advertisers are described in paragraphs 61 and 99 above.
347. According to Meta, this spend threshold was put in place to help many smaller Ad Tech providers grow, by joining the Status. The criterion for accessing the Status was therefore designed as a "*point of entry to identify Ad Tech Service providers with development potential*" with Meta<sup>387</sup>. Compliance with this criterion over time is therefore not intended to be evaluated and no procedure for exiting the Status is provided for in the commitments.
348. With regard to the Badge, the commitments provide for two separate routes of access.
349. The first is open to Ad Tech service providers that meet the following cumulative criteria - referred to as the "Ad Tech MBP Performance Criteria" in paragraph 4.1.3 of the commitments:
- Worldwide Material API Spend in excess of US\$2 million in the last 180 days;
  - 50% of the worldwide Material API Spend during the last 90 days corresponding to Qualifying Spend; and
  - 50% of the worldwide Material API Spend during the last 90 days corresponding to Qualifying Placements.
350. Qualifying Spend is all spend devoted to the optimisation objectives available for advertisers' ad campaigns, with the exception of certain objectives excluded by Meta, a comprehensive list of which appears in the text of the commitments<sup>388</sup>. As discussed in paragraph 10 above, the optimisation objectives are the actions that advertisers want the end user to take after seeing their ads. As such, as shown in the table in paragraph 48 above, ads can, for example, be optimised to be served to the persons most likely to install an app ("*app\_installs*") or to make a conversion on the advertiser's website ("*offsite\_conversions*"). The final version of the commitments include "*link\_clicks*" among the optimisation objectives taken into account in the Qualifying Spend. According to Meta, the available optimisation objectives were chosen so as not to impact the business models of Ad Tech service providers looking to access the Badge<sup>389</sup>.
351. Qualifying Placements are defined as the "*Share of Material API Spend achieved on at least four (4) different placements chosen by the Ad Tech MBP Partner on Meta's Services*

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<sup>386</sup> Material API Spend is defined as "*The amount of material spend generated on the Advertising APIs at the level of an ad campaign, ad set or ad attributable to the Ad Tech Service provider. This amount takes into account material changes and adjustments made via API requests, such as ad creations or updates to key elements of the ads, such as their configuration or visuals. The amount excludes spend on APIs that are only read requests for reports, empty requests or write requests that have no impact on the serving or appearance of an ad*".

<sup>387</sup> See explanatory note of 29 October 2021.

<sup>388</sup> See "Definitions" section of the Commitments, "Qualifying Spend". The description of the optimisation objectives excluded from the qualifying spend is included in the text of the commitments.

<sup>389</sup> Paragraph 56 of the explanatory note of 29 October 2021; paragraphs 3, 61 and 62 of the explanatory note of 6 December 2021.

*including advertising, excluding Right Hand Column, or on automatic placements*"<sup>390</sup>. As discussed in paragraph 49 above, placements are the spaces available for the display of ads on the Meta Services that include advertising<sup>391</sup>. For information, Meta considers that there are currently more than 15 placements, including the News Feed and "Stories" on Facebook or Instagram<sup>392</sup>. According to Meta, the criterion for placements is designed to maximise the advertiser's chances of reaching its audience in the context of its ad campaign, by diversifying the formats on which its ads are served<sup>393</sup>.

352. A second route to access the Badge<sup>394</sup> is provided for Ad Tech service providers whose participation in the former *Facebook Marketing Partner* (FMP) programme was terminated as of January 2017 for alleged non-compliance with the performance criteria applied by Facebook at that time. The commitments provide that these service providers are, until 1 January 2024, deemed to meet the performance criteria to qualify for the Badge if their worldwide Material API Spend over the last 180 days exceeds US\$2 million. From 1 January 2024, in order to maintain access to the Badge, Ad Tech service providers must meet the cumulative criteria set out in paragraph 4.1.3 of the commitments. The companies in question will be informed individually, via a simplified Notification of Eligibility, of the special modalities for obtaining and retaining the Badge that is offered to them.
353. The description of the Ad Tech MBP Performance Criteria will be made public no later than 15 days prior to the date of implementation of the commitments. The published information will be updated immediately in the event of subsequent changes to the criteria. Furthermore, Ad Tech MBP Partners will have the possibility to track their performance against each of the Ad Tech MBP Performance Criteria through the *Partner Center*<sup>395</sup>.

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<sup>390</sup> See "Definitions" section of the Commitments, "Qualifying Placements".

<sup>391</sup> These services include the "Facebook" website and mobile app, including the "Facebook Messenger" service, the "Instagram" website and mobile app, and the "Meta Audience Network" service.

<sup>392</sup> Paragraph 59 of the explanatory note of 29 October 2021.

<sup>393</sup> Paragraph 58 of the explanatory note of 29 October 2021.

<sup>394</sup> Paragraph 4.1.4 of the commitments.

<sup>395</sup> Paragraph 4.1.5 of the commitments.

## b) The process for reviewing applications to the Ad Tech MBP Programme

354. Meta has committed to review applications for the Ad Tech MBP programme "*in an objective, clear and non-discriminatory manner*."<sup>396</sup>
355. The commitments give a comprehensive list of information that Ad Tech providers will need to provide in order to complete their application. This information is listed in the paragraph "Application Information for the Ad Tech MBP Programme" of the "Definitions" section of the commitments. Any modifications made to the list of required information during the period of implementation of the commitments will require prior notification to the monitoring trustee<sup>397</sup>.
356. The commitments further provide that the list of information required to apply for the Status or Badge <sup>398</sup>will be made public no later than 15 days before the date of implementation. Furthermore, Meta has committed to "*promptly*" inform a candidate whose application does not contain all the required information<sup>399</sup>.
357. Meta must process applications for the Ad Tech MBP Programme within a maximum period of three months following reception of a complete application. The commitments also provide that 80% of the applications received will be processed within a period not exceeding one month<sup>400</sup>.
358. The commitments provide that Meta may conduct a "*Compliance and Due Diligence Assessment for Ad Tech MBP*" designed to evaluate the "*integrity*" of the Ad Tech service provider<sup>401</sup>. Meta has committed to ensure that these assessments are based on established facts<sup>402</sup> and conducted in an objective, clear and non-discriminatory manner<sup>403</sup>. Moreover, the text of the commitments lists the "*Reasons for Non-Compliance*" that result in the Ad Tech service provider failing the *Compliance and Due Diligence Assessment*<sup>404</sup>. However, a negative evaluation may not be based on failure to meet a Reason for Non-Compliance. In this case, specific information will be sent to the monitoring trustee<sup>405</sup>.
359. The commitments provide that a candidate who fails the assessment must receive a "*Notification of Non-Compliance*" informing them of the reasons for the failure<sup>406</sup>. The Ad Tech service provider in question then has one month to request a review of its application and to provide detailed evidence to contest the reasons given in the notification. The

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<sup>396</sup> Paragraph 4.3.1 of the commitments.

<sup>397</sup> Paragraph 4.3.2 of the commitments.

<sup>398</sup> Ibid.

<sup>399</sup> Paragraph 4.3.3 of the commitments.

<sup>400</sup> Ibid.

<sup>401</sup> See the "Definitions" section of the Commitments, "Compliance and Due Diligence Assessment for Ad Tech MBPs".

<sup>402</sup> Paragraph 4.3.4 of the commitments.

<sup>403</sup> Paragraph 4.3.1 and 4.3.7 of the commitments.

<sup>404</sup> See the "Definitions" section of the Commitments, "Reasons for Non-Compliance".

<sup>405</sup> Paragraph 4.3.5 of the commitments.

<sup>406</sup> Paragraph 4.3.6 of the commitments.

monitoring trustee must be informed without delay of this request for review, which Meta must decide on within a maximum of one month<sup>407</sup>.

**c) The modification of the Ad Tech MBP Performance Criteria for the duration of the commitments**

360. Meta may modify the Ad Tech MBP Performance Criteria for the period of implementation of the commitments.
361. The commitments provide that the modifications envisaged by Meta are subject to the prior approval of the monitoring trustee<sup>408</sup>.
362. However, the approval of the monitoring trustee will not be required in two specific cases:
- where the envisaged modification relates to the removal of a cumulative Ad Tech MBP Performance Criterion or the addition of an alternative Ad Tech MBP Performance Criterion;
  - where the envisaged modification is required by law. In this case, the monitoring trustee may request any information necessary to verify that this is the case<sup>409</sup>.
363. With the exception of those required by law, no modifications to the criteria may take place before 1 April 2023<sup>410</sup>. Moreover, except where such a modification is required by law, Meta may change these criteria only once every 12 months<sup>411</sup>.
364. In order to ensure that Ad Tech Partners are correctly informed, Meta will send them a "*Communication of Modification of Ad Tech MBP Performance Criteria*" at least three months before any modification of these criteria enters into force. The content of this communication will, within the same time frame, be published on the website of the Ad Tech MBP Programme<sup>412</sup>.

**d) The procedure for withdrawing the Badge**

365. The commitments provide for a Monthly Review intended to analyse the Ad Tech Partners' compliance with the Ad Tech MBP Performance Criteria for obtaining and retaining the Badge<sup>413</sup>.
366. An Ad Tech MBP Partner will be placed on probation period if it does not meet the performance criteria on any day during the previous month<sup>414</sup>. Having met the performance criteria for only one day in the previous month is therefore sufficient not to be placed on

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<sup>407</sup> Paragraph 4.3.8 of the commitments.

<sup>408</sup> Paragraph 4.2.3 of the commitments.

<sup>409</sup> Paragraph 4.2.4 of the commitments.

<sup>410</sup> Paragraph 4.2.1 of the commitments.

<sup>411</sup> Paragraph 4.2.2 of the commitments.

<sup>412</sup> Paragraph 4.2.5 of the commitments.

<sup>413</sup> See "Definitions" section of the Commitments, "Monthly Review".

<sup>414</sup> Ibid.

probation period<sup>415</sup>. According to Meta, this is intended to ensure as much stability as possible for Ad Tech Partners in possession of the Badge and to reserve placing partners on probation period for situations that fully warrant it<sup>416</sup>.

367. If a Monthly Review reveals that an Ad Tech service provider has not met the Ad Tech MBP Performance Criteria, the Ad Tech service provider will be promptly notified of the criteria that have not been fulfilled<sup>417</sup>. The provider concerned is then placed on probation for a period of six months from the date of notification. This duration is intended to allow sufficient time for the Ad Tech MBP partner to improve its performance<sup>418</sup>. During this period, it will retain access to all resources and technical support available to Badge holders<sup>419</sup>.
368. The commitments provide for a deferral of the probation period for Ad Tech MBP Partners who have held the Badge for less than three months, to allow them to adapt to the Ad Tech MBP Performance Criteria<sup>420</sup>.
369. Furthermore, any Modification to the Ad Tech MBP Performance Criteria during the probation period of a Badge holder will result in the suspension of the probation period and the initiation of a new probation period<sup>421</sup>.
370. The Badge may only be withdrawn at the end of the probation period if the Ad Tech Partner fails to meet the Ad Tech MBP Performance Criteria every day during the last month of the period<sup>422</sup>. According to Meta, this requirement is intended to verify the "*stability of performance*" of the partner placed on probation period and to ensure that the partner does not only meet the criteria by chance or occasionally. Meta specifies that such a scenario would be unlikely, however, insofar as the criterion, evaluated over one day, allows for a smoothing of performance over time, as long as it is measured from the average of the previous days<sup>423</sup>.
371. The Ad Tech MBP Partners whose badges will be withdrawn at the end of the probation period will be notified via a "Notification of Withdrawal Ad Tech MBP". This document will specify the criteria that have not been met by the partner<sup>424</sup>.
372. An Ad Tech MBP Partner whose Badge has been withdrawn will be eligible to reapply for the Badge after six months from the Notification of Withdrawal Ad Tech MBP<sup>425</sup>.

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<sup>415</sup> Paragraph 72 of the explanatory note of 6 December 2021.

<sup>416</sup> Paragraph 74 of the explanatory note of 6 December 2021.

<sup>417</sup> Paragraph 4.4.2 of the commitments.

<sup>418</sup> Paragraph 4.4.3 of the commitments.

<sup>419</sup> Paragraph 4.4.5 of the commitments.

<sup>420</sup> Paragraph 4.4.8 of the commitments.

<sup>421</sup> Paragraph 4.4.4 of the commitments.

<sup>422</sup> Paragraph 4.4.6 of the commitments.

<sup>423</sup> Paragraph 74 of the explanatory note of 6 December 2021.

<sup>424</sup> Paragraph 4.4.7 of the commitments.

<sup>425</sup> Paragraph 4.4.9 of the commitments.

## 2. REGARDING THE COMMITMENT TO TRAIN SALES TEAMS

373. Meta has also committed to providing compliance training to its sales teams. The commitment applies to all sales teams working with advertisers who use Ad Tech service providers that are members of the Ad Tech MBP programme, falling within the scope of the commitments<sup>426</sup>. According to Meta, this would affect several thousand employees worldwide<sup>427</sup>.
374. The training will be conducted under the supervision of the Legal Department, which is headed by the *General Counsel* of the Meta Group<sup>428</sup>. It will focus on the content of the communication from sales teams. In particular, it will emphasise the need not to disclose information to advertisers regarding the commencement of a probation period for an MBP partner, so as not to deprive the latter of the possibility of fulfilling the criteria that would allow it to terminate this probation period. Meta has also committed to training the relevant employees to recommend MBP partners to advertisers only on the basis of objective and justified reasons<sup>429</sup>.
375. The content of this training, including a knowledge test and implementation schedule, is subject to prior approval by the monitoring trustee<sup>430</sup>.
376. The training will be mandatory every year for all employees concerned. These employees will only be able to validate the training if they have attended the complete course, and if they have correctly answered all the questions on the knowledge test, which is also subject to the approval of the monitoring trustee. Except in exceptional circumstances, failure to validate this training will result in the employee's access to Meta's internal systems being withdrawn within two months of the deadline of the annual training<sup>431</sup>. Each year, Meta will provide the monitoring trustee with a report on this training, including the number of employees who did not complete the course<sup>432</sup>.
377. This commitment is offered for a period of five years from the date of implementation of the commitments<sup>433</sup>.

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<sup>426</sup> Paragraph 5.1.1 of the commitments.

<sup>427</sup> Explanatory note of 6 December 2021, paragraph 77.

<sup>428</sup> Explanatory note of 6 December 2021, paragraph 75.

<sup>429</sup> Paragraph 5.1.2 of the commitments.

<sup>430</sup> Paragraph 5.1.3 of the commitments.

<sup>431</sup> Paragraph 5.1.4 of the commitments.

<sup>432</sup> Paragraph 5.1.5 of the commitments.

<sup>433</sup> Paragraph 3.1 of the commitments.

### 3. REGARDING THE COMMITMENTS RELATING TO THE RECOMMENDATION FUNCTIONALITY

378. Meta has committed to develop a new API for third-party service providers, called the "Recommendation Functionality"<sup>434</sup>. This API will allow eligible Ad Tech MBP partners to interact with the *Dynamic Ads*<sup>435</sup> solution. As such, the Recommendation Functionality will allow MBP partners who have access to it to send individualised queries for product recommendations on Meta-controlled social networks, or to send individualised bid adjustments<sup>436</sup>.
379. Meta has committed to provide free access to this Recommendation Functionality to all MBP Partners who request it, subject to certain access and access retention criteria described below. Once the application has been accepted, the partner will only have to agree to a confidentiality agreement and accept the terms and conditions relating to the functionality - which will have been previously reviewed by the monitoring trustee - in order to access the Recommendation Functionality<sup>437</sup>.
380. The commitments relating to the Recommendation Functionality are proposed for a period of three years from the date of implementation of the commitments, which will occur three months after the notification of the present decision<sup>438</sup>.

#### a) Application process for the Recommendation Functionality

381. The application process for the Recommendation Functionality will be open to Ad Tech MBP Partners on the date of implementation of the commitments, i.e. no later than three months after the notification of the decision<sup>439</sup>.
382. Submitting an Ad Tech MBP partner application requires a prior positive opinion from the monitoring trustee, that the applicant has a proven track record of operating recommendation and bidding algorithms. To issue such an opinion, the monitoring trustee must ensure that two conditions are met for at least the last three years prior to the applicant's request: (i) the applicant must have its own recommendation and bidding algorithm and have operated it on at least one app or website; (ii) the applicant must have generated at least 25% of its annual advertising spend on behalf of its advertisers through its own recommendation and bidding algorithm<sup>440</sup>.
383. Subject to the supplementary access criteria described below in section b), the applicant will be granted access to the Recommendation Functionality within one month of applying<sup>441</sup>. It

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<sup>434</sup> Paragraph 6.1.1 of the commitments.

<sup>435</sup> For a description of Meta's *Dynamic Ads* solution, see paragraph 43 above.

<sup>436</sup> See definition of *Dynamic Ads* on page 4 of the commitments.

<sup>437</sup> Paragraph 6.1.1 of the commitments.

<sup>438</sup> Paragraph 3.1 of the commitments of 11 February 2022.

<sup>439</sup> Paragraph 6.1.3 of the commitments.

<sup>440</sup> Paragraph 6.2.3 of the commitments.

<sup>441</sup> Paragraph 6.1.3 of the commitments.

will retain this access during the three-year period envisaged for this commitment, for as long as it meets the access retention criteria described below in section (c)<sup>442</sup>.

#### **b) Access criteria for the Recommendation Functionality**

384. In order to provide access to the Recommendation Functionality, Meta will ensure that at least one of the following two criteria is met at the time of the Ad Tech MBP partner's application: (i) the partner has used the advertising APIs provided by Meta to serve ads on Meta's sites and has generated more than US\$5 million in ad spend worldwide during the last 180 days; and (ii) the partner has a history of using APIs similar to the Recommendation Functionality<sup>443</sup>. This second criterion shall be considered fulfilled for all former Ad Tech Services providers who may have previously used the ULB or *Product Recommendations* APIs in beta, even if, as was the case for Criteo, Meta subsequently withdrew their access to these APIs<sup>444</sup>.
385. Meta has also committed to ascertain, as of the date of notification of the decision, which partners meet the above criteria, and to inform them individually that they are potentially eligible for the Recommendation Functionality. Meta has committed to send these notifications prior to the date of implementation of the commitments, so that these providers can apply for the Recommendation Functionality as soon as possible<sup>445</sup>.

#### **c) Criteria for retaining access to the Recommendation Functionality**

386. In order to retain access to the Recommendation Functionality, service providers must meet a set of three conditions on a permanent basis.
387. The first of these conditions is the actual use of the Recommendation Functionality once access has been granted. This use must generate ad spend of an average of €800 per day over a rolling 30 day period, for advertising campaigns that include ads for users identified by Meta as being located in France<sup>446</sup>. It must also result in the Recommendation Functionality representing more than 50% of the total daily spend on Meta sites<sup>447</sup>.
388. The second condition is that, following the first six months of access to the Recommendation Functionality, usage tests must be performed. The partner must have passed a test within the last six months according to the methodology laid down by Meta. This test consists in measuring the impact of the Recommendation Functionality. Service providers will be asked to choose an optimisation objective, from a list that includes conversions, clicks, or app installs, among others<sup>448</sup>. The test consists in comparing the total number of realisations of

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<sup>442</sup> Paragraph 6.1.4 of the commitments.

<sup>443</sup> Paragraph 6.2.1 of the commitments.

<sup>444</sup> Meta's explanatory note of 6 December 2021, paragraph 80.

<sup>445</sup> Paragraph 6.2.2 of the commitments.

<sup>446</sup> As confirmed by Meta, this criterion of being based in France is the same as that in paragraph 8 of the commitments, discussed below in paragraph 455. See Meta's explanatory table of 17 January 2022, page 16.

<sup>447</sup> Paragraph 6.3.1 of the commitments.

<sup>448</sup> See definition of "Optimisation Objectives available on the Recommendation Functionality" in Section 1 of the commitments.

this objective with the use of the Recommendation Functionality, weighted by the realisation value of the objective set out by the partner, with the total number of realisations of the same objective without the Recommendation Functionality (A/B test). For the test result to be positive, the first figure must not be more than 10% lower than the second<sup>449</sup>.

389. The partners may perform these tests themselves according to the methodology laid down by Meta, which must follow the principles set out in the annex to the commitments and be approved by the monitoring trustee<sup>450</sup>.
390. Finally, the third condition consists of a minimum amount of advertising spend on Meta's services following the first 12 months of access to the Recommendation Functionality. Under this condition, the partner must have consistently spent a minimum of US\$10 million worldwide via Meta's advertising APIs over a rolling 180-day period.

#### **d) The procedure for withdrawing access to the Recommendation Functionality**

391. If partners who have access to the Recommendation Functionality do not meet the retention criteria described above, Meta may initiate a procedure to withdraw access.
392. Meta has committed, where appropriate, to inform the partners in question without delay if they do not meet one of the retention criteria. Meta proposes explaining the specific reasons and grounds for the violation, as well as the means that could be implemented to resolve the violation and regain access to the Recommendation Functionality<sup>451</sup>. This notification opens a three-month period before the actual withdrawal of access to the Recommendation Functionality<sup>452</sup>. The withdrawal may be temporary, or permanent if the incident is the result of malicious intent<sup>453</sup>.
393. A Partner who has lost access to the Recommendation Functionality having failed to meet the retention criteria will be entitled to reapply for access three months after access is withdrawn<sup>454</sup>.
394. Furthermore, Meta may also temporarily or permanently withdraw access to the Recommendation Functionality from any partner whose use of the Recommendation Functionality has led to serious or repeated incidents relating to the privacy of Meta users or to the integrity and security of Meta's services<sup>455</sup>.

### **4. REGARDING THE MONITORING TRUSTEE**

#### **a) Designation of the monitoring trustee**

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<sup>449</sup> Paragraph 6.3.2 of the commitments.

<sup>450</sup> Paragraph 6.3.3 and 6.3.4 of the commitments.

<sup>451</sup> Paragraph 6.4.3 of the commitments.

<sup>452</sup> Paragraph 6.4.1 of the commitments.

<sup>453</sup> Paragraph 6.4.3 of the commitments.

<sup>454</sup> Paragraph 6.4.4 of the commitments.

<sup>455</sup> Paragraph 6.4.2 of the commitments.

395. Meta has committed to having a monitoring trustee appointed to monitor the implementation of the commitments. This monitoring trustee must have the required qualifications, particularly in legal, statistical and IT matters<sup>456</sup>. He or she will be independent of Meta and remunerated under conditions that do not compromise the proper execution of their mission<sup>457</sup>.
396. The commitments provide that Meta will propose to the Autorité, within a maximum period of 15 working days following notification of this decision, the names of three persons or institutions that it considers suitable to act as monitoring trustee. The proposal shall include sufficient information to enable the Autorité to ascertain that the persons proposed meet the requirements set forth in paragraph 395 above. Meta's proposal will also include the full text of the draft mandate, as well as a draft work plan for the monitoring trustee, outlining the manner and means by which the latter will conduct their assignment<sup>458</sup>.
397. The Autorité may approve or reject applications submitted to it. In the event that several proposed candidates are approved by the Autorité, Meta may select the candidate of its choosing from among them<sup>459</sup>. The Autorité may also approve, reject or, where appropriate, modify the draft mandate and the draft work plan<sup>460</sup>.
398. If the Autorité refuses to approve the first three proposed candidates, Meta will propose two new candidates<sup>461</sup>. If these are also refused approval, the Autorité will itself appoint the monitoring trustee of its choosing, after consulting Meta<sup>462</sup>.
399. The monitoring trustee chosen at the end of the selection procedure will start their assignment within 15 days of being approved by the Autorité, in accordance with the terms of the mandate contract<sup>463</sup>.
400. The monitoring trustee shall submit a first report to the Autorité one month after starting their assignment, together with a detailed work plan setting out how they intend to perform their duties<sup>464</sup>.

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<sup>456</sup> Paragraph 8.1.1 of the commitments.

<sup>457</sup> Paragraph 8.1.2 of the commitments.

<sup>458</sup> Paragraph 8.1.3 of the commitments.

<sup>459</sup> Paragraph 8.1.5 of the commitments.

<sup>460</sup> Paragraph 8.1.4 of the commitments.

<sup>461</sup> Paragraph 8.1.6 of the commitments.

<sup>462</sup> Paragraph 8.1.7 of the commitments.

<sup>463</sup> Paragraph 8.1.8 of the commitments.

<sup>464</sup> Paragraph 8.1.9 of the commitments.

## **b) Information of the monitoring trustee**

401. The commitments provide that the monitoring trustee shall have access within a reasonable time frame to all the information necessary for the accomplishment of their mission, as soon as they request it<sup>465</sup>.
402. The commitments further provide that certain categories of decisions taken by Meta pursuant to the commitments shall be subject to a "Notification to the Monitoring Trustee". This pertains to the following decisions: modification of the Ad Tech MBP Performance Criteria not subject to approval by the monitoring trustee<sup>466</sup>, modification of the Application Information for the Ad Tech MBP Programme<sup>467</sup>, Compliance and Due Diligence Assessment for the Ad Tech MBP not based on a Reason for Non-Compliance<sup>468</sup>, modification of the definition of an Application for the Recommendation Functionality<sup>469</sup>.
403. Moreover, the commitments provide a non-exhaustive list of information that must be provided to the monitoring trustee without the latter having to request it. For example, the monitoring trustee shall receive copies of all notifications sent to Ad Tech service providers pursuant to the commitments<sup>470</sup>. In addition, he or she shall receive information such as applications for the Ad Tech MBP programme and the Recommendation Functionality, implementation of the Training for Sales Communication, and results of the Usage Tests for the Recommendation Functionality<sup>471</sup>.

## **c) The remit of the monitoring trustee**

404. The monitoring trustee is responsible for verifying that Meta is complying with the commitments. To this end, they will submit a quarterly report to the Autorité. They may also submit a report to the Autorité on their own initiative, if they deem that the circumstances so require. Meta will receive a copy of these reports<sup>472</sup>.
405. Under the terms of the commitments, the monitoring trustee also has the right to alert and thus send observations to Meta and, if necessary, notify the Autorité of any decision of which they have been notified and which, in their opinion, distort the commitments due to a lack of objectivity or proportionality<sup>473</sup>.
406. Furthermore, the monitoring trustee will perform a series of missions, set out in paragraph 8.2.3 of the commitments, in connection with the implementation of the commitments. In particular, they will be responsible for verifying that notifications sent by Meta to Ad Tech

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<sup>465</sup> Paragraph 8.2.1 of the commitments.

<sup>466</sup> Paragraph 4.2.4 of the commitments.

<sup>467</sup> Paragraph 4.3.2 of the commitments.

<sup>468</sup> Paragraph 4.3.5 of the commitments.

<sup>469</sup> Paragraph 6.1.2 of the commitments.

<sup>470</sup> These are Notifications of Eligibility for the Recommendation Functionality, Simplified Notifications of Eligibility for the Ad Tech MBP Programme, Notifications of Non-Compliance, Notifications of Probation Period, Notifications of Withdrawal of the Recommendation Functionality and Notifications of Withdrawal Ad Tech MBP.

<sup>471</sup> Paragraph 8.2.2 of the commitments.

<sup>472</sup> Paragraph 8.2.5 of the commitments.

<sup>473</sup> Paragraph 8.2.4 of the commitments.

service providers are actually received by the latter. In addition, the monitoring trustee will be asked to approve the content of certain documents, such as the simplified Notification of Eligibility for Ad Tech MBP, the template Notification of Withdrawal Ad Tech MBP, and the draft Training on Sales Communication.

407. They will also be involved in implementing the commitment relating to the Recommendation Functionality, in particular by issuing, when the conditions are met, the Favourable opinion required to access this functionality, by approving the Methodology of the Usage Tests, and by carrying out, upon request, a verification of the proper performance of these tests<sup>474</sup>.

## **C. ANALYSIS OF THE COMMITMENTS PROPOSED BY META**

### **1. INTRODUCTION**

408. In order to assess whether the proposed commitments address the competition concerns identified in the preliminary assessment, the Autorité examines the relevance, credibility and verifiability of the proposed commitments. It also ensures that they are proportionate.
409. In the present case, the preliminary assessment concerns practices that were likely to have affected the conditions of competition between MBPs, as well as the conditions of competition between Criteo and Meta. The conditions of competition between MBPs may have been affected by the lack of transparency and objectivity of the criteria used by Meta to grant access to the MBP status and badge, and the associated services. This lack of transparency and objectivity may also have affected the conditions of competition between certain online advertising service providers such as Criteo on the one hand, and Meta on the other, in the context of Meta's closed ecosystem of advertising technologies and products.
410. The Autorité considers that the commitments proposed by Meta are likely to remedy the competition concerns only insofar as they make it possible to restore free competition on the market. The Autorité will therefore take into consideration, in examining the credibility of the proposed commitments, their capacity to remedy the restrictions on competitive intensity on the market that resulted from Meta's disputed conduct<sup>475</sup>.
411. Finally, to the extent that it is both competition between MBPs and competition between MBPs and Meta that may have been harmed by the practices referred to in the preliminary assessment, it is necessary, but not enough, to ensure that the criteria for access to the MBP programme and associated services are objective, transparent and applied in a non-discriminatory manner. The application of these practices should also not be likely to negatively impact competition between Meta and the service providers which, like Criteo, provide or could provide services to advertisers for campaigns involving Meta's platform inventory. In effect, the proposed criteria should not allow Meta to select partners based on a subjective assessment of their business model, such as a discretionary assessment of advertisers' needs. It is therefore important to ensure that the proposed criteria do not influence the business models of the service providers in question.

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<sup>474</sup> Paragraph 8.2.3 of the commitments.

<sup>475</sup> In this sense, see European Commission Decision of 12 December 2012, aff. COMP/39847, *Ebooks*, paragraphs 129 et seq.

## 2. REGARDING ACCESS TO THE AD TECH MBP PROGRAMME

412. The preliminary assessment identified several competition concerns relating to Meta's former FMP programme. These concerns relate in particular to the lack of objectivity of the criteria for accessing the programme, the fact that different parties received different treatment in the implementation of these criteria, and their lack of transparency, predictability and stability.

### a) Regarding the reapplication of objective criteria by Meta

413. First, the commitments make it possible to address the competition concerns regarding the lack of objectivity of the criteria applied by Meta.

414. With regard to access to the Status, the commitments state that this will be subject exclusively to a quantitative criterion, linked to the level of Material API Spend generated by Ad Tech service providers. The level of spend set out in the commitments is low enough to allow a significant number of companies to benefit from the advantages of the Status.

415. With regard to access to the Badge, the Ad Tech MBP Performance Criteria include a qualitative criterion related to the Qualifying Spend, which allows the Ad Tech service providers to choose from a number of optimisation objectives available on the Meta Services including advertising. With regard to the diversity of these optimisation objectives, which in the final version of the commitments include the "*link\_clicks*" objective, which was initially excluded, the criteria for accessing the Badge are not such as to influence the business model of Meta's partners. It is not disputed, moreover, that, as Meta points out<sup>476</sup>, the optimisation objectives excluded from the Qualifying Spend represent a very small share of advertisers' ad spend.

416. In addition, the Qualifying Placement requirement, which requires Ad Tech service providers to configure advertising campaigns so that the advertiser's ads are displayed on a minimum of four different placements on the Meta Services that include advertising, is not likely to influence the business model of Ad Tech service providers looking to obtain the Badge.

417. In addition, it should be noted that Meta has proposed a specific access route to the Badge for companies that have lost access to the former FMP Badge as a result of the conduct identified in the preliminary assessment. This commitment allows the companies concerned - who will be individually informed of their eligibility for this specific access route - to more easily regain the benefits of the Badge. It also provides for a period of adjustment until 1 January 2024, after which the companies must meet the Ad Tech MBP Performance Criteria to retain access to the Badge. Implementing this access route is intended to remedy the consequences that the withdrawal of the FMP badge may have had on the level of material spend and the performance of advertising campaigns of the Ad Tech service providers affected by the practices identified in the preliminary assessment.

418. In total, the commitments provide for objective criteria for access to the Ad Tech MBP Programme, whereby Meta does not have discretion in selecting the companies that can benefit from the Status and the Badge. Similarly, retaining the Badge is subject to continued compliance with these same criteria, evaluated on a monthly basis by Meta, under the

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<sup>476</sup> Paragraphs 50 and 51 of the explanatory note of 6 December 2021 (VNC).

supervision of the monitoring trustee. Moreover, via the Partner Center, Ad Tech Partners will be able to monitor their own performance.

**b) Regarding equal treatment in the implementation of the membership criteria to the Ad Tech MBP programme**

419. Second, the proposed commitments make it possible to rule out the fact that different parties are unjustly treated differently in Meta's implementation of the Ad Tech MBP programme criteria.
420. Indeed, Meta has committed to implementing the Ad Tech MBP programme criteria in a non-discriminatory manner. To this end, the monitoring trustee may request any information necessary to verify that there is no unjustified difference in treatment in the application of these criteria.
421. In this regard, the commitments provide that any Compliance and Due Diligence Assessments that Meta may conduct will be conducted in an objective, clear and non-discriminatory manner. As such, they may not be used to select Ad Tech Partners indirectly on the basis of criteria other than those set out in the commitments. In addition, the monitoring trustee must be able to verify that these assessments are based on established facts and that no applicant is discriminated against in the context of implementation.
422. Furthermore, the guarantees granted by the commitments are identical for all Ad Tech Partners who meet the conditions to benefit from them. In this regard, unlike the situation identified in the preliminary assessment, all Ad Tech service providers who fail a Monthly Review will be placed on a probation period of six months and will retain access to the resources and technical support available to Badge holders during this period. Moreover, the monitoring trustee will be responsible for ensuring that the relevant Ad Tech service providers actually receive the Notice of Probation Period provided for in paragraph 4.4.2 of the commitments<sup>477</sup>.

**c) Regarding the transparency and predictability of the criteria for joining the Ad Tech MBP programme**

423. Third, the commitments make it possible to ensure the transparency and predictability of criteria for the Ad Tech MBP programme.
424. As stated in paragraphs 353 and 356 above, Meta has committed to publish a description of the Ad Tech MBP Performance Criteria, as well as the list of information required to apply, no later than 15 days before the date of implementation of the commitments. The Autorité believes that publishing this information on the Ad Tech MBP Programme website provides sufficient publicity, so that companies potentially eligible for the Status or Badge are aware of the possibility of submitting an application. The monitoring trustee must also be able to ensure that this information is visible. Similarly, the individual information communicated via the simplified Notification of Eligibility to companies that have lost access to the FMP program after 1 January 2017 helps make the commitments that specifically concern them more effective.
425. Furthermore, individual notifications to Ad Tech service providers, in particular when they have been placed on probation period, or if the Badge is withdrawn, help to ensure

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<sup>477</sup> See paragraphs 3.2 and 8.2.3 of the commitments.

transparent application of the Ad Tech MBP Performance Criteria. These notifications must be justified in such a way as to allow the companies concerned to understand the reasons why Meta judged that the performance criteria had not been met.

426. The commitments also help ensure the predictability of the criteria applied by Meta, by envisaging that any modifications to the Ad Tech MBP Performance Criteria will be communicated to the Ad Tech Partners at least three months prior to implementation and published on the Ad Tech MBP Programme website.
427. Finally, Meta's possibility of modifying the Ad Tech MBP Performance Criteria during the term of the commitments is limited, to ensure a certain stability of these criteria over time.
428. As noted in paragraph 363 above, any modification in the criteria at Meta's initiative may occur no earlier than 1 April 2023 and may be implemented only once in any 12-month period.
429. Furthermore, except in the cases mentioned in paragraph 4.2.4 of the commitments, any modification of the criteria envisaged by Meta is subject to the agreement of the monitoring trustee. Meta will therefore have to carefully examine the need for the envisaged modification and will have to provide sufficient justification to convince the monitoring trustee that this modification is well-founded. As regards the cases referred to in paragraph 4.2.4 of the commitments, the monitoring trustee will be informed within a reasonable time frame of the modifications envisaged by Meta. Where appropriate, if the monitoring trustee considers that these modifications are likely to distort the commitments due to a lack of objectivity or proportionality, he or she may exercise the right of alert provided for in paragraph 8.2.4 of the commitments<sup>478</sup>.
430. With specific regard to modifications to criteria implemented by Meta due to a change in legislation, the monitoring trustee may, as stated in paragraph 362 above, request all information necessary to verify that the change is indeed required by law<sup>479</sup>. The monitoring trustee may also exercise their right of alert if they consider that such a modification is likely to distort the commitments, in particular on account of a lack of proportionality<sup>480</sup>.
431. In total, in their final version, the commitments relating to the Ad Tech MBP programme proposed by Meta provide for objective, transparent and predictable criteria for accessing and retaining the Status and the Badge, which are not such as to restrict the commercial freedom of the partner companies or distort the conditions of competition between them.
432. Furthermore, by envisaging specific measures for the benefit of companies that have been denied access to the FMP program, the commitments help remedy the consequences that the conduct identified in the preliminary assessment may have had on these companies.

### **3. REGARDING THE SALES COMMUNICATION**

433. In their preliminary assessment, the case team noted conduct on the part of Meta's sales teams that was likely to constitute "disparagement" practices by the latter teams. The effect of this conduct was to exacerbate the lack of objectivity and the unfairness of the conditions

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<sup>478</sup> On this point, see paragraph 469 below

<sup>479</sup> Paragraph 4.2.4 of the commitments.

<sup>480</sup> Paragraph 8.2.4 of the commitments.

of accessing the FMP status. This effect was particularly striking in that the conduct at issue was likely to prevent Criteo from regaining its FMP status following its suspension in 2018.

434. To address the identified shortcomings, Meta has committed to implement a training programme for all global sales teams that may be working with advertisers that may use Ad Tech service providers falling within the scope of the commitments.

435. This training will be organised by Meta's legal department. It will raise awareness among many sales teams of the potentially anticompetitive consequences of what they disclose to advertisers.

The content of the training and its level of difficulty must be validated beforehand by the monitoring trustee. Failure to validate the training will result in serious consequences for the employees in question, as Meta will withdraw their access to its IT systems. The consequences of failing to validate the training are likely to strongly encourage the staff in question to apply themselves more rigorously to the course.

436. The Autorité therefore considers that, as things stand, the proposed commitment, which should in any case have already been put in place in the context of compliance programmes expected of any company of Meta's size, is likely to remedy the shortcomings identified in the preliminary assessment with regard to Meta's disparaging conduct.

#### **4. REGARDING ACCESS TO THE RECOMMENDATION FUNCTIONALITY**

437. The preliminary assessment identified several competition concerns relating to access to Facebook's Marketing APIs, specifically the ULB API. In particular, the case team noted that the withdrawal of Criteo's access to these APIs had limited the latter's ability to provide services through its own advertising technologies. In effect, by losing access to the API that allowed Criteo to transmit user-level coefficient information to Facebook for bidding and recommendations, Criteo forfeited the only way it could use its own product recommendation algorithms and implement its user-level bidding solution on Meta's services, for the benefit of its clients. The conditions of this loss of access raised serious concerns about the transparency, objectivity and non-discriminatory nature of the criteria for accessing the APIs. The case team highlighted differences in treatment between different service providers that appeared unjustified.

438. The Recommendation Functionality that Meta has committed to develop under paragraph 6.1.1 of the commitments is intended to replace the ULB API. Whereas the ULB API was offered to a limited number of service providers in the context of a beta partnership, the Recommendation Functionality is intended to be available to a larger number of service providers, in a more finalised version, regularly updated by Meta. Access to the Recommendation Functionality would therefore address the competition concerns highlighted above, on the double condition that this access is sufficiently broad to allow enough Ad Tech service providers to use their own advertising solutions for the users of Meta's social network, and that the access criteria are sufficiently objective and relevant, transparent and non-discriminatory.

439. The access conditions proposed by Meta in its commitments proposal make it possible, first, to address the competition concerns regarding the lack of objectivity of the access criteria to the Recommendation Functionality.

440. Indeed, it follows from the commitments that access to the Recommendation Functionality is subject to objective criteria.

441. As such, the criterion of historical and proven experience in operating recommendation and bidding algorithms, itself justified to ensure the correct use of a relatively advanced technology<sup>481</sup>, is objectively set out in paragraph 6.2.3 of the commitments. Partners are therefore required to have their own recommendation and bidding algorithm, since it is the existence of this technology that justifies any possible access to the Recommendation Functionality. Partners are required to have had this algorithm for more than three years, and it must represent more than 25% of the provider's annual ad spend.
442. Similarly, the access criteria provided for in paragraph 6.2.1 of the commitments are alternative criteria, the first of which refers to a level of ad spend on Meta, a relatively low level insofar as it is calculated at the global level<sup>482</sup>.
443. With the second access criterion, Meta provides a priority access route for service providers who may have used APIs in the past, such as the ULB API, and were consequently subjected to the practices referred to in the preliminary assessment. The criteria for retaining access that apply to these service providers in the same way as to any partner with access to the Recommendation Functionality (see paragraphs 444 to 446 below) appear to be achievable, particularly in light of their spend generated when they had access to the ULB API<sup>483</sup>. The first criterion for retaining access, set out in paragraph 6.3.1 of the commitments, concerns the actual use of the Recommendation Functionality. This use must be regular, so as to respect the first threshold of €800 of average spend per day over a rolling period of 30 days. It must also not be marginal, and thus account for the bulk of the ad spend on Meta's social networks, in order to justify the development and provision of the Recommendation Functionality<sup>484</sup>.
444. Meta also proposes basing the usage test criterion on objective elements. This is an A/B test, set out in paragraph 6.3.2 of the commitments and standard in the online advertising sector. It is intended to ensure that the use of the Recommendation Functionality does not adversely affect the performance of advertisers' advertising campaigns<sup>485</sup>. The elements of the methodology specified by Meta in the annex to the commitments appear to be sufficiently objective to be applied in the same way to all service providers. As provided for in paragraph 6.3.4 of the commitments, the exact methodology of the A/B test will have to be approved by the monitoring trustee, who will ensure that it is objective. If the results of an A/B test are disputed, the verification by the monitoring trustee, as provided for in paragraph 6.3.6 of the commitments, will also guarantee that the implementation of this procedure is objective.
445. Finally, the last retention criterion provided for in paragraph 6.3.1 of the commitments is also a criterion regarding the amount of ad spend. The threshold of US\$10 million spent on Meta's social networks in the last 180 days, 12 months after gaining access to the Recommendation Functionality, does not appear to be excessive in relation to the access

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<sup>481</sup> Explanatory note of 29 October 2021, paragraphs 83 and 84. See also Criteo's response to the market test, paragraph 135.

<sup>482</sup> In paragraphs 81 and 82 of its explanatory note of 29 October 2021, Meta stated that, as of 13 September 2021, 8 Ad Tech service providers met this access criterion, and others were likely to meet the envisaged spend threshold by, for example, reallocating some of the budget currently spent on non-programmatic advertising.

<sup>483</sup> See Meta's explanatory note of 6 December 2021, paragraph 90.

<sup>484</sup> Meta's explanatory note of 29 October 2021, paragraph 88.

<sup>485</sup> Meta's explanatory note of 29 October 2021, paragraphs 91; Meta's explanatory note of 6 December 2021, paragraph 193.

threshold of US\$5 million set forth in paragraph 6.2.1, as this amount is based on worldwide spend<sup>486</sup>, and there is a legitimate expectation that access to the Recommendation Functionality will result in a higher spend on *Dynamic Ads* for the account of every client of each MBP on Meta's services.

446. As a result, insofar as the commitments provide for access to the Recommendation Functionality based on objective criteria, they do not give Meta discretionary power in selecting the companies that can benefit from the API.
447. The objectivity of these criteria must also make it possible to rule out any occurrences of unjustified differences in treatment between the various partners.
448. The commitments also make it possible to ensure the transparency and predictability of the criteria for accessing the Recommendation Functionality. Meta has therefore committed, in paragraph 6.2.2 of the commitments, to inform the partners meeting the access criteria at the date of notification of the present decision that they are eligible, if they so wish, for the Recommendation Functionality. Under paragraph 6.1.2, Meta may modify the application process for the Recommendation Functionality. However, any modification will be subject to prior notification to the monitoring trustee and Ad Tech MBP Partners. As such, if an application requires the provision of additional documents in order for Meta to comply with its regulatory obligations, the list of these documents must be published beforehand, and the monitoring trustee must be able to verify that they are visible.
449. Similarly, the procedure for withdrawing access to the Recommendation Functionality requires Meta, under the terms of paragraph 6.4.3 of the commitments, to explain the precise reasons and grounds for the alleged violation, and even to specify the means that could be implemented by the partner to rectify the violation.
450. Finally, the commitments provide for access criteria that offer guarantees of neutrality in the competition between Meta and Ad Tech service providers with their own bidding and recommendation technology. These criteria include the involvement of the monitoring trustee in determining the level of experience of applicants for the Recommendation Functionality. Similarly, under the proposed commitments, companies with access to the Recommendation Functionality will be responsible for conducting the A/B tests set forth in paragraph 6.3.4 et seq. and Meta will not have direct access to data concerning other Ad Tech service providers' technology or business strategy.
451. The A/B tests can be performed according to different optimisation objectives (conversions, clicks, etc.), so as not to undermine the commercial strategy developed by the service provider<sup>487</sup>. Using a limited number of optimisation objectives in these tests could have created incentives for the beneficiaries of the Recommendation Functionality to align themselves with Meta's preferred objectives.
452. Finally, Meta's proposed commitments envisage a 10% margin of error. As a result, these A/B tests should make it possible to identify genuine anomalies, without unjustifiably influencing the objectives pursued by the service providers through the use of the Recommendation Functionality. Indeed, there may be a decorrelation between the parameters of the test and the objectives pursued by the intermediary's advertiser client, which may rely on information other than that available through Meta. Not envisaging a margin of error would have limited the incentives for beneficiaries of the Recommendation Functionality to offer services to advertisers that rely on data other than Meta's. The proposed

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<sup>486</sup> Criteo's remarks regarding the commitments of Facebook, 19 July 2021, paragraph 133.

<sup>487</sup> Explanatory note of 4 February 2022, page 4.

commitments therefore appear likely to remedy the consequences that the practices applied by Meta may have had on the DSP market, while guaranteeing the beneficiaries of the Recommendation Functionality the possibility of developing their activity according to the value-added model of their choosing.

453. It follows from the foregoing that the commitments proposed by Meta regarding the Recommendation Functionality are likely to address the competition concerns identified in the preliminary assessment as regards the access conditions of APIs such as the ULB API, insofar as the access criteria to the Recommendation Functionality appear sufficiently justified, objective, transparent and non-discriminatory, and do not unjustifiably create new distortions of competition.

## **5. REGARDING THE DURATION AND GEOGRAPHICAL SCOPE OF THE COMMITMENTS**

454. In their final version, the commitments are proposed for a period of 5 years from the date of implementation (i.e., three months after the present decision), with the exception of the commitment concerning the recommendation functionality, which is proposed for a period of 3 years from the same date.
455. With regard to the geographic scope of the commitments, the Autorité notes that they pertain to all Ad Tech service providers which, during the previous 180 days, participated in at least one advertising campaign that targeted, in particular, users of Meta's services located in France, regardless of whether the campaign in question was aimed solely at users located in France or whether it was aimed at both users in France and abroad ("mixed" campaign).
456. However, once an Ad Tech service provider falls within the scope of the commitments, the main criteria defined by these commitments, such as the Material API Spend taken into account for accessing the MBP programme, are assessed at the worldwide level. Similarly, service providers who have been granted the Status or Badge will be able to use it for their advertising campaigns regardless of the location of the targeted users. Service providers who have been given access to the Recommendation Functionality may also use it for all of their advertising campaigns, without geographical restriction<sup>488</sup>.

## **6. REGARDING THE MONITORING OF COMPLIANCE WITH THE COMMITMENTS**

457. According to the sixth paragraph of Article L. 464-8 of the French Commercial Code (Code de commerce) (freely translated), "*the Autorité de la concurrence shall ensure that its decisions are implemented*". It follows from these provisions that it is incumbent on the Autorité to ensure effective monitoring of the proper implementation of the commitments.
458. Given their nature, behavioural remedies require monitoring that may be more complex than that for structural measures<sup>489</sup>. Indeed, as the Autorité noted in its study on behavioural remedies, evaluating the implementation of these commitments "*requires an analysis, sometimes delicate, of the actions of their creator and the context of their implementation*".

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<sup>488</sup> See Meta's explanatory note of 29 October 2021.

<sup>489</sup> See in this sense Decision 12-D-15 of 9 July 2012 on compliance with commitments in the Decision authorising Bigard Group's takeover of Socopa Viandes, paragraph 31 (French only).

<sup>490</sup> The monitoring of compliance with these commitments must also be carried out on a regular basis throughout the duration of their execution. As such, verifying these commitments "*often involves the mobilisation of significant resources, for the case team in particular*"<sup>491</sup>.

459. While it follows from points 48 and 49 of the procedural notice of 2 March 2009 that the monitoring of compliance with the commitments may be carried out on the basis of reports sent by the company to the case team and that the latter may request additional information and, if necessary, carry out an investigation, the appointment of a monitoring trustee may, in certain cases, prove useful, particularly for monitoring behavioural remedies.
460. The appointment of a monitoring trustee may allow the Autorité to effectively verify and monitor compliance with the commitments, while not overtaxing its resources<sup>492</sup>.
461. The appointment of a monitoring trustee may also be essential in order to assist the Autorité in monitoring particularly complex commitments. For example, in order to monitor compliance with a commitment made by SNCF, which consisted of guaranteeing access to a range of material, IT and human resources for companies operating in the technical assistance market, the Autorité considered that the appointment of a monitoring trustee was (freely translated) "*essential to ensure that there is no discrimination between companies requesting access to the resource, since this access is based on various strict technical conditions that may be difficult to assess*"<sup>493</sup>.
462. Indeed, the usefulness of using a monitoring trustee lies in the fact that the latter acts independently of the company that has proposed the commitments. He or she contributes to the monitoring of compliance by drawing up regular reports for the Autorité. The monitoring trustee may also alert the latter to any difficulties in application<sup>494</sup>. Nevertheless, it should be emphasised that the Autorité is not bound by the assessment made by the monitoring trustee as to compliance with the commitments<sup>495</sup>.
463. In order to carry out its mission effectively, the monitoring trustee must be chosen in such a way as not to be in a conflict of interest with the company proposing the commitments, and be remunerated under conditions that allow them to carry out their mission properly. They must also have the necessary qualifications to ensure rigorous monitoring of compliance with the commitments. Finally, they must have access to the necessary information to be able to verify for themselves compliance with the commitments.
464. In this case, the modalities for appointing the monitoring trustee, as proposed by Meta, make it possible to ensure both their independence and their effective capacity to ensure that Meta will implement and respect its commitments<sup>496</sup>. It should be noted that the monitoring of

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<sup>490</sup> Study "*Behavioural Remedies*", page 378

<sup>491</sup> Ibid.

<sup>492</sup> See in this sense Decision 13-D-15 of 25 June 2013 on practices implemented in the maritime freight transport sector between Northern Europe and the French West Indies, paragraph 175 (French only).

<sup>493</sup> On this point, see Decision 15-D-19 of December 15, 2015 regarding practices implemented in the standard and express delivery sectors, paragraph 81 (French only).

<sup>494</sup> On these various points, see Study "*Behavioural Remedies*", page 380.

<sup>495</sup> French Administrative Supreme Court (Conseil d'État), Assembly, 21 December 2012, Groupe Canal Plus company, No. 353856, in recueil, paragraph 41.

<sup>496</sup> Paragraphs 8.1.1 to 8.1.9 of the commitments.

compliance with commitments will require broad competencies on the part of the monitoring trustee, in particular in the legal, economic and IT fields.

465. It also follows from the proposed commitments that the monitoring trustee will be closely involved in each stage of implementation. In particular, they will ensure the clarity, objectivity and non-discriminatory application of the criteria for access to the Ad Tech MBP programme<sup>497</sup>. They have the right to review the content of the notifications sent by Meta, so that Ad Tech service providers who fall within the scope of the commitments can actually benefit from them: this includes the simplified Notification of Eligibility for the Ad Tech MBP Programme<sup>498</sup> and the Notification of Eligibility for the Recommendation Functionality<sup>499</sup>. As stated in paragraph 407 above, the monitoring trustee must also approve the Methodology of the Usage Tests for the Recommendation Functionality<sup>500</sup>.
466. In the same way, the monitoring trustee is associated with the implementation of the commitment relating to the Training on Sales Communication, for which they must approve the content, the schedule, and the modalities of evaluation<sup>501</sup>.
467. In addition, it follows from the proposed commitments that the monitoring trustee is invested with the role of interlocutor with the Ad Tech service providers with whom they will regularly interact: In this capacity, they are responsible for verifying the correct reception of notifications sent to the service providers<sup>502</sup>, for following up on any requests for clarification that may be made by an Ad Tech MBP Partner in the event that a Badge is withdrawn<sup>503</sup>, or for verifying, at the request of a Partner, the validity of the reasons for Meta's refusal to allow it to submit a new application for the Recommendation Functionality<sup>504</sup>.
468. In order to carry out their mission, and minimise the asymmetry of information that may result from the fact that Meta alone has the necessary elements to assess the proper implementation of the commitments, the commitments include a non-exhaustive list of documents that the monitoring trustee will receive without having to request them<sup>505</sup>. Furthermore, the commitments provide that (freely translated) "*the monitoring trustee shall have access within a reasonable time frame to all the information necessary for the smooth progress of their mission, as soon as they request it*"<sup>506</sup>.
469. As noted in paragraphs 404 and 405 above, the monitoring trustee will submit a quarterly report to the Autorité and, if necessary, additional reports if it considers that the circumstances warrant it<sup>507</sup>. Under the terms of the commitments, the monitoring trustee also

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<sup>497</sup> See in particular paragraph 4.1.6 of the commitments.

<sup>498</sup> Paragraph 4.1.4 of the commitments.

<sup>499</sup> Paragraph 6.2.2 of the commitments.

<sup>500</sup> Paragraphs 6.3.4 and 8.2.3 of the commitments.

<sup>501</sup> Paragraphs 5.1.1 to 5.1.5 of the commitments.

<sup>502</sup> Paragraph 3.2 of the commitments.

<sup>503</sup> Paragraph 4.4.7 of the commitments.

<sup>504</sup> Paragraph 6.4.5 of the commitments.

<sup>505</sup> Paragraph 8.2.2 of the commitments.

<sup>506</sup> Paragraph 8.2.1 of the commitments.

<sup>507</sup> Paragraph 8.2.5 of the commitments.

has the right to alert and thus send observations to Meta and, if necessary, notify the Autorité of any decision of which they have been notified and which, in their opinion, distort the commitments due to a lack of objectivity or proportionality<sup>508</sup>.

470. In view of these elements, the Autorité considers that, in the context of the monitoring of compliance with the commitments proposed by Meta, the appointment of a monitoring trustee with the means to carry out their mission enhances the verifiability of these commitments.

## **7. CONCLUSION**

471. The Autorité considers that the commitments proposed by Meta, in their final version of 11 February 2022, will put an end to the competition concerns expressed in the preliminary assessment of the case team, and are substantial, credible and verifiable. It is therefore appropriate to accept them, make them binding and close the procedure.

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<sup>508</sup> Paragraph 8.2.4 of the commitments.

## DECISION

**Article 1:** The Autorité de la concurrence accepts the commitments given by Meta, which form an integral part of this decision to which they are appended. These commitments are made binding as of the notification of this decision.

**Article 2:** The complaint registered under n° 19/0054 F is closed.

Deliberated on the oral report by Mr Mathieu Guennec and Mrs Laure Dosogne Varaire, Rapporteurs, and the intervention of Mrs Pascale Déchamps, Deputy General Rapporteur, by Mr Henri Piffaut, Vice-President and Chairperson, Mr Emmanuel Combe, Vice-President and Mrs Fabienne Siredey-Garnier, Vice-President.

Hearing Secretary,

Chair,

Caroline Orsel

Henri Piffaut

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