



EUROPEAN COMMISSION  
DG Competition

**PUBLIC VERSION**

***Case M. 10262-META (FORMERLY FACEBOOK) /  
KUSTOMER***

(Only the English text is authentic)

**REGULATION (EC) No 139/2004  
MERGER PROCEDURE**

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Article 8(2) Regulation (EC) 139/2004  
Date: 27/01/2022

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Brussels, 27.1.2022  
C(2022) 409 final

**COMMISSION DECISION**

**of 27.1.2022**

**declaring a concentration to be compatible with the internal market and the EEA  
agreement**

**(Case M.10262 – META (FORMERLY FACEBOOK) / KUSTOMER)**

(Only the English text is authentic)

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# COMMISSION DECISION

of 27.1.2022

**declaring a concentration to be compatible with the internal market and the EEA agreement**

**(Case M.10262 – META (FORMERLY FACEBOOK) / KUSTOMER)**

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union<sup>1</sup>,

Having regard to the Agreement on the European Economic Area, and in particular Article 57 thereof,

Having regard to Council Regulation (EC) No 139/2004 of 20.1.2004 on the control of concentrations between undertakings<sup>2</sup>, and in particular Article 8(2) thereof,

Having regard to the Commission's decision of 2 August 2021 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission,

Having regard to the opinion of the Advisory Committee on Concentrations<sup>3</sup>,

Having regard to the final report of the Hearing Officer in this case<sup>4</sup>,

Whereas:

## **1. THE PARTIES AND THE OPERATION**

- (1) On 25 June 2021, the Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which Meta Platforms, Inc., formerly Facebook, Inc. (“Meta” or “Facebook” or the “Notifying Party”, U.S.) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of Kustomer, Inc. (“Kustomer”, U.S.) (the “Transaction”). Facebook and Kustomer are collectively referred to as “Parties”.
- (2) **Meta (formerly Facebook)** was founded in 2004 and is headquartered in the U.S. It provides various websites and applications for mobile devices offering social networking, consumer communications and photo and video-sharing functionalities. These include Facebook, Messenger, Instagram and WhatsApp. Meta (formerly Facebook) offers most of its services at no cost to users. Meta (formerly Facebook)’s

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<sup>1</sup> OJ C 115, 9.8.2008, page 47 (“TFEU”).

<sup>2</sup> OJ L 24, 29.1.2004, page 1 (the “Merger Regulation”). With effect from 1 December 2009, the TFEU has introduced certain changes, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout this decision.

<sup>3</sup> Opinion of the Advisory Committee on Concentrations of 14 January 2022.

<sup>4</sup> Final report of the Hearing Officer.



primary revenue-generating activity is offering ads space and related services (such as tools for designing, and measuring the effectiveness of, ads campaigns) to third parties, which currently accounts for the vast majority of its annual revenues globally. Meta (formerly Facebook)'s FY 2020 worldwide revenues were EUR [Revenue Information], of which EUR [Revenue Information] or [Revenue Information] were generated in the EEA (excluding the UK).

- (3) **Kustomer** was founded in 2015 and is headquartered in the U.S. It offers a Software as a Service (“SaaS”) customer relationship management (“CRM”) software specialising in customer service. It is designed to help agents in a company’s customer service function manage communications with consumers, e.g., when a consumer contacts the business with a product enquiry, in connection with a late delivery or a faulty product or return. Kustomer displays all interactions that a consumer has had with the business in a single timeline view, including the consumer’s purchase history, refunds, complaints and all other communications. Kustomer’s CRM software integrates with a wide range of business-to-consumer (“B2C”) communication channels and supports agent communications with consumers through communication channels including phone, email, webchat, SMS, Messenger, WhatsApp, Instagram and Twitter. Kustomer’s FY 2020 worldwide revenues were EUR [Revenue Information], of which EUR [Revenue Information] or [Revenue Information] were generated in the EEA (excluding the UK). Kustomer’s worldwide and EEA revenues are expected to be EUR [Revenue Information] and EUR [Revenue Information] respectively in FY 2021.
- (4) The Transaction consists in the acquisition of sole control by Meta (formerly Facebook) over Kustomer, pursuant to a merger agreement dated [Transaction Structure]. Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

## 2. JURISDICTION

- (5) The Transaction does not have a Union dimension within the meaning of Article 1 of the Merger Regulation as the Parties' turnover does not meet the thresholds of Article 1(2) or 1(3) of the Merger Regulation.<sup>5</sup>
- (6) On 2 April 2021, the Commission received a referral request from the Federal Competition Authority of Austria (the “Austrian NCA”) pursuant to Article 22(1) of the Merger Regulation.<sup>6</sup> The national competition authorities of Belgium, Bulgaria, France, Iceland, Ireland, Italy, the Netherlands, Portugal and Romania subsequently joined the request made by the Austrian NCA. On 12 May 2021, the Commission accepted the request and therefore decided to examine the Transaction pursuant to Article 22(3) of the Merger Regulation.

## 3. THE PROCEDURE

- (7) The Transaction was notified to the Commission on 25 June 2021.
- (8) After a preliminary examination of the notification and based on the first phase market investigation, the Commission raised serious doubts as to the compatibility of the Transaction with the internal market and adopted a decision to initiate

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<sup>5</sup> Kustomer achieves revenues of less than EUR [Revenue Information] in the EEA.

<sup>6</sup> The Transaction was notified to the Austrian NCA on 31 March 2021 on the basis that it met the applicable turnover thresholds under Austrian competition rules.

proceedings pursuant to Article 6(1)(c) of the Merger Regulation on 2 August 2021 (the "Article 6(1)(c) Decision").

- (9) On 2 August 2021, the Commission provided a number of key documents to the Notifying Party.
- (10) On 6 August 2021, the second phase investigation period was extended by 5 working days at the request of the Notifying Party pursuant to the first sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (11) On 23 August 2021, the Notifying Party submitted its written comments to the Article 6(1)(c) Decision (the "Article 6(1)(c) Response").
- (12) On 24 August 2021, the second phase investigation period was extended by 10 working days in agreement with the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (13) On 27 August 2021, a State of Play meeting between the Notifying Party and the Commission took place.
- (14) The Commission held technical meeting with the Parties on 21, 22, 23 and 24 September 2021.
- (15) On 29 September 2021, the Commission provided preliminary feedback to the Notifying Party on the results of its second phase market investigation.
- (16) On 10 October 2021, the Notifying Party submitted a paper setting out their reactions to the feedback provided by the Commission on 29 September 2021. The underlying data and calculations were shared with the Commission two days later on 12 October 2021.
- (17) A State of Play meeting between the Notifying Party and the Commission took place on 14 October 2021 during which the Commission explained its preliminary findings based on its second phase investigation.
- (18) After reviewing the available evidence collected in Phase I and Phase II, the Commission came to the preliminary view that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition in a substantial part of the internal market within the meaning of Article 2(3) of the Merger Regulation, and issued a Statement of Objections to the Notifying Party on 18 October 2021 (the "SO").
- (19) On 28 October 2021, the Notifying Party confirmed that it would not request an Oral Hearing.
- (20) On 3 November 2021, the Notifying Party submitted its written comments on the SO (the "SO Response").
- (21) A State of Play meeting between the Notifying Party and the Commission took place on 18 November 2021.
- (22) On 24 November 2021, the Notifying Party submitted commitments pursuant to Article 8(2) second subparagraph of the Merger Regulation in order to address the competition concerns identified by the Commission. Accordingly, the legal deadline for the Commission decision was automatically extended by 15 working days, pursuant to Article 10(3) first subparagraph of the Merger Regulation.
- (23) On 26 November 2021, the Commission launched a market test of the commitments submitted by the Notifying Party.

- (24) On 3 December, the Commission sent a Letter of Facts to inform the Notifying Party about additional factual elements which were not yet expressly relied on in the SO and that would be potentially relevant for its final decision (the “LoF”). The Notifying Party submitted a response to the LoF (the “LoF Response”) on 13 December 2021.
- (25) The Commission gave the Notifying Party detailed feedback on the outcome of the market test during a State of Play meeting on 10 December 2021.
- (26) On 17 December 2021, the second phase investigation period was extended by five working days in agreement with the Notifying Party pursuant to the third sentence of the second subparagraph of Article 10(3) of the Merger Regulation.
- (27) On 20 December 2021, the Notifying Party submitted revised and final commitments pursuant to Article 8(2) of the Merger Regulation.
- (28) On 22 December 2021, the Commission sent a draft of the decision taken pursuant to Article 8(2) of the Merger Regulation (the “Decision”) to the Advisory Committee with the view of seeking the Committee’s opinion. The meeting of the Advisory Committee took place on 14 January 2022 and the Committee issued its positive opinion.

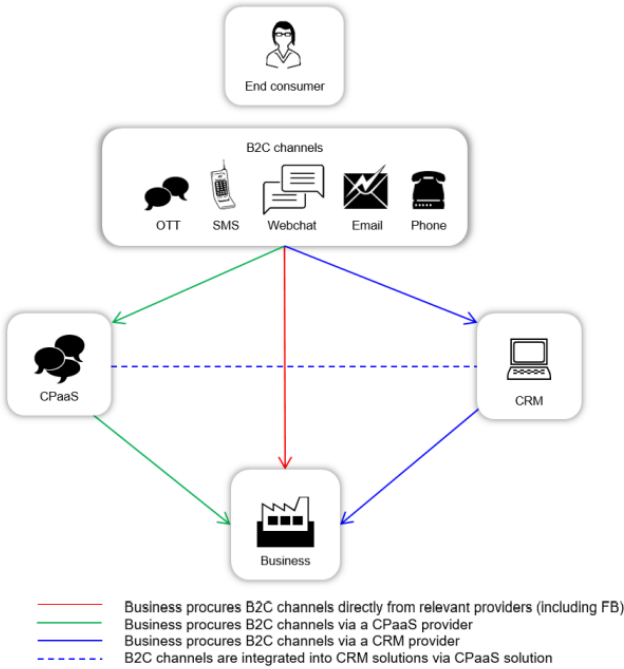
#### **4. THE COMMISSION’S INVESTIGATION**

- (29) This Decision contains the Commission's findings on the basis of the market investigation it carried out prior to the notification of the Transaction, in the first phase and in the second phase of the investigation until the adoption of the Decision.
- (30) Prior to the notification of the Transaction, the Commission sent eleven requests for information (“RFI”) to the Parties, responses to which were included in the notification. The Commission also exchanged draft data requests with Meta (formerly Facebook) and its competitors in the market for online advertising. Finally, the Commission conducted several interviews with the Parties' customers and competitors.
- (31) During the first phase investigation, the Commission sent two requests for information to the Parties pursuant to Article 11 of the Merger Regulation. The Commission also sent requests for information in the form of four different questionnaires to competitors and customers of the Parties. The Commission also finalised the draft data requests it had exchanged with Meta (formerly Facebook) and its competitors in the market for online advertising, and sent these final data requests.
- (32) Over the course of its second phase investigation, the Commission sent twelve requests for information to the Parties pursuant to Article 11 of the Merger Regulation, including two detailed internal documents requests, resulting in the submission of over [1-2] million internal documents (approximately [1-1.5] million internal documents from Meta (formerly Facebook) and approximately [300,000-500,000] from Kustomer). Further, the Commission held several calls with market participants and sent several requests for information to competitors and customers of the Parties, including four different questionnaires.

#### **5. INDUSTRY OVERVIEW**

- (33) In this Section, the Commission provides an overview of all sectors that are relevant for the purpose of assessing the Transaction in order to provide context for the competitive assessment undertaken in Section 7.

- (34) Businesses and consumers communicate with each other using a range of different communication channels including traditional channels like phone, email and more modern channels such as messaging channels (e.g., Meta (formerly Facebook)’s WhatsApp or Messenger, Twitter, or webchat<sup>7</sup>). Businesses can procure B2C communication services either directly from the relevant provider (e.g., from a fixed telephone provider, an enterprise email provider, or Meta (formerly Facebook)) or indirectly from intermediaries that provide connectivity to multiple communication channels. These include CRM software tools, such as the SaaS CRM tool offered by Kustomer, or Communication-Platform-as-a-Service (“CPaaS”) solutions, which are cloud-based middleware solutions that integrate communication channels (such as voice, email, SMS, webchat and over-the-top (“OTT”)<sup>8</sup> messaging) into their applications via application programming interfaces (“APIs”)<sup>9</sup> and then provide businesses (including CRM software providers) with access to the relevant channels without needing to build backend infrastructure and interfaces.
- (35) The figure below sets out the manner in which such communications can take place.



Source: The Notifying Party (Form CO, Figure 6.2)

- (36) In general, the means and channels through which a business will typically communicate with its customers can depend on various factors, including its size, the sector it operates in, and the types of customers it serves. At one end of the spectrum,

<sup>7</sup> A webchat is accessible via a web browser and does not require a specific chat software.

<sup>8</sup> OTT messaging channels are messaging channels that are provided via an internet connection, as opposed to messaging channels that are provided via a cellular (i.e., mobile phone) network, such as SMS. OTT messaging channels include Meta (formerly Facebook)’s messaging channels (Messenger, Instagram messaging and WhatsApp) as well as third party messaging channels such as Twitter DM, Telegram, Line and WeChat.

<sup>9</sup> An API is a particular set of rules and specifications that a software programme follows in order to access and make use of the services and resources provided by another software programme or hardware that also implements that API. In essence, APIs allow software programmes and hardware, or different software programmes, to communicate with each other.

it is typical for small businesses<sup>10</sup> to procure B2C messaging channels directly (i.e., to communicate with customers via a phone number, email address, Facebook or WhatsApp account or any other means), not to have dedicated customer service staff, and not to use a CRM software tool. Medium to large businesses (i.e., with a reasonably high volume of customer interactions and which may have a number of customer service staff), may need to opt for a CRM software tool that integrates a range of B2C communication channels. Large to very large enterprises, depending on their size and specific needs, may use a highly customisable CRM tool or alternatively build their own in-house solution which may integrate different B2C messaging channels both directly and indirectly (e.g., through CPaaS providers) and employ (or outsource to) large teams of customer service staff.

## **5.1. CRM software solutions**

(37) CRM software solutions help companies of various industry sectors manage their customer interactions by organising, automating and synchronising data from various sources, such as sales, marketing, customer database, customer service and technical functions. CRM software solutions collate sets of data and display them in a user friendly manner. This enables companies to improve customer relationships, to better manage accounts, to enhance sales effectiveness, to optimise data quality and to mitigate regulatory compliance risks.<sup>11</sup>

### *5.1.1. Types of CRM software solutions*

(38) CRM software solutions can offer different functionalities, such as (i) Customer Service and Support; (ii) Sales, (iii) Marketing; and (iv) Digital Commerce.<sup>12</sup> CRM software solutions can be on-premises or cloud-based (i.e., delivered as SaaS), and can be customisable to the industry sector of the business customer. Kustomer, for example, offers a SaaS CRM software tool specialised in customer service and support.

### *5.1.2. Data held by CRM software solutions*

(39) CRM software solutions specialised in customer service and support may hold a variety of different types of data on behalf of their business customers, including for example, the end customer's identity, location, contact information and purchasing history (conversions data) as well as pre-sale customer data (e.g., product queries, website visits, preferences), post-sale customer data (e.g., returns, delivery queries) and unstructured conversations data (i.e., that take place over one or more B2C communication channels integrated into the CRM software tool) between a business and their customers.<sup>13</sup>

(40) The data that is stored in a CRM software solution (whether on-site or on a server of the CRM software provider) is owned / under the control of the business using the CRM software tool, who retains the decisions on the means and purposes of the processing of the data. The CRM software provider will therefore not be able, without prior agreement of / instruction from the business and if relevant the end-customer, to use or sell any of this data. All CRM providers expressing an opinion indeed confirmed that they do not sell data that is stored in their CRM software

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<sup>10</sup> The Notifying Party segments customers based on the following criteria: [Business Plans] – e.g., Form CO, paragraph 2.2.9.

<sup>11</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraph 29.

<sup>12</sup> These functionalities are the most relevant ones identified under the industry classification by Gartner.

<sup>13</sup> Replies to questionnaire 1 to CRM software providers, question 60.

tool.<sup>14</sup> This does however not mean that this data cannot be shared with third parties such as online ads service providers (through partnerships between CRM software providers and online ads service providers or otherwise) with the agreement of the business and, if relevant, the consent of the end-customer. The majority of CRM providers expressing an opinion indicated that their CRM tool currently allows business customers to share their data with a provider of online display advertising services through their CRM software.<sup>15</sup> Moreover, all CRM providers expressing an opinion indicated that business customers indeed share data from their CRM software with online ads service providers<sup>16</sup>, although only a minority of customers of CRM software responding to the market investigation indicated that they currently do so.<sup>17</sup>

- (41) From the perspective of a business that makes use of CRM software, there is a commercial interest to share data with an online ads service provider. The sharing of data will allow that business to measure and optimise the performance of their ad campaigns. Businesses may however decide to share their data through other channels than their CRM software, for example through a point of sale (such as Amazon or Shopify) or to share it themselves directly.
- (42) The data that is stored in a CRM software tool (e.g., whether a particular customer has already purchased, or expressed interest in purchasing, from a company) is also valuable to online ads service providers. In particular, this data could be used to improve ad targeting, and to measure “conversions” (i.e., the effectiveness of particular ads campaigns in leading to more sales).<sup>18</sup> Moreover, with regard to Meta (formerly Facebook) in particular, data is also used to [Information on how Meta uses its data]. This involves the [Information on how Meta uses its data].<sup>19</sup>

## 5.2. B2C communications

- (43) Businesses and consumers communicate using a wide range of different communication channels. Traditionally, these B2C communication channels included telephone/voice, letters, fax, email and SMS. However, many alternative communication channels have since emerged. These more modern channels include, for example, form messages that consumers may fill in on the website of a business (also called webchat) that can be included on a website or in a business’ app.
- (44) Most notably, more modern B2C communication channels include different types of messaging. Messaging channels can be cellular-based (i.e., making use of a mobile telephone connection as is the case with SMS), OTT (as is the case with Meta (formerly Facebook)’s channels such as WhatsApp), or a combination of both cellular-based and OTT (such as Google Rich Communication Services (“RCS”) or Apple Business Chat<sup>20</sup>). A wide range of B2C messaging channels exist today,

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<sup>14</sup> Replies to questionnaire 1 to CRM software providers, question 62.

<sup>15</sup> Replies to questionnaire 7 to CRM software providers, question 51.

<sup>16</sup> Replies to questionnaire 7 to CRM software providers, question 52

<sup>17</sup> Replies to questionnaire 5 to business customers, question 16.2.

<sup>18</sup> Form CO, paragraph 6.120.

<sup>19</sup> Parties’ reply to RFI 21, question 11.

<sup>20</sup> Both Google RCS and Apple Business Chat are directly available on mobile phones running respectively on Android or iOS. These services are intended to replace SMS and add functionalities of OTT messaging channels (i.e., to see when another user types or was last online, sending larger texts or files etc.). Both Google RCS and Apple Business Chat make use of an internet connection. However, unlike OTT messaging channels such as WhatsApp, no account or registration with the messaging channel is required (other than the general account with which the user has signed up for the mobile

including: WhatsApp, Messenger, Instagram Messaging, Twitter, iMessage, Apple Business Chat, Google RCS, WeChat, Telegram, Line, Signal, Talk, Viber, Kakao Talk, IMO, etc.

- (45) Many of these B2C messaging channels are available globally. However, the degree to which consumers use these channels, i.e., the penetration rate of a given messaging channel, differs per country.

#### 5.2.1. B2C communication channels and CRM software

- (46) A business' chosen CRM software solution and the B2C communication channels it uses are not automatically interoperable. A B2C communication channel can however be integrated in all of a business' systems, including its CRM software, through an API.
- (47) The API allows for the integration into the CRM software solution and enables access to the communication channel by multiple agents/employees. The API is generally provided by the provider of the B2C communication channel and APIs are either sold or available as open source. A B2C communication service provider is not required to make an API available as open source.
- (48) Kustomer's CRM software integrates with a range of B2C communication channels, including telephone/voice, email, SMS, webchat, Messenger, Facebook WhatsApp, Instagram (comments and direct messages), and Giphy, Twitter (tweets and direct messages) and form messages. Other B2C communication channels that certain CRM software providers integrate with include OTT messaging channels like Viber, WeChat, Line and Telegram.

#### 5.2.2. B2C communication channels, CPaaS solutions and CRM software solutions

- (49) CPaaS providers are intermediaries that offer cloud-based middleware which allows businesses and CRM software providers to integrate communication channels (including voice, email, SMS, webchat and OTT messaging) into their applications without needing to build backend infrastructure and interfaces. The CPaaS integrates with the relevant B2C communication channel provider via APIs and provides its customers with access to the relevant channel (or series of channels), for example via a further API. CPaaS providers may for example integrate voice and SMS channels from various network operators and package that into a single product, which can be integrated into a CRM software tool. By way of example, a CPaaS provider may provide access to voice, SMS, as well as various OTT messaging channels such as Meta (formerly Facebook)'s WhatsApp. As outlined above, Kustomer integrates Messenger, Instagram and WhatsApp messaging channels. [Information on Kustomer's means of integration of Messenger, Instagram Messaging and Whatsapp].<sup>21</sup>
- (50) Business customers may procure a CRM software tool that already integrates certain communication channels (e.g., via API access directly from B2C communication service providers for certain channels (such as many OTT messaging channels, which have open APIs) and via API access to CPaaS solutions for other channels

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phone to run on the respective OS) and messages can be sent using a cellular connection in case there is no internet connection. The additional functionalities of Google RCS and Apple Business Chat will, as of today, not work for messages that are sent between iOS and Android devices. Rather, messages sent between the two operating systems will be regular SMS messages without the additional functionalities.

<sup>21</sup> Meta (formerly Facebook)'s WhatsApp for Business API is currently not open access [Business Plans]. See Form CO, paragraph 2.2.8.

(typically SMS and voice or OTT messaging channels with no open APIs)). It is also possible for businesses to contract separately with a CPaaS provider (or even with a B2C communication channel provider) and with a CRM software provider, and in a second step arrange for the API to the B2C channels that it acquired either directly or through CPaaS software to be integrated into their chosen CRM solution.

- (51) Ultimately, as acknowledged by the Notifying Party, whether a business contracts only with a CRM software provider, or separately with a CPaaS provider (or a B2C communication channel provider) as well as with a CRM software provider, the B2C channels are generally integrated in the chosen CRM software solution.<sup>22</sup>

### **5.3. Online advertising sector**

- (52) Demand for ads services in the online advertising sector comes from businesses (i.e., advertisers) who wish to present ads to (potential) customers to drive a particular audience response (such as the purchase of a certain product or service). The goal for advertisers is to generate incremental sales and profits.

- (53) Advertisers seeking to launch an ads campaign can choose between two types of online ads:

- (a) Online search ads: these are displayed on the basis of search queries entered by users into internet search engines (i.e., advertisers can specify the keywords for which they want their ads to be triggered or the queries for which they are most likely to be relevant). Search ads are typically presented next to the search results on the search engine's own pages or other search results pages.
- (b) Online display ads: these can be either contextual ads, displayed according to the content of the page on which they appear, or non-contextual ads. Since no query-keyword is usually available to trigger display ads, the data collected about the user accessing the pages is relatively more important for display ads than for search ads.

- (54) On the supply-side of the online advertising sector, ads venues aim to attract and retain advertisers by giving the opportunity to convey the advertiser's message in an appealing and engaging way to drive a customer response that generates incremental sales and profits.

- (55) Digital advertising space (or "inventory") can be sold at a fixed price through direct deals between the publishers (the "sell side") and individual advertisers or media agencies (the "buy side"). The matching between the two sides can also be made by intermediaries. The advertising supply chain involves a diversified network of intermediaries that provide technologies and/or data ("ad tech") to facilitate the programmatic sale and purchase of digital advertising inventory.

- (56) Meta (formerly Facebook) provides online display advertising services at the various levels of the ad tech value chain. It sells ads on its own properties (i.e., Facebook, Instagram and Messenger) and also through Meta (formerly Facebook) Audience Network ("MAN"). As regards the ads Meta (formerly Facebook) sells on its own properties, it offers several types of advertising formats both on desktops and on mobile devices. Advertising formats can include video advertising, non-video advertising and click-to-message ("CTM") advertising. CTM ads will send a (potential) customer who clicks on a particular ad to a conversation with the advertiser on Messenger, Instagram or WhatsApp.

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<sup>22</sup> Meta (formerly Facebook)'s Comments on State of Play Meeting, 22 July 2021, paragraph 5.1(B).



- (57) Through MAN, Meta (formerly Facebook) matches advertisers seeking to deliver their ads off Facebook to businesses looking to fill their unsold advertising space on their mobile apps. On the demand side, Meta (formerly Facebook) enables advertisers to buy advertising space through its Ads Manager. Meta (formerly Facebook)'s Ads Manager allows a business among others to build ads, choose an audience, set up ad budgets and following the ads campaign to monitor its effectiveness.<sup>23</sup>
- (58) Advertisers who wish to run an ads campaign will go through the following processes. First, a marketing objective will be defined. While ultimately all advertising is designed to increase sales, objectives can also include the increase of conversion (e.g., user action), consideration (e.g., user traffic) or awareness (e.g., user awareness of a brand). Second, the advertiser will have to select a target audience. Through Meta (formerly Facebook)'s Ads Manager, advertisers can choose an audience in three ways, through Core Audiences, Custom Audiences, and Lookalike Audiences. "Core Audiences" allows businesses to define their target audience on the basis of for example location, demographics, interests, consumer behaviour and connections that a business may have on its Facebook page. "Custom Audiences" allows businesses to connect with people that have already shown an interest in their company (e.g., customers, people using a company app, or people that have visited the company's website). It allows businesses among others to connect with "*customers and contacts on Facebook using information from [their] CRM system or email lists*".<sup>24</sup> Finally, "Lookalike Audiences" allows business to create a source audience of people they know, and Meta (formerly Facebook) will enable that the ads campaign reaches similar people with common interests and traits. The third step for running an ads campaign is for the advertiser to select the surfaces, format and content of the ads. Finally, the fourth step is for advertisers to measure the performance of their ads campaign against the marketing objectives pursued and the audiences that are targeted. Meta (formerly Facebook)'s Ads Manager does allow businesses to do so.<sup>25</sup>
- (59) A key aspect of an advertising campaign is targeting. For an advertiser, better targeting will help to achieve its marketing objective. For an online ads service provider, the ability to provide better targeting will result in a more valuable ads service. In this regard, the range of signals (i.e., data) that an online ads service provider receives are important. Meta (formerly Facebook) receives a range of those signals from both Facebook users and from third parties (such as advertisers) that choose to share data with Meta (formerly Facebook). The data that Meta (formerly Facebook) receives can be categorised as follows:
- (a) On-site signals: these are signals gathered as a result of user behaviour on Meta (formerly Facebook)'s services. These signals can include data on: (i) users' connections, preferences, interests and activities; (ii) how users interact with Meta (formerly Facebook)'s services (including interactions with ads delivered on Meta (formerly Facebook)'s services); (iii) information relating to the devices used by users to access Meta (formerly Facebook)'s services; and (iv) the people, places or things users are connected to and interested in.

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<sup>23</sup> See <https://en-gb.facebook.com/business/tools/ads-manager>, last accessed on 7 October 2021 (ID: 2814).

<sup>24</sup> See [https://en-gb.facebook.com/business/ads/ad-targeting?ref=fbb\\_adsmanager\\_products](https://en-gb.facebook.com/business/ads/ad-targeting?ref=fbb_adsmanager_products), last accessed on 7 October 2021 (ID: 2817).

<sup>25</sup> Parties' reply to RFI 6, question 14(a).

- (b) Off-site signals: these are signals that Meta (formerly Facebook) collects or receives from third parties and relating to users' behaviour on those third parties' products and services. Off-site signals include things such as: (i) how users interact with third-party websites and apps (e.g., visits, purchases and ads seen/interacted with); (ii) information relating to the devices used by users to access third-party websites / apps; and (iii) data relating to the performance of Meta (formerly Facebook)'s products (e.g., Meta (formerly Facebook) Business Tools) that third parties have chosen to integrate on their websites / apps.<sup>26</sup>
- (60) Specifically in relation to data stored on a business' CRM software, this can be used for the purposes of ads services in several ways. First, data may be used to help businesses improve ad targeting efforts as set out above. Second, data may be used to measure "conversions" and optimise the performance of a business' ad campaign.<sup>27</sup> Third, data is also used to improve Meta (formerly Facebook)'s ad delivery systems generally. General system improvement involves the improvement to predictions around which users are likely to take the actions that are important to the relevant advertiser.<sup>28</sup> Meta (formerly Facebook)'s improved ad delivery systems can then be relied upon by any advertiser through Meta (formerly Facebook)'s Ads Manager. In the Ads Manager, advertisers can choose how their ad campaign will be optimised to address their marketing objective. For example, if an advertiser seeks to engage with people, Meta (formerly Facebook) can optimise the ads campaign through the following option: "*Conversations – We'll deliver your ads to people most likely to have a conversation with you through messaging*".<sup>29</sup>

## 6. RELEVANT MARKET DEFINITION

- (61) For the assessment of the Transaction in this Decision, the following business activities of the Parties are relevant: (1) Kustomer is active in the supply of CRM software; (2) Meta (formerly Facebook) is active in the supply of B2C communication channels, and (3) Meta (formerly Facebook) offers online advertising services.

### 6.1. CRM software

- (62) Kustomer is active in the market for the supply of CRM software. It provides a SaaS CRM tool specialised in customer service and support. Meta (formerly Facebook) is not active in this market.<sup>30</sup>

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<sup>26</sup> Parties' reply to RFI 6, question 14(b).

<sup>27</sup> Form CO, paragraph 6.120.

<sup>28</sup> Parties' reply to RFI 21, question 11.

<sup>29</sup> See <https://en-gb.facebook.com/business/help/416997652473726>, last accessed on 8 October 2021 (ID: 2811).

<sup>30</sup> For completeness, the Commission notes that Meta (formerly Facebook) offers Unified Inbox to businesses with a Facebook business page or an Instagram business profile. It consolidates communications between a business and consumers that occur via Facebook, Messenger and Instagram (provided the business has linked its Facebook and Instagram accounts). It is designed to help (generally small) businesses manage incoming customer enquiries on a small scale, and is typically free. In the Form CO, Meta (formerly Facebook) submits that Unified Inbox is not a CRM software tool and [Business Plans]. See Form CO, paragraphs 6.57 and following.

### 6.1.1. Product market definition

#### 6.1.1.1. Commission precedents

- (63) The Commission previously considered the market for the supply of CRM software solutions in *Oracle/Siebel*, where it identified CRM as a distinct product market within the overall category of enterprise application software (“EAS”).<sup>31</sup> In that case, the Commission found that CRM software solutions are a separate product market as opposed to other software categories (or “pillars”) within EAS. The Commission left open the question whether the market for CRM software solutions could be further segmented on the basis of (i) functionality of the software, such as Customer Service and Support, Sales, Marketing, or Digital Commerce; (ii) industry sector in which the customer is active; (iii) mode of deployment, that is to say installation on the premises or host-based deployment (i.e., SaaS); or (iv) customisation, i.e., custom-built solutions as opposed to standardised software.<sup>32</sup>
- (64) In *IMS/Cegedim Business*, the Commission found that the market investigation did not give clear indications as to whether a separate CRM software solutions market should have been identified for the industry relevant in that case, that is to say the pharmaceutical sector, but ultimately left open the question whether the market should be further segmented by industry, functionality, mode of deployment or customisation.<sup>33</sup>
- (65) In *Microsoft/LinkedIn*, the Commission considered that CRM software solutions may likely be further distinguished on the basis of functionality, in particular as customers viewed the different functionalities as complementary, rather than substitutable, and there appeared to be also limited scope for supply-side substitution by CRM providers. However, for the purposes of that decision the exact product market definition for CRM software solutions was left open. Similarly, the Commission considered but left open whether the market may be segmented by mode of deployment (on-premises v. cloud based), customer size or based on the type of industry of the customers.<sup>34</sup>

#### 6.1.1.2. The Notifying Party’s view

- (66) The Notifying Party submits that there is a single market for the supply of CRM software.<sup>35</sup>
- (67) The Notifying Party considers that there is no reason to segment the market for the supply of CRM software on the basis of functionality. In particular, the Notifying Party submits that there is no distinct market for the provision of customer service and support CRM software. According to the Notifying Party, customers of CRM software procure varying functionality demands and most suppliers of CRM software provide most or all of the relevant CRM functionalities or offer the ability for customers to mix and match functionalities with different CRM providers.<sup>36</sup>

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<sup>31</sup> Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraphs 11-16.

<sup>32</sup> Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraph 16.

<sup>33</sup> Commission decision of 19 December 2014 in case M.7337 – *IMS Health/Cegedim Business*, paragraphs 91-92. See also Commission decision of 27 November 2007 in case M.4944 – *SAP/Business Objects*, paragraph 7; Commission decision of 4 January 2008 in case M.4987 – *IBM/Cognos*, paragraphs 7-9; Commission decision of 20 July 2010 in case M.5904 – *SAP/Sybase*, paragraph 21; Commission decision of 29 August 2014 in case M.7334 – *Oracle/Micros*, paragraph 9.

<sup>34</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 49-50.

<sup>35</sup> Form CO, paragraph 6.14.

<sup>36</sup> Form CO, paragraph 6.15.

- (68) The Notifying Party also considers that a segmentation between large enterprises and small and medium enterprises is not required as the different needs of businesses can be considered as part of the competitive assessment. Nevertheless, the Notifying Party submits that very small businesses which do not have the scale or resources to justify the investment in dedicated CRM software fall outside of the scope of the market.<sup>37</sup>
- (69) In the Article 6(1)(c) Response, the Notifying Party argues that the Commission arrives at narrow segmentations of the market for the supply of CRM software based on a functional characteristics approach and without applying the substitutability test set out in the Commission Notice on the definition of relevant markets for the purposes of Community competition law (the “Market Definition Notice”).<sup>38</sup> In this regard, the Notifying Party submits that products may differ in their characteristics, price or use, but nevertheless belong to the same relevant market if they are regarded as substitutable for customers and the Commission does not properly consider demand-side substitutability.<sup>39</sup> However, the Notifying Party considers that, since the Transaction does not raise competitive concerns under any plausible market definition, the exact scope of the product markets for the supply of CRM software can be left open.<sup>40</sup>

#### 6.1.1.3. Commission’s assessment

- (70) With respect of a possible distinction of CRM software solutions based on functionality, the market investigation indicated that there may be a separate market for the CRM software functionality of customer service and support, which also corresponds to a distinction used by Kustomer itself<sup>41</sup>, as well as in third party reports, such as Gartner.<sup>42</sup> From a demand-side perspective, a strong majority of responding market participants (both CRM software providers and business customers) considered that CRM software with different functionalities are complementary rather than substitutable<sup>43</sup> and that customer service and support CRM software is the only type of CRM software functionality that is substitutable for Kustomer’s CRM software product.<sup>44</sup> The majority of CRM providers that expressed a view considered it would not be technically possible (or at best only to a limited extent), nor would it be likely from a commercial perspective, for business customers to switch to other CRM software functionalities (i.e., other than customer service and support CRM software) in a scenario where the price of customer service and support CRM software increased.<sup>45</sup> From a supply-side perspective, while larger CRM software providers may offer a range of different functionalities, smaller players (such as Kustomer) may only offer one or a limited number of

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<sup>37</sup> Form CO, paragraph 6.14.

<sup>38</sup> OJ C 372, 9.12.1997.

<sup>39</sup> Article 6(1)(c) Response, paragraphs 2.2 and 2.3.

<sup>40</sup> Form CO, paragraph 6.13 and Article 6(1)(c) Response, paragraph 2.1.

<sup>41</sup> E.g., Form CO, paragraph 2.2.8 and PowerPoint presentation session 2 “Facebook’s proposed acquisition of Kustomer - Kustomer and the CRM Market” of the site visit held on 22 September 2021, slide 7.

<sup>42</sup> Gartner data is used to calculate market shares in the Form CO for both the broader CRM software market and the narrower market for customer service and support CRM software.

<sup>43</sup> Replies to questionnaire 1 to CRM software providers, question 10; replies to questionnaire 4 to business customers, question 10.

<sup>44</sup> Replies to questionnaire 1 to CRM software providers, question 11; replies to questionnaire 4 to business customers, question 9.

<sup>45</sup> Replies to questionnaire 7 to CRM software providers, question 11.

functionalities. There was no clear consensus among CRM providers on the ability for a company specialised in other functionalities to start offering customer service and support CRM software in the short term and without incurring significant investment costs. While in the Phase I market investigation, a majority of respondents that expressed a view said that this would not be possible in the short term and without incurring significant investment costs<sup>46</sup>, in the Phase II market investigation, the results were mixed, with several respondents indicating that it would depend on the CRM software provider's existing capabilities (e.g., existing technology and know-how).<sup>47</sup> In light of the above, the Commission concludes that, from a demand side perspective, there is a separate market for customer service and support CRM software. To the extent the market would be wider than customer service and support CRM software, this would thus only be due to supply-side substitutability arguments (i.e., a CRM software provider offering another functionality starting to offer customer service and support CRM software). However, the Commission considers that any CRM software provider active in another segment wanting to start offering customer service and support CRM software would require B2C communication channels as an input, as customer service and support CRM by definition requires interaction with customers, and that the mere fact that some CRM software providers offer multiple functionalities does not establish full supply-side substitutability if starting to offer a different functionality cannot necessarily be done in the short term and without incurring significant investment costs.

- (71) For the purposes of this Decision, the market definition can be left open in this regard as the Commission considers that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition in both the overall market for CRM software and the market for customer service and support CRM software.
- (72) As regards a possible distinction depending on the mode of deployment, namely cloud-based/SaaS or on-premises, the results of the market investigation were mixed from a demand side perspective. There was no consensus between business customers that expressed a view on whether on-premises and cloud-based CRM software solutions are substitutable for one another.<sup>48</sup> From a supply-side perspective, the majority of respondents that expressed a view considered that it would not be possible for a CRM software provider specialised in on-premises solutions to start offering cloud-based CRM solutions in the short term and without incurring significant investment costs.<sup>49</sup> However, the market investigation also indicated that a majority of CRM software customers use cloud-based solutions, and most CRM software providers only or primarily offer cloud-based solutions.<sup>50</sup> One market participant indicated that "*companies that specialized in on-premises solutions have or are moving towards offering cloud-based solutions*"<sup>51</sup> and a leading CRM software provider confirmed that it "*offers only cloud-based solutions*."<sup>52</sup> The same is true of Kustomer. Indeed, the majority of respondents that

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<sup>46</sup> Replies to questionnaire 1 to CRM software providers, question 9.

<sup>47</sup> Replies to questionnaire 7 to CRM software providers, question 9.

<sup>48</sup> Replies to questionnaire 4 to business customers, question 14.

<sup>49</sup> Replies to questionnaire 1 to CRM software providers, question 15.

<sup>50</sup> Replies to questionnaire 1 to CRM software providers, question 14; replies to questionnaire 4 to business customers, question 12.

<sup>51</sup> Reply to questionnaire 1 to CRM software providers, question 14.1 (ID: 759).

<sup>52</sup> Reply to questionnaire 1 to CRM software providers, question 14.1 (ID: 846).

expressed a view also indicated that cloud-based CRM software solutions are either progressively replacing on-premises solutions, or have almost entirely done so.<sup>53</sup> In light of the mixed market investigation results and the fact that the majority of the market already appears to be cloud-based/SaaS, the Commission considers that it is not necessary to segment the broader CRM software market or the narrower customer service and support CRM software market between SaaS/cloud based solutions on the one hand and on-premises solutions on the other hand. However, the precise segmentation can be left open as the Commission considers that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition in both an overall market for customer service and support CRM software and a potential segment for cloud-based customer service and support CRM software solutions (as well as on the broader CRM software solutions market and a potential segment for cloud-based CRM software solutions).

- (73) As regards a possible segmentation based on business customer size, the vast majority of business customers that responded to the market investigation indicated that such a distinction was justified based on the needs and resources of a particular business (i.e., between small, medium and large businesses)<sup>54 55</sup>, with one such respondent noting that *“a small company would rather take an easy-to-use cloud-based solution with a per license cost model [whereas] on-premises or customized solutions require substantial investments and their benefits would only outweigh costs in bigger companies that can afford the necessary manpower and investment for customization.”*<sup>56</sup> A majority of CRM software providers that expressed a view also supported a segmentation based on business size, on similar grounds.<sup>57</sup> In this regard, the majority of CRM software providers that expressed a view not only indicated that there are material differences in the types of CRM software solutions or the manner in which they are sold depending on whether the CRM software solution is being sold to small, medium-size or large business customers, but also confirmed that their own offering is specifically designed for, or primarily targets, a particular size of business customer (either primarily large enterprises or small and medium-sized business customers).<sup>58</sup> One such respondent explained that *“small business customers require CRM solutions that that are easy to set up and use, require little administrative overhead, and are able to cover a lot of CRM functionality (...). They expect to buy through a fixed-fee model (...). Medium-sized business customers require CRM solution that they can implement quickly while allowing them to scale usage as they might need due to growth or seasonal business conditions. (...) Large business customer prioritize solutions that they are able to customize to match their existing business workflow and processes. (...) Large business customers expect to purchase through tenders or individual negotiations, and similar to medium-sized business customers, typically require a longer sales and implementation process.”*<sup>59</sup>

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<sup>53</sup> Replies to questionnaire 1 to CRM software providers, question 15; replies to questionnaire 4 to business customers, question 17.

<sup>54</sup> Small business (less than 8 employees), medium-size business (between 8 and 500 employees) and large business (more than 500 employees).

<sup>55</sup> Replies to questionnaire 4 to business customers, questions 16 and 16.1.

<sup>56</sup> Reply to questionnaire 4 to business customers, questions 16 and 16.1 (ID: 776).

<sup>57</sup> Replies to questionnaire 1 to CRM software providers, questions 18 and 19.

<sup>58</sup> Replies to questionnaire 7 to CRM software providers, questions 12 and 13.

<sup>59</sup> Reply to questionnaire 7 to CRM software providers, question 12.1 (ID: 1713).

- (74) Moreover, the majority of CRM providers that expressed a view indicated that a company specialised in CRM software solutions for small and medium-sized business (“SMB”) customers would not be able to start providing CRM software services to large enterprises in the short term without incurring significant investments, while several others noted that this would depend on the company’s existing capacities (e.g., human and financial resources or relevant integrations) and the customer’s use case.<sup>60</sup> Respondents that expressed a view confirmed that such a segmentation by business size is equally applicable to customer service and support CRM software.<sup>61</sup> Although the majority of CRM providers that expressed a view considered it would be technically possible for SMBs to switch to customer service and support CRM software designed for large enterprises in the scenario where the price of customer service and support CRM software designed for SMBs increased, they also considered that such a switch would be unlikely, from a commercial perspective.<sup>62</sup> Internal documents and submissions of the Parties indicate that Kustomer is primarily focused on [Type of customers that Kustomer focuses on].<sup>63</sup> Accordingly, and in particular based on the consistent responses to the market investigation and Kustomer’s own primary focus on [Type of customers that Kustomer focuses on], the Commission considers that there may be grounds to further segment the relevant broader market for CRM software and the narrower market for customer service and support CRM software based on business size.
- (75) However, there was no clear consensus expressed on the precise segmentation to be applied as between small medium and large businesses. For the purposes of the present Decision, the market definition can be left open in this regard as the Commission considers that it is likely and there is even a strong probability that the Transaction would significantly impede effective competition in an overall market for customer service and support CRM software and potential segments for customer service and support CRM software based on business size (as well as on the broader CRM software solutions market and potential segments of such a market based on business size). Nevertheless, the segmentation based on business size is taken into consideration as part of the Commission’s competitive assessment in Section 7 in what regards Kustomer’s close competitors.
- (76) With respect to a potential segmentation according to the industry sector in which the business customer is active, again, the majority of market participants that expressed a view indicated that such a segmentation was warranted from a demand-side perspective, including in the case of customer service and support CRM software.<sup>64</sup> The reasons include differences in regulation and policy (e.g., financial, health or retail services), different needs (e.g., public vs private sector) and different levels of data sensitivity (e.g., healthcare sector) according to the sector. However, there was no clear consensus between CRM providers that expressed a view on whether it would be technically possible for business customers in the e-commerce sector (where many of Kustomer’s business customers are active) to switch to customer service and support CRM software designed for business customers in other

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<sup>60</sup> Replies to questionnaire 7 to CRM software providers, question 14.

<sup>61</sup> Replies to questionnaire 4 to business customers, question 17.

<sup>62</sup> Replies to questionnaire 7 to CRM software providers, question 15.

<sup>63</sup> These customers are referred to as [Customer Information]. See Form CO, paragraph 2.2.9 Table 2.4, which shows that the [Customer Information] of Kustomer’s customers belong to the [Customer Information] segment.

<sup>64</sup> Replies to questionnaire 1 to CRM software providers, question 20; replies to questionnaire 4 to business customers, questions 18 and 19.

industries in the scenario where the price of the former increased, while the majority considered the likelihood of such switch, from a commercial perspective, would depend on the customer.<sup>65</sup> Nevertheless, one respondent indicated that “(...) *typically not eCommerce customers, (Traditional Retail), as well as other service centric organizations will have radically different requirements and workflows. As a result customer service functionality that is designed to support e-Commerce, will not likely meet the needs of other businesses, such as Travel, Government, Utilities, High-Tech Manufacturing, etc.*”<sup>66</sup> From a supply side, the majority of CRM software providers that responded to the market investigation indicated that they are capable of providing CRM software to customers active in different sectors, with one respondent pointing out that “*the core CRM functionalities are generally the same across industries*”<sup>67</sup> and another indicating that “*by and large, CRM providers don't tend to focus on specific industries to the exclusion of others, and beyond [creating industry-specific veneers], most underlying CRM products remain fairly similar.*”<sup>68</sup> There was also no clear consensus expressed on the precise segmentation to be applied as between different industry sectors of CRM software customers, including whether there was a distinct market for CRM software for customers active in the e-commerce sector.<sup>69</sup> As a result, the Commission considers that there may be grounds to further segment the relevant broader market for CRM software and narrower market for customer service and support CRM software based on the industry sector of the business customer.

- (77) For the purposes of this Decision, the market definition can be left open in this regard as the Commission considers that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition in an overall market for customer service and support CRM software and potential segments for customer service and support CRM software based on the industry sector of the business customer (as well as on the broader CRM software solutions market and potential segments based on the industry sector of the business customer).
- (78) Finally, the Commission sought to understand whether CPaaS solutions should be included within the same market as CRM software, or as customer service and support CRM software. The majority of market participants that expressed a view considered that CPaaS solutions are not in the same market as CRM software (or customer service and support CRM software) solutions, as they are different in terms of use, product characteristics and price.<sup>70</sup> Several market participants highlighted that they are used for different purposes, and that CRM solutions tend to use CPaaS solutions to complement their service offering.<sup>71</sup> One CRM software provider indicated that “*while CPaaS typically focuses on facilitating the communication between customers and an organization, managing the customers’ records and composing the customers’ experience typically lies within the CRM. CPaaS and*

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<sup>65</sup> Replies to questionnaire 7 to CRM software providers, questions 19 and 20.1.

<sup>66</sup> Reply to questionnaire 7 to CRM software providers, question 19.1.1 (ID: 1655).

<sup>67</sup> Reply to questionnaire 1 to CRM software providers, question 20.1 (ID: 846).

<sup>68</sup> Reply to questionnaire 1 to CRM software providers, questions 20 and 20.1 (ID: 726).

<sup>69</sup> Replies to questionnaire 1 to CRM software providers, question 20.1.

<sup>70</sup> Replies to questionnaire 1 to CRM software providers, questions 23 and 24; replies to questionnaire 2 to CPaaS providers, questions 9 and 10; replies to questionnaire 4 to business customers, questions 20 and 21.

<sup>71</sup> Replies to questionnaire 1 to CRM software providers, question 23.1; replies to questionnaire 2 to CPaaS providers, question 10.1; replies to questionnaire 4 to business customers, question 20.1.



*CRM are more complementary than comparable.*<sup>72</sup> A CPaaS provider indicated that “*Kustomer, being a CRM, covers a broader scope than a CPaaS platform [and] it consumes [via API access] CpaaS platforms in the communication space (i.e. SMS, Voice over MNO connections, other OTT communication channels like Apple Business Chat, Google Business Messages, etc.)*.”<sup>73</sup> The Notifying Party also does not argue that CPaaS should be included within a broader market for CRM software or a narrower market for customer service and support CRM software. Accordingly, in particular because of the consistent responses of market participants active in the supply of CRM software and CPaaS solutions, the Commission concludes that CPaaS solutions do not form part of the narrower market for customer service and support CRM software, or the broader CRM software market.

#### 6.1.1.4. Conclusion

(79) In light of the above, for the purpose of this Decision, the Commission concludes that the question whether there is a separate market for the supply of customer service and support CRM software or whether it is part of the overall market for the supply of CRM software can be left open, and that CPaaS solutions do not form part of either of these markets. The question whether the market for the supply of customer service and support CRM software (or the broader market for CRM software overall) should be further segmented based on (i) mode of deployment, (ii) business customer size, and (iii) industry sector in which business customers are active can be left open in this Decision, as the Commission considers that it is likely, and that there is even a strong probability, that the Transaction would significantly impede effective competition in the market for customer service and support CRM software (or the broader market for CRM software overall) irrespective of such potential segmentation. The Commission will carry out its competitive assessment on that basis.

#### 6.1.2. Geographic market definition

##### 6.1.2.1. Commission precedents

- (80) In *Oracle/Siebel*, the Commission noted that “*trade patterns of CRM solutions do not vary to any significant extent across different geographic regions*”, that there were “*no indications that CRM Solutions would be made either specific for the EEA region or specific to any other region*”, and that local customisation is made solely for “*language reason, or through customised add-ons to meet specific local needs*.”<sup>74</sup> However, the Commission ultimately left open whether the market could be defined as worldwide or EEA-wide, since the transaction did not give rise to competitive concerns.<sup>75</sup> The same conclusion was reached in *IBM/Cognos*.<sup>76</sup>
- (81) In *IMS/Cegedim Business*, the Commission noted that the market was likely EEA-wide in scope, if not broader: the market investigation in that case did not clearly indicate that there were marked regulatory, technical or linguistic differences in the supply of CRM software among Member States. The Commission ultimately left the

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<sup>72</sup> Reply to questionnaire 1 to CRM software providers, question 23.1 (ID: 759).

<sup>73</sup> Reply to questionnaire 2 to CPaaS providers, questions 10.1 (ID: 738).

<sup>74</sup> Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraph 18.

<sup>75</sup> Commission decision of 22 December 2005 in case M.3978 – *Oracle/Siebel*, paragraph 19.

<sup>76</sup> Commission decision of 4 January 2008 in case M.4987 – *IBM/Cognos*, paragraph 16.

exact geographic market definition open, as the transaction did not raise concerns irrespective of the precise geographic scope of the market.<sup>77</sup>

- (82) In *Microsoft/LinkedIn*, the Commission likewise considered that the market for CRM software solutions overall and possible narrower markets or segments of that market to be EEA-wide, if not worldwide, in scope but ultimately left the precise scope of the geographic market open.<sup>78</sup>

#### 6.1.2.2. The Notifying Party's view

- (83) In line with the Commission's decisional practice, the Notifying Party submits that the geographic scope of the market for CRM software is at least EEA-wide, if not worldwide. The Notifying Party submits that (i) CRM software does not vary materially across different regions, and (ii) that there are no material regulatory or technical differences or local software customisation when CRM software is provided in different regions (other than data requirements in certain regions that the software be hosted locally). As regards linguistic differences, the Notifying Party points out that most CRM software offers support for multiple languages and embedded translation technology, and that there are no significant regional or local CRM providers.<sup>79</sup>

#### 6.1.2.3. Commission's assessment

- (84) In the present case and based on the results of the market investigation, the Commission considers that the geographic scope of the market for CRM software solutions overall, or any segmentation thereof, including the narrower market for customer service and support CRM software solutions, is at least EEA-wide, if not worldwide, in scope. Indeed, market participants considered that the geographic scope is at least EEA wide, if not global. In this regard, respondents to the market investigation among CRM providers unanimously agreed that the geographic market for CRM software solutions is worldwide in scope<sup>80</sup> and the vast majority of business customers that responded to the market investigation likewise indicated that the geographic scope of the broader CRM software market is EEA-wide or worldwide in scope.<sup>81</sup> One CRM software provider indicated that they "*do not see any significant differences geographically since it is a global market and companies are looking to solve similar challenges. Companies that serve customers worldwide design their software/solutions to work universally regardless of the geography. Any geographical differences are configured within the solution (i.e. selecting the language to use, date/time format to use, workflows for a region/area, etc.)*".<sup>82</sup>

#### 6.1.2.4. Conclusion

- (85) In light of the above, for the purpose of this Decision, the Commission considers that the geographic scope of the market for CRM software solutions overall, or any segmentation thereof, including the narrower market for customer service and support CRM software solutions, is at least EEA-wide, if not worldwide.

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<sup>77</sup> Commission decision of 19 December 2014 in case M.7337 – *IMS Health/Cegedim Business*, paragraph 96.

<sup>78</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraph 56.

<sup>79</sup> Form CO, paragraph 6.17.

<sup>80</sup> Replies to questionnaire 1 to CRM software providers, question 36; replies to questionnaire 7 to CRM software providers, question 30.

<sup>81</sup> Replies to questionnaire 4 to business customers, question 49.

<sup>82</sup> Reply to questionnaire 1 to CRM software providers, question 36.2 (ID: 759).

## 6.2. B2C communication services

(86) Meta (formerly Facebook) provides a number of messaging services that can be used by businesses to communicate with consumers (and vice versa), namely Messenger, Instagram and WhatsApp. Kustomer offers a live webchat functionality to businesses using its software, which allows those businesses to communicate with consumers via webchat (e.g., on the businesses' website).

### 6.2.1. Product market definition

#### 6.2.1.1. Commission precedents

(87) In its decisional practice, the Commission never specifically considered the market definition for B2C communication services. However, the Commission did previously assess a number of related markets.

(88) In particular, the Commission previously considered that there are distinct markets for (i) consumer communication services and (ii) enterprise communication services and that, within a market for consumer communication services, a market for consumer communication apps for smartphones can be distinguished.

(89) In *Microsoft/Skype*, the Commission concluded that consumer communication services and enterprise communication services differ in terms of prices and features, while there are only a limited number of providers of communications applications designed for both consumers and enterprises.<sup>83</sup> As a consequence, the Commission concluded that consumer communication services and enterprise communication services form two distinct markets.<sup>84</sup>

(90) As regards the market for consumer communication services, the Commission assessed whether the market could be further segmented by functionality (such as instant messaging, voice and video calls), by platform (including, among others, personal computers, smartphones and tablets) or by operating system. However, the Commission ultimately left open the exact product market definition.<sup>85</sup>

(91) As regards the market for enterprise communication services, the Commission assessed whether any of the segmentations mentioned above should be taken into account, as well as a possible segmentation by size of customers. However, also as regards the market for enterprise communication services, the Commission ultimately left open the exact product market definition.<sup>86</sup>

(92) In *Microsoft/Nokia*, the Commission further assessed the market for customer communication services and considered that there are indications that there may be a specific product market for consumer communications apps further divided by platform.<sup>87</sup> However, the Commission ultimately left the exact scope of the relevant market for consumer communication apps open.

(93) In *Facebook/WhatsApp*, the Commission considered it appropriate to assess a market for consumer communications apps for smartphones.<sup>88</sup> Furthermore, the Commission considered whether this market should be broadened to include traditional electronic communication services, such as voice calls, SMS, MMS and email. While the

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<sup>83</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraphs 13-16.

<sup>84</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraph 17.

<sup>85</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraphs 20-43.

<sup>86</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraphs 49-63.

<sup>87</sup> Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraphs 37-45.

<sup>88</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 21.

market investigation indicated that these traditional channels and consumer communications apps are substitutable, it also pointed to the following elements which suggest imperfect substitutability or complementarity. First, while both type of services are used for the same purpose, consumer communication apps are richer in terms of functionalities (e.g., seeing when another user was last online, whether another user is typing etc.).<sup>89</sup> Second, there is a difference in pricing conditions as consumer communications apps are mainly offered for free.<sup>90</sup> Third, telecoms operators responding to the market investigation indicated that the competitive interaction between traditional services and consumer communications apps is only one-way (i.e., consumer communications apps constrain electronic communication services but not the other way around).<sup>91</sup> However, the Commission ultimately left the exact scope of the relevant market for consumer communication apps on smartphones open.<sup>92</sup>

- (94) In addition to consumer communication services, the Commission previously considered whether a distinct relevant market for Application to Person (“A2P”) SMS services exists. A2P SMS is an enterprise to customer messaging service for the types of messages that companies, such as airlines and banks, exchange with their customers.
- (95) In *Syniverse/MACH*, the Commission considered that the ultimate customers of A2P SMS services are companies while, for Person to Person SMS services the ultimate customers are mobile network operators. For this reason, and because of the fact that the specific services are materially different, the Commission considered in that case that those two activities constitute separate product markets but ultimately decided there was no need to take a conclusive view on the exact product market definition.<sup>93</sup>

#### 6.2.1.2. The Notifying Party’s view

- (96) The Notifying Party considers that the relevant product market includes all B2C messaging channels and should not be further segmented by either (i) B2C written communication channels, (ii) B2C messaging channels, (iii) OTT B2C messaging channels or (iv) device.<sup>94</sup>
- (97) The Notifying Party submits that from the perspective of businesses, the primary factor in choosing which B2C channels to use is their ability to reach consumers and that many B2C channels offer a set of communication channels (almost always including phone and/or e-mail, and increasingly webchat). From the perspective of consumers, the Notifying Party considers they have access to and use multiple different channels as well as devices to contact businesses. According to the Notifying Party, the relative convenience or functionality of different communication channels is not sufficient to consider particular channels as distinct relevant markets.<sup>95</sup>
- (98) The Notifying Party also does not consider it appropriate to segment the market based on the B2C procurement channel (e.g., direct vs. indirect via B2C providers, via CPaaS providers, or via CRM software providers). According to the Notifying

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<sup>89</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 30.

<sup>90</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 31.

<sup>91</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 32.

<sup>92</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 34.

<sup>93</sup> Commission decision of 29 May 2013 in case M.6690 – *Syniverse/MACH*, paragraphs 152-154.

<sup>94</sup> Form CO, paragraphs 6.23 and 6.24.

<sup>95</sup> Form CO, paragraph 6.24.

Party, the communication channels offer the same functionality to businesses whether they are procured directly or indirectly and many suppliers enable direct and indirect access to other channels.<sup>96</sup>

- (99) Finally, the Notifying Party does not consider it appropriate to distinguish between A2P and non-application to person communications. The Notifying Party considers there is no consistent definition of A2P communication and submits that while its messaging channels can be used by businesses for both automated and non-automated messaging, the Notifying Party does not supply A2P solutions.<sup>97</sup>
- (100) In the Article 6(1)(c) Response, the Notifying Party argues that in the Article 6(1)(c) Decision, the Commission arrived at narrow segmentations of the market for B2C communications based on a functional characteristics approach and without applying the substitutability test set out in the Market Definition Notice.<sup>98</sup> In this regard, the Notifying Party submits that products may differ in their characteristics, price or use but nevertheless belong to the same relevant market if they are regarded as substitutable for customers and the Commission does not properly consider demand-side substitutability.<sup>99</sup>
- (101) In particular, in relation to the substitutability between cellular-based and OTT B2C messaging channels, the Notifying Party considers the Commission does not address whether businesses and consumers consider that cellular-based and OTT B2C messaging services are substitutes.<sup>100</sup> Furthermore, the Notifying Party considers that the Commission does not take into consideration that: (i) there are CRM providers that have chosen to support a limited number (or only one) of B2C channels<sup>101</sup>; (ii) different B2C channels score comparably in terms of user preference<sup>102</sup>; and (iii) most consumers will have access to many, if not all, of the range of different B2C channels and it is common for consumers to switch to different channels on a regular basis, including to contact the same business.<sup>103</sup>
- (102) However, the Notifying Party considers that, since the Transaction does not raise competitive concerns under any plausible market definition, the exact scope of the product markets for B2C communication services can be left open.<sup>104</sup>

#### 6.2.1.3. Commission's assessment

- (103) The Commission did not previously consider the market for B2C communication services. In the market investigation, the Commission therefore first assessed whether respondents considered different B2C communication channels to be substitutable.
- (104) A majority of CRM software providers expressing an opinion indicated that APIs for different B2C communication channels are not substitutable.<sup>105</sup> This is not contradicted by a majority of CPaaS providers expressing an opinion, who indicated

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<sup>96</sup> Form CO, paragraph 6.24.

<sup>97</sup> Form CO, paragraphs 6.25 and 6.26.

<sup>98</sup> Article 6(1)(c) Response, paragraph 2.2.

<sup>99</sup> Article 6(1)(c) Response, paragraphs 2.2 and 2.3.

<sup>100</sup> Article 6(1)(c) Response, paragraph 2.3.

<sup>101</sup> The Parties cite Helpshift as appearing to integrate only its in-app/web chat.

<sup>102</sup> The Parties cite a 2018 Salesforce survey ("State of the Connected Customer, Insights from 6,700 consumers and business buyers", second edition, 2018, page 47) and [Business Plans].

<sup>103</sup> Article 6(1)(c) Response, paragraph 2.4.

<sup>104</sup> Form CO, paragraph 6.22 and Article 6(1)(c) Response, paragraph 2.1.

<sup>105</sup> Replies to questionnaire 1 to CRM software providers, question 31.

that substitutability depends on the situation while no respondent directly stated that APIs for different B2C communication channels are substitutable.<sup>106</sup> From the business customer's perspective, the market investigation results support that B2C communication channels are generally complementary as the vast majority of responding customers indicate that B2C communication channels are complementary to each other.<sup>107</sup>

- (105) More specifically with regard to the substitutability of individual B2C communication channels, a majority of B2C communication service providers indicated that Meta (formerly Facebook)'s channels (WhatsApp, Messenger and Instagram) could be considered as substitutable with other OTT messaging channels, rich cellular-based B2C messaging channels (such as Google RCS and Apple Business Chat), SMS and webchat.<sup>108</sup> However, only a minority of responding CRM software providers, CPaaS providers or customers of Meta (formerly Facebook) and Kustomer indicated that there was a single overall category of B2C communication channels in which Meta (formerly Facebook)'s channels were substitutable with other such channels.<sup>109</sup>
- (106) Moreover, a vast majority of respondents confirm that the use of B2C communication channels is generational.<sup>110</sup> In this regard, more traditional B2C communication channels, including in particular telephone/voice and email, are regarded as complementary from this perspective.<sup>111</sup> One respondent clarified that *“[t]hese services are old time services, and as we understand their use is dropping and younger generations prefer new methods of communication.”*<sup>112</sup> The Commission notes that the Salesforce survey results from 2018 that were submitted by the Notifying Party are in line with these findings. [Survey data on customers' preferred channels].<sup>113</sup>
- (107) Considering that only B2C communication service providers indicate that, from a supply side perspective, other types of B2C messaging channels are substitutable with Meta (formerly Facebook)'s messaging channels while from a demand side perspective other respondents indicate that different B2C communication channels are complementary to each other, the Commission considers that a further segmentation of the overall market for B2C communication services is appropriate.
- (108) The Commission investigated five potential segmentations of an overall market for B2C communication services: (i) synchronous versus asynchronous B2C communication services; (ii) cellular-based B2C messaging services versus OTT B2C messaging services; (iii) rich cellular based B2C messaging services versus OTT B2C messaging services; (iv) webchat versus OTT B2C messaging services;

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<sup>106</sup> Replies to questionnaire 2 to CPaaS providers, question 18.

<sup>107</sup> Replies to questionnaire 4 to business customers, question 25.

<sup>108</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 13.

<sup>109</sup> Replies to questionnaire 1 to CRM software providers, question 34; replies to questionnaire 2 to CPaaS providers, question 21; replies to questionnaire 4 to business customers, question 26.

<sup>110</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 15; replies to questionnaire 4 to business customers, question 27.

<sup>111</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 14; replies to questionnaire 4 to business customers, question 25.

<sup>112</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 14.1 (ID: 741).

<sup>113</sup> Kustomer's internal document, [...]. The Commission has not verified the underlying data or the methodology of this survey and does not use this information to draw any conclusions.

and (v) B2C messaging services available on desktops versus services available on mobile devices.

- (109) As regards a potential segmentation between synchronous and asynchronous B2C communication services, that is to say a segmentation between phone/voice and other B2C communication channels, the vast majority of respondents indicated that both from the business' perspective (i.e., the business using CRM software) and the end customer's perspective (i.e., the customers of businesses using CRM software) these differ in terms of use, price or characteristics.<sup>114</sup> One respondent indicates that "*[t]here are different use cases for synchronous and asynchronous B2C communication based on the urgency of this communication and internal company structures.*"<sup>115</sup> Respondents moreover indicate that both from the business' perspective as well as from the end-customer's perspective there are price differences between asynchronous and synchronous B2C communication channels. Specifically, respondents indicated that there are significant cost differences for a business customer between offering synchronous and asynchronous B2C channels, among others because employees can handle several asynchronous conversations at one time as a result of which less customer service employees are required.<sup>116</sup> Finally, within a potential market for asynchronous B2C communication services a small majority of respondents indicated that there might be a separate market segmentation for quasi-synchronous B2C communication services (e.g., B2C messaging channels or webchat), where a relatively quick response is expected by a customer, versus letter/fax/email, where a slower response would be expected.<sup>117</sup> Overall, a majority of the respondents indicate that separate markets for synchronous and asynchronous B2C communication services can be distinguished within the overall market of B2C communication services.<sup>118</sup>
- (110) The Commission considers that, both for businesses and end customers, there are significant differences between synchronous and asynchronous B2C communication services. For businesses, there are significant costs involved as customer service agents can only handle one call at a time. For customers, there are often costs involved in calling, while they might also need to queue before speaking to a representative of a business. The results of the market investigation do not indicate as clearly whether a separate segmentation for quasi-synchronous B2C communication services (including both cellular based and OTT B2C messaging services as well as webchat) exists within all asynchronous B2C communication services. As mentioned before however, other asynchronous B2C communication services such as email are considered to be complementary and not substitutable to quasi synchronous B2C communication services.<sup>119</sup> The Commission considers that a distinction could potentially be made between synchronous and asynchronous B2C communication

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<sup>114</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 16 and 18; replies to questionnaire 4 to business customers, question 28.

<sup>115</sup> Reply to questionnaire 4 to business customers, question 28.1 (ID: 747).

<sup>116</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 20; replies to questionnaire 4 to business customers, question 30.

<sup>117</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 17.

<sup>118</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 22; replies to questionnaire 4 to business customers, question 32.

<sup>119</sup> Replies to questionnaire 1 to CRM software providers, question 34; replies to questionnaire 2 to CPaaS providers, question 21; replies to questionnaire 4 to business customers, question 26.

services, without it being necessary to take a view on the existence of a narrower segment for quasi-synchronous B2C communication services.

- (111) Within a potential market for asynchronous B2C communication services, the Commission investigated a potential segmentation between cellular-based B2C messaging services and OTT B2C messaging services. Cellular-based B2C messaging services concern in particular SMS, while OTT B2C messaging services could include internet-based messaging services such as Meta (formerly Facebook)’s messaging channels but also webchat. While the results of the market investigation are mixed as regards the classification of webchat, at least some respondents considered webchat to be substitutable with Meta (formerly Facebook)’s messaging channels.<sup>120</sup> Moreover, webchat appears to be offering at least some of the same functionalities of B2C messaging services and it is provided OTT. In considering a potential segmentation between cellular-based and OTT B2C messaging services, the Commission therefore considers that webchat is included in the latter segmentation.
- (112) As to the differences between cellular-based and OTT B2C messaging services, a majority of responding B2C communication service providers indicate that both from the business’ and the end customer’s perspective these differ in terms of use, price or characteristics.<sup>121</sup> All responding customers of Meta (formerly Facebook) and Kustomer expressing an opinion agree that there are differences from their perspective.<sup>122</sup> One respondent states that “[u]sers are increasingly using OTT messaging for their day to day conversations, and SMS is used more for utilities. SMS is sometimes associated [sic] with costs, especially in the international context, while OTT is usually free for the user.”<sup>123</sup> From a business’ perspective, a respondent observed that “Business customers are able to leverage a much deeper, and richer set of features with OTT messaging services that are not available in the cellular-based B2C messaging services. [...]”<sup>124</sup>
- (113) The Notifying Party submitted that some CRM software providers have chosen to support a limited number of B2C messaging channels, which would suggest substitutability. In this regard, the Notifying Party only provided an example of one company, Helpshift, which exclusively integrates in-app / web chat.<sup>125</sup> The Commission notes that Helpshift states itself that it is the only mobile-first customer service platform and that it specifically targets businesses that make use of their own app.<sup>126</sup> As such, this example is not sufficient to support the claim that the entire cellular-based and OTT B2C messaging segments would be substitutable, contrary to what the results of the market investigation reveal. Another argument the Notifying Party brings forward is that a Salesforce survey would show that B2C channels score comparably in terms of user preference.<sup>127</sup> However, the Commission notes that a more recent version of this survey states that [Survey data on customers’ preferred

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<sup>120</sup> Replies to questionnaire 4 to business customers, question 26.

<sup>121</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 23 and 25.

<sup>122</sup> Replies to questionnaire 4 to business customers, question 33.

<sup>123</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, questions 23.1 (ID: 741).

<sup>124</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, questions 25.1 (ID: 723).

<sup>125</sup> Article 6(1)(c) Response, paragraph 2.4.

<sup>126</sup> See: <https://www.helpshift.com>, last accessed on 13 October 2021 (ID: 2799).

<sup>127</sup> Article 6(1)(c) Response, paragraph 2.4 and footnote 36: Salesforce, “State of the Connected Customer, Insights from 6,700 consumers and business buyers”, second edition, 2018, page 47.



channels] and, more specifically on substitutability between cellular-based and OTT B2C messaging segments, [Survey data on customers' preferred channels].<sup>128</sup> Finally, the Notifying Party submitted that most consumers will have access to many different B2C channels and switch between these different channels even within the context of a single transaction.<sup>129</sup> In this context, the Commission notes that while consumers might indeed use multiple channels to start and complete a transaction, [Survey data on customers' preferred channels].<sup>130</sup> Overall, the Commission considers therefore that the arguments brought forward by the Notifying Party do not contradict the results from the market investigation, wherein only a minority of CRM and CPaaS providers as well as business customers indicate that a single category of communication channels (including SMS) is substitutable with Meta (formerly Facebook)'s channels.<sup>131</sup>

- (114) The Commission further investigated the likelihood for business customers to switch. In the scenario where the cost of using OTT B2C messaging services would increase permanently by 5%, most of responding customers indicate that while it would be technically possible to switch to using SMS they could only do so in part.<sup>132</sup> One respondent indicates this is the case for three reasons: (i) because of Wi-Fi and cross-country use of an OTT B2C messaging channel it would be difficult to switch to SMS only; (ii) because horizontal communications through for example a help desk could not be supported by SMS as this requires more than one person to access ticket information; and (iii) because of data transfer and compliance concerns.<sup>133</sup> From a commercial perspective, a majority of the responding customers indicate moreover they would not or only to a limited extent be able to switch to SMS.<sup>134</sup> Several respondents indicate that this has to do with a lack of capabilities for SMS, stating for example that OTT B2C messaging channels have “*the ability to support multi-media communications (videos and not just text) and the ability to be viewed on multiple devices at any point in time*”.<sup>135</sup> Other respondents point to the character limitation on SMS and the fact that they might not maintain a record of phone numbers of all customers that would be required for communications via SMS.<sup>136</sup> The results of the market investigation are inconclusive as to the question whether there are significant costs involved for a business to offer cellular-based B2C messaging channels.<sup>137</sup> However, responding B2C communication service providers indicate that, if there were no significant costs involved, businesses would be able to switch relatively quickly from offering cellular-based B2C messaging services to OTT services.<sup>138</sup>

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<sup>128</sup> Kustomer's internal document, [...]. The Commission has not verified the underlying data or the methodology of this survey and does not use this information to draw any conclusions.

<sup>129</sup> Article 6(1)(c) Response, paragraph 2.4.

<sup>130</sup> Kustomer's internal document, [...].

<sup>131</sup> Replies to questionnaire 1 to CRM software providers, question 34; replies to questionnaire 2 to CPaaS providers, question 21; replies to questionnaire 4 to business customers, question 26.

<sup>132</sup> Replies to questionnaire 5 to business customers, question 3.1.

<sup>133</sup> Reply to questionnaire 5 to business customers, question 3.1.1 (ID: 1577).

<sup>134</sup> Replies to questionnaire 5 to business customers, question 3.2.

<sup>135</sup> Reply to questionnaire 5 to business customers, question 3.2.1 (ID: 1496).

<sup>136</sup> Replies to questionnaire 5 to business customers, question 3.2.1.

<sup>137</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 27; replies to questionnaire 4 to business customers, question 35.

<sup>138</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 28.

- (115) Overall, however, a majority of respondents to the market investigation indicated that separate markets for cellular-based B2C messaging and OTT B2C messaging services can be distinguished within a potential market for asynchronous B2C communication services. Therefore, the Commission considers that a distinction could potentially be made between a market for cellular based B2C messaging services and a market for OTT B2C messaging services.
- (116) The Commission then considered whether, aside from the distinction between cellular-based and OTT B2C messaging services, a separate market for rich cellular-based B2C messaging channels could be distinguished (in particular Google RCS and Apple Business Chat) or whether these services should be considered to be part of the market for OTT B2C messaging services. As set out in footnote 20 above, these channels are directly available on mobile phones and are intended to replace SMS by adding functionalities of OTT messaging channels. However, unlike OTT messaging channels, they do not require an account or registration (other than the general account with which the user has signed up for the mobile phone to run on the respective OS) and messages can be sent using a cellular connection. For example, messages sent between iOS and Android devices would currently be sent as regular SMS messages without the additional functionalities of OTT messaging channels.
- (117) Most responding customers indicate that it would be technically possible to switch to using a rich cellular-based B2C messaging service in the case where the cost of using OTT B2C messaging services for communicating with end customers would increase permanently by 5%. However, this would only be possible partly.<sup>139</sup> A majority of responding customers indicate that it would not be possible from a commercial perspective to switch to rich cellular-based B2C messaging services or only to a limited extent.<sup>140</sup> One respondent points out that Google RCS and Apple Business Chat are not available everywhere<sup>141</sup>, and another states that “*contrary to SMS, RCS is a new technology that is not yet fully deployed and the effectiveness of the RCS channel is not yet fully demonstrated*”.<sup>142</sup> In this regard, another respondent states that they “*don’t want to be switching channels and then need to “recruit” consumers to those channels. We will follow where consumers will engage.*”<sup>143</sup> The observations regarding the size and roll-out of rich cellular-based B2C messaging channels are mirrored in the fact that only 8% of the responding customers indicate that they used either Google RCS or Apple Business Chat in the past year.<sup>144</sup>
- (118) The Commission considers that it can be left open whether a separate market for rich cellular-based B2C messaging services should be distinguished, in particular because of the limited presence of those services at present.
- (119) The Commission further considered whether, within a market for OTT B2C messaging services, a distinction could be made between OTT B2C messaging services and webchat. In the scenario where the cost of using OTT B2C messaging services would increase permanently by 5%, most of responding customers indicated that while it would be technically possible to switch to using webchat they could only do so in part.<sup>145</sup> One respondent states that while it is technically possible to

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<sup>139</sup> Replies to questionnaire 5 to business customers, question 5.1.

<sup>140</sup> Replies to questionnaire 5 to business customers, question 5.2.

<sup>141</sup> Reply to questionnaire 5 to business customers, question 5.2.1 (ID: 1584).

<sup>142</sup> Reply to questionnaire 5 to business customers, question 5.2.1 (ID: 1484).

<sup>143</sup> Reply to questionnaire 5 to business customers, question 5.2.1 (ID: 1571).

<sup>144</sup> Replies to questionnaire 5 to business customers, question 2.

<sup>145</sup> Replies to questionnaire 5 to business customers, question 7.1.

switch, “webchat is mainly customers within desktop browser, while OTT B2C lives largely on mobile”.<sup>146</sup> Another respondent explains further that “webchat can be used to engage with customers and non-customers, it is a reactive bi-lateral communications channel – it cannot be used to launch campaigns or engage proactively with potential customers”.<sup>147</sup> From a commercial perspective, most of the responding customers indicate that they would not or only to a limited extent be able to switch to webchat although several respondents indicate they would be partly or completely able to switch.<sup>148</sup> As a result, the Commission considers that for the purpose of this investigation it can be left open whether a distinction should be made between OTT B2C messaging services and webchat.

- (120) The Commission also considered whether the market for OTT B2C messaging services included public comments on social media platforms, such as on Facebook or on Instagram. Such public comments are integrated in Kustomer’s CRM software tool, and can be used as a means of communicating with business, e.g., where such business has a Facebook or Instagram page, or posts an advertisement on such a platform. While a majority of market participants considered Facebook and Instagram public comments to be OTT B2C messaging channels, and moreover, that it was important for the purposes of customer service and support for a business to be able to respond to such public comments, e.g., via a private OTT messaging channel,<sup>149</sup> some of the more substantiated responses from market participants were more nuanced.<sup>150</sup> A leading CRM software provider noted that “*from a consumer standpoint, they may not see a difference between Facebook and Facebook Messenger (i.e. they see it as “Facebook”)*”<sup>151</sup> while another CRM software provider indicated that “*public pages could be considered a common entry point for a B2C conversation ... with the business following up with the user via a private or direct message to begin a conversation*”.<sup>152</sup> A business customer indicated that “*Facebook and Instagram public comments are normally one time communications and not channels to have a long-term conversation (possibly due to being public)*”<sup>153</sup> Twitter, the largest OTT B2C communication service provider after Meta (formerly Facebook) indicated that they “*would not consider that comments are the same as OTT messaging channels. One has an expectation that messaging is a one to one exchange and a private communication*”<sup>154</sup> while a competitor of Meta (formerly Facebook) indicated that “*it is conceivably possible, but likely rare, that there may be B2C communication through a public post.*”<sup>155</sup> For the purposes of this Decision, the Commission considers that it can be left open whether the market for OTT B2C communication channels includes public posts or comments on social media platforms such as Facebook and Instagram, in particular since, in the case of Facebook and Instagram public comments, the associated private OTT B2C messaging channels, Messenger and Instagram messaging respectively, each include a feature which enables a business to read a public comment and respond to it via the

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<sup>146</sup> Reply to questionnaire 5 to business customers, question 7.1.1 (ID: 1533).

<sup>147</sup> Reply to questionnaire 5 to business customers, question 7.1.1 (ID: 1496).

<sup>148</sup> Replies to questionnaire 5 to business customers, question 7.2.

<sup>149</sup> Replies to questionnaire 8 (Commitments Market Test), question 17.2.

<sup>150</sup> Replies to questionnaire 8 (Commitments Market Test), question 17.1.

<sup>151</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2543).

<sup>152</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2634).

<sup>153</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2540).

<sup>154</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2628).

<sup>155</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2562).

relevant private channel.<sup>156</sup> Accordingly, whether or not public comments on social media platforms are included within the market for OTT B2C messaging channels will not impact the competitive assessment.

- (121) Finally, with respect to a potential segmentation between OTT B2C messaging services available on desktops or mobile devices, the results of the market investigation indicate that such a segmentation of a potential market for OTT B2C messaging services would not be warranted despite the fact that the services might differ. Customers of Meta (formerly Facebook) and Kustomer indicate that messaging services available on desktops and mobile devices differ in terms of use, price or characteristics.<sup>157</sup> Respondents clarify that the messaging experience on mobile devices is better, that mobile devices are more convenient for consumers and that the user base for mobile devices is different.<sup>158</sup> However, a majority of responding B2C communication channel providers and online ads service providers do not recognise these differences.<sup>159</sup> Also as regards the question whether B2C messaging services available on desktops or mobile devices are interchangeable, the results of the market investigation are inconclusive. A majority of respondents do consider that there are no significant costs involved for a business to offer B2C messaging services on either a desktop or on mobile devices.<sup>160</sup> Overall, a majority of respondents to the market investigation considered that no separate markets for B2C messaging services on desktops or on mobile devices could be identified within a broader potential market for asynchronous B2C communication services.<sup>161</sup>
- (122) As to a potential distinction between OTT B2C messaging services available on desktops or mobile devices, the Commission notes that many if not all OTT B2C messaging services are available both on desktops and mobile devices. For example, all of Meta (formerly Facebook)'s messaging services are available both on desktops and mobile phones and the same applies to other large OTT B2C messaging services (such as wechat, Twitter, WeChat, Signal, Telegram, Twitter and Viber). The Commission considers, for the purpose of this Decision, that the potential segments for OTT B2C messaging services available respectively on desktops and on mobile devices are part of the same overall market for OTT B2C messaging services. While the messaging experience might differ between desktops and mobile devices, there are no differences in terms of costs. Because of this, and on the basis of the results of the market investigation, the Commission considers, for the purpose of this Decision, that the exact product market definition can be left open.

#### 6.2.1.4. Conclusion

- (123) In light of the above, the Commission concludes that a broad overall product market for B2C communication services exists. For the purpose of this Decision, the Commission considers that, within this overall market for the supply of B2C communication services, a separate intermediate product market for asynchronous B2C communication services can be considered, while for the purpose of this

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<sup>156</sup> Parties' reply to RFI 21, Annex 1.

<sup>157</sup> Replies to questionnaire 4 to business customers, question 37.

<sup>158</sup> Replies to questionnaire 4 to business customers, question 37.1 (IDs: 768, 776 and 812).

<sup>159</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 30 and 32.

<sup>160</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 34; replies to questionnaire 4 to business customers, question 39.

<sup>161</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 35; replies to questionnaire 4 to business customers, question 40.

Decision it can be left open whether a further segmentation between quasi-synchronous and asynchronous B2C communication services could be distinguished. Within an intermediate market for asynchronous B2C communication services, the Commission considers, for the purpose of this Decision, that a separate narrower product market for OTT B2C messaging services can be considered, which may include rich-cellular-based B2C messaging services, webchat and public comments on social media platforms. The Commission will carry out its competitive assessment on the basis of a market for B2C communication services, while taking into account, within that market, both the plausible intermediate market for asynchronous B2C communication services as well as the plausible narrower market for OTT B2C messaging services.

## 6.2.2. *Geographic market definition*

### 6.2.2.1. Commission precedents

- (124) As regards the markets for consumer communication services and enterprise communication services, the Commission considered previously in *Microsoft/Skype*, that the geographic scope of both markets is at least EEA-wide, but ultimately left open the exact geographic scope of the market.<sup>162</sup> The market investigation results indicated that a majority of respondents do not consider there are particular legal or technical barriers that restrict the use or trade of communication services worldwide and that services are generally perceived as not different in terms of quality, price and features worldwide (with the exception of some geographic areas).<sup>163</sup> The Commission further concluded that, as regards consumer communication services, suppliers provide their services on a global level with limited differentiation in the quality and features in the EEA (and to a lesser extent worldwide).<sup>164</sup>
- (125) In *Microsoft/Nokia*, the Commission concluded that the geographic scope of the market for consumer communication services is at least EEA-wide, if not worldwide, but ultimately left open the exact scope of the geographic market.<sup>165</sup>
- (126) In *Facebook/WhatsApp*, the results of the market investigation revealed no major differences in the offering of consumer communications apps across the world.<sup>166</sup> However, given the different degree of penetration of consumer communications apps in certain world regions (i.e., WhatsApp being widespread in the EEA, but not so much in the United States), the Commission considered that this is an indication of different competitive dynamics, which could be explained by different consumer preferences, regulatory environments and marketing efforts.<sup>167</sup> The Commission further investigated the possibility of a narrower geographic definition within the EEA. In this regard, in that case, the Commission concluded that while the degree of penetration might differ, the apps of Meta (formerly Facebook) (e.g., Messenger and WhatsApp) tended to be the number 1 and 2 in most large Member States. Further, while WhatsApp was not free in every Member State, the Commission considered this was not sufficient to justify the definition of national markets. Finally, the Commission considered that the main factors relevant for the assessment of the transaction (including closeness of competition, customer switching and entry

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<sup>162</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraphs 67-68.

<sup>163</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraph 65.

<sup>164</sup> Commission decision of 7 October 2011 in case M.6281 – *Microsoft/Skype*, paragraph 66.

<sup>165</sup> Commission decision of 4 December 2013 in case M.7047 – *Microsoft/Nokia*, paragraph 81.

<sup>166</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 37.

<sup>167</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraph 38.

barriers) do not differ according to the Member State concerned.<sup>168</sup> The Commission concluded in light of this that the geographic scope of the market for consumer communication apps is at least EEA-wide, if not worldwide.

- (127) Finally, as regards the geographic scope of the market for A2P SMS services, the Commission considered in *Syniverse/MACH* that the market could have a larger scope than national or regional, possibly worldwide. However, ultimately the Commission left the geographic scope of the market for A2P SMS services open.<sup>169</sup>

#### 6.2.2.2. The Notifying Party's view

- (128) The Notifying Party submits that the geographic scope of the market for B2C communications is worldwide.<sup>170</sup>

- (129) The Notifying Party submits that (i) many B2C communication channels offer their services on a global basis (e.g., email and particularly OTT channels), (ii) many businesses procure B2C communication services on a global basis to allow communications with consumers to occur cross-border (in particular email and messaging channels), (iii) the functionalities of B2C communication services do not vary materially across different regions and there are no material regulatory or technical differences between particular regions or countries.<sup>171</sup>

- (130) As regards linguistic differences, the Notifying Party considers that while the language of conversations will vary geographically, most B2C communication channels offer support in multiple languages. Further, the Notifying Party submits that such language differences do not determine the varying use or prevalence of different messaging channels across countries.<sup>172</sup>

#### 6.2.2.3. Commission's assessment

- (131) The results of the market investigation do not differ significantly from the findings in *Facebook/WhatsApp*. All responding CRM providers indicate that they obtain API access to B2C communication channels at a worldwide level.<sup>173</sup> The large majority of responding B2C communication service providers indicate moreover that they make available the APIs for the B2C communication channels on a worldwide level.<sup>174</sup> Finally, the large majority of responding customers of Meta (formerly Facebook) and Kustomer indicate that they procure the B2C communication channels they use on a worldwide level.<sup>175</sup>

- (132) Moreover, respondents did not raise the existence of any particular legal or technical barriers that restrict the use or trade of B2C communication channels.<sup>176</sup>

- (133) Similarly as in *Facebook/WhatsApp*, the Commission finds that the degree of penetration, at least for Meta (formerly Facebook)'s B2C messaging channels, differs per EEA Member State and that, overall, the degree of penetration of WhatsApp,

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<sup>168</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 41-43.

<sup>169</sup> Commission decision of 29 May 2013 in case M.6690 – *Syniverse/MACH*, paragraph 183.

<sup>170</sup> Form CO, paragraphs 6.27 and 6.29.

<sup>171</sup> Form CO, paragraph 6.27 (i)-(iii).

<sup>172</sup> Form CO, paragraph 6.27 (iv).

<sup>173</sup> Replies to questionnaire 1 to CRM software providers, question 37.

<sup>174</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 44.

<sup>175</sup> Replies to questionnaire 4 to business customers, question 51.

<sup>176</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 44.2.

Messenger and Instagram on an EEA-level is higher than the degree of penetration worldwide.<sup>177</sup> However, the Commission considers that the main factors that might be relevant for the assessment of the Transaction do not differ significantly according to the Member State concerned.

#### 6.2.2.4. Conclusion

- (134) In light of the above, for the purpose of this Decision, the Commission considers that the geographic scope of the market for B2C communication services, or any segmentation thereof, is at least EEA-wide, if not worldwide

### 6.3. Online Display Advertising

- (135) Meta (formerly Facebook) is active in the market for online advertising services, and provides these services almost entirely on its own social networks as well as almost entirely in the form of online display advertising. Meta (formerly Facebook) provides advertising service for both mobile and desktop, as well as in both video and non-video formats. Kustomer is not active in online advertising.

#### 6.3.1. Product market definition

##### 6.3.1.1. Commission precedents

- (136) In previous decisions, the Commission considered the market for online advertising to be separate from offline advertising. It also considered possible further segmentations between online search and non-search (i.e., display) advertising, on the basis of the platform (PC versus mobile), between online display ads on social networks or off social networks, or between online display video and non-video advertising.<sup>178</sup> Following the *Google AdSense* decision,<sup>179</sup> the Commission concluded in *Google/Fitbit* that there were separate relevant product markets for the supply of online search advertising services (and potential segments) on the one hand, and the supply of online display advertising services (and potential segments) on the other hand.<sup>180</sup>

##### 6.3.1.2. The Notifying Party's view

- (137) The Notifying Party considers that the relevant market includes all ads services (i.e., including both online and offline advertising services).<sup>181</sup>
- (138) The Notifying Party submits that the various forms of media (e.g., news, entertainment, games and social media) across a variety of channels (e.g., print, TV, online and offline) all compete to attract and retain user engagement and advertisers. According to the Notifying Party, advertisers allocate their budget across different venues in order to maximise the additional sales and profits that they may generate and where one advertising venue becomes more expensive, they will switch towards another one where they can get a better return on investment, regardless of the media or channel involved. Moreover, there is a tendency for advertising format and venues

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<sup>177</sup> Parties' reply to RFI 6, question 22.

<sup>178</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 74-79; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 159-161; Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, paragraphs 133-135; Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraphs 148-155.

<sup>179</sup> Commission decision of 20 March 2019 in case AT.40411 – *Google AdSense*, paragraphs 121-183.

<sup>180</sup> Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraph 155.

<sup>181</sup> Form CO, paragraph 6.34.

to converge due to its rapid technological progress (e.g., TV has made improvements in the targeting and measurement options offered to advertisers).<sup>182</sup>

- (139) The Notifying Party also considers it is not appropriate to segment the market by (i) specific channel (e.g., search vs. display ads), (ii) on-social network/off-social network context, (iii) advertising format (video/non-video ads), or (iv) device (desktop vs. mobile).<sup>183</sup>
- (140) As regards search vs. display ads, the Notifying Party submits that both forms of advertising share characteristics in terms of format, buying, targeting functionalities and market objectives.
- (141) As regards on/off-social media networks, the Notifying Party considers that ads can reach the same consumers on-social and off-social networks. In addition, the same ads buying, targeting functionalities and marketing objectives are available in both channels.
- (142) As regards video/non-video, according to the Notifying Party, almost all advertising channels offer a variety of ads formats, including image and video-based ads, which are generally sold and purchased in the same way as other digital advertising.
- (143) As regards desktop vs. mobile devices, the Notifying Party submits that all online advertising channels offer ads on both desktops and mobile devices. Moreover, the same formats, buying, targeting functionalities and marketing objectives are available across both devices.
- (144) The Notifying Party also submits that while CTM ads have distinct features, they are substitutable with other ad formats and channels for the same aforementioned reasons.<sup>184</sup>
- (145) In the Article 6(1)(c) Response, the Notifying Party argues that the Commission arrives at narrow segmentations of the market for online display advertising services based on a functional characteristics approach and without applying the substitutability test as set out in the Market Definition Notice. In this regard, the Notifying Party submits that market shares alone are not sufficient to determine whether an undertaking is dominant without further evidence or analysis.<sup>185</sup>
- (146) However, the Notifying Party considers that, since the Transaction does not raise competitive concerns under any plausible market definition, the exact scope of the product markets for advertising services can be left open.<sup>186</sup>

#### 6.3.1.3. Commission's assessment

- (147) Contrary to the Notifying Party's views that an overall market for ads services including both online and offline advertising exists, the Commission considers in line with recent precedents that a separate market for online ads services exists and that within this market, a distinction can be made between online search and online display advertising services. Several participants explained that search advertising and display advertising had different use cases and purposes, noting that "*there are a number of differences between search-based online advertising and non-search*

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<sup>182</sup> Form CO, paragraphs 6.35 and 6.36.

<sup>183</sup> Form CO, paragraphs 6.37 and 6.38.

<sup>184</sup> Form CO, paragraph 6.39.

<sup>185</sup> Article 6(1)(c) Response, paragraph 2.3.

<sup>186</sup> Form CO, paragraph 6.41.



*online advertising*<sup>187</sup> and “*search advertising is really focused on the bottom of the funnel (intent and conversion). Display advertising can serve the entire funnel (awareness, consideration, intent, and conversion)*”.<sup>188</sup> Further, a majority of respondents that indicated a view (including both competitors and business customers) confirmed a difference in terms of targeting capabilities, user engagement, return on investment, reach, price/cost, planning/marketing objectives, ad format, design and content and ad tech services required.<sup>189</sup>

- (148) The Commission further investigated the likelihood for business customers to switch from purchasing online display advertising services to online search advertising services in case of a permanent price increase by 5%. The results of the market investigation are mixed whether a switch to online search advertising services would be technically possible. While a majority of the customers expressing an opinion indicate that switching is entirely or partly possible from a technical perspective, more than a third of those respondents indicate that this is not the case.<sup>190</sup> A majority of online ads service providers expressing an opinion indicate that while switching would be possible from a technical perspective<sup>191</sup>, this would not be possible or only to a limited extent from a commercial perspective<sup>192</sup>. One respondent states that “[...] *as display ads rely on known characteristics of the users it can be more ideal for targeted advertising which are general and not action specific. 5% increase won’t be significant to cause the drastic change [...]*”.<sup>193</sup> The majority of customers expressing an opinion confirm that from a commercial perspective they would not switch to online search advertising services in this scenario.<sup>194</sup> One respondent states in this regard that “*from a commercial perspective this would imply to lose one commercial channel, and therefore to lose market reach and customer leads*”<sup>195</sup>, whereas another respondent observes that “*the two channels play different roles with different performance metrics*”<sup>196</sup>. Several respondents further indicate that a 5% permanent price increase would not be sufficient for them to switch.<sup>197</sup>
- (149) As a result, the Commission maintains its view, in line with recent precedents, that a distinction should be made between the market for online search advertising services and the market for online display advertising services.
- (150) Within a market for online display advertising services, the Commission investigated a potential segmentation between online display advertising on and off social networks. A majority of both competitors and business customers expressing an opinion stated there are differences in terms of targeting capabilities, user

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<sup>187</sup> Reply to questionnaire 3 to B2C communications service providers and online ads service providers, question 36 (ID: 864).

<sup>188</sup> Reply to questionnaire 3 to B2C communications service providers and online ads service providers, question 36 (ID: 870).

<sup>189</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 37; replies to questionnaire 4 to business customers, question 42.

<sup>190</sup> Replies to questionnaire 5 to business customers, question 8.1.

<sup>191</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 11.1.

<sup>192</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 11.3.

<sup>193</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 11.4 (ID: 1704).

<sup>194</sup> Replies to questionnaire 5 to business customers, question 8.2.

<sup>195</sup> Reply to questionnaire 5 to business customers, question 8.2.1 (ID: 1493).

<sup>196</sup> Reply to questionnaire 5 to business customers, question 8.2.1 (ID: 1571).

<sup>197</sup> Replies to questionnaire 5 to business customers, question 8.2.1 (IDs: 1339, 1496 and 1571).

engagement, ad format, design and content and ad tech services required.<sup>198</sup> Respondents noted that “*advertising on social networks has specific requirements for format, content, and creative, which apply to the networks policies*”<sup>199</sup> and “*social network[s] reach a greater number of people, and [achieve] more engagement from those people*”.<sup>200</sup> Furthermore, the Commission notes that third party industry reports consider ads on social networks and off social networks separately, suggesting that for advertisers these may be separate markets or segments and thus it may be informative to have separate information in that respect when deciding how to spend their advertising budget. This is in particular the case for the reports compiled by IDC, a global provider of market intelligence that develops industry standards, conducts research, and provides legal support for the online advertising industry.<sup>201</sup>

- (151) In the scenario where the price of online display advertising services on social networks would permanently increase by 5%, a majority of both competitors and business customers indicate that it would be technically possible for businesses to switch to online display advertising off social networks.<sup>202</sup> A majority of both competitors and business customers expressing an opinion indicate however that business customers would not, or only to a limited extent, be able from a commercial perspective to switch to online display advertising off social networks.<sup>203</sup> Responding competitors point in particular to the fact that advertising on social networks can sometimes be more targeted<sup>204</sup> and state that “*[d]ue to the different audiences (advertise where your customers are) – the use of social networks is so prevalent as part of a cohesive marketing strategy, it would be highly difficult to completely move away from social network advertising into online (non social) display advertising*”<sup>205</sup>. Similar responses have been given by business customers, in particular stating that there is “*[...] a difference in the reach and the quality of the audience for both prospecting and retargeting campaigns. Besides that the targeting options will be limited (e.g. no interests targeting since it’s only available on social networks)*”.<sup>206</sup>
- (152) The Commission considers that, for the purposes of this Decision, it can be left open whether a separate market for online display advertising services on social networks should be distinguished, as this would not change the outcome of the competitive assessment in the present case.
- (153) The Commission further investigated whether, within the market for online display advertising services, different segments should be distinguished for online video display advertising services and online non-video display advertising services. A majority of respondents expressing an opinion (including both competitors and

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<sup>198</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 39; replies to questionnaire 4 to business customers, questions 44.

<sup>199</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 38 (ID: 723).

<sup>200</sup> Reply to questionnaire 4 to business customers, questions 43 (ID: 717).

<sup>201</sup> Parties’ reply to RFI 4, question 1a.

<sup>202</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 12.1; replies to questionnaire 5 to business customers, question 9.1.

<sup>203</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 12.3; replies to questionnaire 5 to business customers, question 9.2.

<sup>204</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 11.4 (ID: 1704).

<sup>205</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 11.4 (ID: 1658).

<sup>206</sup> Reply to questionnaire 5 to business customers, question 9.2.1 (ID: 1369).

business customers) confirmed a difference in terms of user engagement, return on investment, price/cost, planning/marketing objective, ad format, design and content and ad tech services required.<sup>207</sup> Respondents noted that “*online video advertising [...] offers the advertiser more opportunities for creativity, expression, and engagement*”<sup>208</sup> and “*video ads, in particular, may be used when an advertiser wants to employ a format better suited for storytelling, informing, and/or educating*”.<sup>209</sup> Furthermore, similar to online display advertising on and off social networks, the Commission notes that third party industry reports consider video and non-video ads separately.<sup>210</sup>

- (154) However, the Commission considers that for the purposes of this Decision, it can be left open whether a distinction should be made between online video and non-video display advertising services, as this would not change the outcome of the competitive assessment in the present case.
- (155) Finally, the Commission investigated whether, within the market for online display advertising services, different segments should be distinguished for online display advertising services on mobile devices and desktops. A majority of respondents expressing an opinion (including both competitors and business customers) confirmed that a difference exists in terms of targeting capabilities, user engagement, possibility to monitor effectiveness, return on investment, reach and ad format, design and content.<sup>211</sup> A respondent noted that “*the primary differences between online display advertising services on desktops and online display advertising services on mobile apps are that mobile apps may present advertisers with the potential for greater reach, engaging full-screen experiences, and additional formats available for mobile apps*”.<sup>212</sup> Furthermore, similar to online display advertising on and off social networks, the Commission notes that third party industry reports consider ads on mobile and desktop separately.<sup>213</sup>
- (156) However, the Commission considers that for the purposes of this Decision, it can be left open whether a distinction should be made between online display advertising services on mobile devices and desktops, as this would not change the outcome of the competitive assessment in the present case.

#### 6.3.1.4. Conclusion

- (157) In light of the above, for the purpose this Decision, the Commission considers that the relevant product market is the market for the supply of online display advertising services. The question whether the market for the supply of online display advertising services should be further segmented by (i) on-/off-social networks, (ii) video/non-video ads, and (iii) mobile/desktop can be left open in this Decision, as this would not change the outcome of the competitive assessment in the present case.

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<sup>207</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers and questionnaire 4 to business customers, questions 41 and 46 respectively.

<sup>208</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 40 (ID: 855).

<sup>209</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 40 (ID: 873).

<sup>210</sup> Parties’ reply to RFI 4, question 1a.

<sup>211</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 43; replies to questionnaire 4 to business customers, questions 48.

<sup>212</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 42 (ID: 882).

<sup>213</sup> Parties’ reply to RFI 4, question 1a.

This applies equivalently to any further potential segmentations based on combinations of these wider segments.

### 6.3.2. *Geographic market definition*

#### 6.3.2.1. Commission precedents

(158) With reference to the geographic scope of the online advertising market and its possible segments, the Commission found in previous cases that they should be defined as national in scope or following linguistic borders within the EEA.<sup>214</sup> Following the *Google AdSense* decision,<sup>215</sup> the Commission concluded in *Google/Fitbit* that the geographic scope of the online advertising market and its possible segments is national or follows linguistic borders within the EEA.<sup>216</sup>

#### 6.3.2.2. The Notifying Party's view

(159) The Notifying Party submits that although some advertising demand may be national, the geographic scope of the advertising market is global and competitive conditions in online advertising services do not vary significantly across geographic areas.<sup>217</sup>

(160) However, the Notifying Party considers that, since the Transaction does not raise competitive concerns under any plausible market definition, whether the relevant geographic market is narrower than global or EEA-wide can be left open.

#### 6.3.2.3. Commission's assessment

(161) The evidence in the Commission's file has not provided any indication which would suggest that, in defining the relevant geographic market for online advertising (and sub-segments thereof), it would be appropriate to deviate from its previous decisional practice.

(162) The majority of respondents to the market investigation (both competitors and business customers) indicate that the market for online advertising is national/regional in scope, pointing in particular to language differences as well as other factors such as different product offerings, cultural differences, regulatory considerations and locus of control for the ad campaign.<sup>218</sup> Indeed, a majority of respondents stated that country and/or language specificities (e.g., cultural, regulatory) are important for the design of an online (display) advertising campaign.<sup>219</sup>

#### 6.3.2.4. Conclusion

(163) In light of the above, for the purpose this Decision, the Commission considers that the geographic scope of the market for online display advertising services (or potential segments thereof) is either national in scope or following linguistic borders within the EEA.

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<sup>214</sup> Commission decision of 3 October 2014 in case M.7217 – *Facebook/WhatsApp*, paragraphs 44 and 83; Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 163-164; Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, paragraphs 138-140.

<sup>215</sup> Commission decision of 20 March 2019 in case AT.40411 – *Google AdSense*, paragraphs 203-217.

<sup>216</sup> Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraphs 158-160.

<sup>217</sup> Form CO, paragraph 6.43.

<sup>218</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 4; replies to questionnaire 4 to business customers, question 53.

<sup>219</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 46; replies to questionnaire 4 to business customers, questions 54.

## 7. COMPETITIVE ASSESSMENT

### 7.1. Introduction

#### 7.1.1. *Rationale for the Transaction*

- (164) The Notifying Party submits that, by acquiring Kustomer, Meta (formerly Facebook) will have the opportunity to make it easier and more efficient for businesses and consumers to communicate by accelerating the shift from more traditional channels, such as phone and email, to messaging channels (such as Messenger, WhatsApp and Instagram). CRM software could play a key role in facilitating this shift and allowing businesses to make more and better use of B2C messaging. Kustomer in particular is an ideal fit for Meta (formerly Facebook) because it has been designed to handle messaging seamlessly alongside other communication channels. Meta (formerly Facebook) [Business Plans], and use it to showcase the potential of its messaging channels in B2C communications, to both businesses and other CRM software providers.<sup>220</sup>
- (165) In order to facilitate and accelerate the shift from traditional channels to messaging channels, the Notifying Party has a three-fold strategy depending on the size of a business. “Tail businesses” (i.e., very small businesses) generally do not have the scale or resources to justify the investment in paid CRM software. For these businesses, Meta (formerly Facebook) has a free service available called Unified Inbox that enables a business to aggregate messages that they receive on Messenger and Instagram, and comments on Facebook and Instagram posts, in one consolidated inbox. “Torso businesses” (i.e., SMBs), which have more interactions with customers and that may have dedicated customer service personnel, need and often use CRM software to manage those interactions. While the aim of Meta (formerly Facebook) is to accelerate the shift to messaging channels more generally, [Business Plans]. Finally, “head businesses” (i.e., large enterprises) generally require a high level of customisation from their CRM software. While Kustomer will continue to compete for these businesses, they will typically turn to more sophisticated offerings from large CRM providers. Meta (formerly Facebook) will also continue to support these businesses through partnerships and the availability of APIs.<sup>221</sup>
- (166) The Notifying Party expects to gain in several ways from the Transaction. [Sources of revenue for Meta resulting from the Transaction] presents a key revenue opportunity for Meta (formerly Facebook). Meta (formerly Facebook) further identified two ancillary revenue streams. [Sources of revenue for Meta resulting from the Transaction].<sup>222</sup>

#### 7.1.2. *Affected markets*

- (167) As set out above, the key rationale for the Transaction is the acceleration of the shift to B2C messaging. In relation to this, the Transaction creates a vertical relationship between the upstream market for the supply of B2C communication services (and the narrower markets for asynchronous B2C communication services and OTT B2C messaging services) and the downstream market for the supply of CRM software and the narrower market for the supply of customer service and support CRM software. Section 7.3 assesses the impact of a potential input foreclosure strategy of Kustomer’s rivals through the restriction or degradation of API access to Meta

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<sup>220</sup> Form CO, paragraphs 1.5 and following.

<sup>221</sup> Form CO, paragraph 3.2.5.

<sup>222</sup> Form CO, paragraphs 3.2.11 and 3.2.12.

(formerly Facebook)'s B2C messaging channels on the market for the supply of CRM software and the narrower market for the supply of customer service and support CRM software.

- (168) There is no meaningful horizontal overlap between the Parties' activities. There may be a limited horizontal overlap in the B2C communications market between Meta (formerly Facebook)'s messaging channels and Kustomer's webchat functionality. However, this webchat functionality is offered only to businesses using Kustomer's CRM software (i.e., not on a standalone basis) and, in any case, Kustomer's share of the B2C communications market is less than [0-5%] in the EEA (with just [Customer Information] of Kustomer's EEA customers using its webchat functionality) and even lower worldwide.<sup>223</sup>
- (169) Although the Transaction does not give rise to any horizontally affected markets in a traditional sense, the Commission considers that, after the Transaction, Meta (formerly Facebook) might be able to gain access to commercially exploitable data, which can be obtained through Kustomer's activities. Meta (formerly Facebook)'s databases are not made available today to third parties and Kustomer, as a processor under the GDPR, cannot on its own take a decision to give access to a database of its business customers. Post-Transaction, customers of Kustomer will be able to opt-in to share data with Meta (formerly Facebook) through Kustomer's CRM software which could add to the current portfolio of data exploitable by Meta (formerly Facebook), in particular for online advertising purposes. In Section 7.4, the Commission will therefore assess the impact of the potential accumulation of data by Meta (formerly Facebook) on the market for online display advertising, and potential segments of that market.
- (170) According to the information provided by the Parties, there are no non-horizontally affected markets between Meta (formerly Facebook)'s e-commerce activities and the market for the supply of CRM software or the supply of customer service and support CRM software.<sup>224</sup>
- (171) Finally, the Commission assesses in Section 7.5 whether the Transaction could give rise to conglomerate effects by Meta (formerly Facebook) leveraging its position in the market for online display advertising services into the market for the supply of CRM software and the narrower market for the supply of customer service and support CRM software (as well as any possible segments thereof).

## **7.2. Market Shares**

- (172) According to the Non-Horizontal Guidelines<sup>225</sup>, market shares provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

### *7.2.1. CRM software*

- (173) Table 1 and Table 2 set out Kustomer's and its main competitors' market shares, in value terms, within the market for customer service and support CRM software as

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<sup>223</sup> Form CO, paragraph 6.54 Tables 6.7 and 6.8.

<sup>224</sup> Parties' reply to RFI 20, question 6.

<sup>225</sup> Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("Non-Horizontal Guidelines"), OJ C 265, 18.10.2008, paragraph 24.

well as within the broader market for CRM software, both in the EEA and worldwide, for 2018, 2019 and 2020.<sup>226</sup>

**Table 1: CRM software shares (Worldwide and EEA, value terms, 2018-2020)**

Party	CRM software					
	Worldwide			EEA <sup>227</sup>		
	2018	2019	2020	2018	2019	2020
Meta (formerly Facebook)	-	-	-	-	-	-
<b>Kustomer</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>
Salesforce	19.5%	20.1%	n.a.	15.3%	17.8%	n.a.
SAP	8.3%	6.3%	n.a.	10.3%	10.2%	n.a.
Oracle	5.5%	5.1%	n.a.	5.7%	5.1%	n.a.
Adobe	5.1%	4.2%	n.a.	4.5%	4.9%	n.a.
Microsoft	2.7%	2.6%	n.a.	3.2%	3.0%	n.a.
Genesys	2.6%	2.3%	n.a.	2.6%	2.4%	n.a.
Epsilon	2.1%	1.9%	n.a.	0.1%	0.1%	n.a.
Zendesk	1.1%	1.3%	n.a.	1.3%	1.5%	n.a.
Others	[50-60%]	[50-60%]	[90-100%]	[50-60%]	[50-60%]	[90-100%]
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Form CO, Tables 6.2-6.6, and Gartner (April 2020).<sup>228</sup>

<sup>226</sup> The Notifying Party has not provided separate market share data for the market segments that are left open, i.e., segments based on (i) mode of deployment, (ii) business customer size, and (iii) industry sector. On the segments where Kustomer is active, i.e., potential segments for cloud-based CRM solutions, CRM software for SMBs and CRM software provided for the ecommerce sector, the market shares of Kustomer would be similar if not larger than on the market for the supply of customer service and support CRM software (and the broader market for CRM software overall).

<sup>227</sup> Competitors' market shares cover the regions "Western Europe" and "Eastern Europe". These two regions include one non-EEA country, as well as relatively small "Rest of Western Europe" and "Rest of Eastern Europe" categories (which may include both EEA and non-EEA countries), but are considered to be a sufficient approximation of EEA market sizes given that the vast majority of countries included are EEA countries.

<sup>228</sup> Parties' reply to RFI 5, question 1.

**Table 2: Customer service and support CRM software shares (Worldwide and EEA, value terms, 2018-2020)**

Party	Customer service and support CRM software					
	Worldwide			EEA <sup>229</sup>		
	2018	2019	2020	2018	2019	2020
Meta (formerly Facebook)	-	-	-	-	-	-
<b>Kustomer</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>	<b>[0-5%]</b>
Salesforce	21.0%	22.5%	n.a.	16.5%	19.9%	n.a.
Oracle	7.8%	7.0%	n.a.	8.1%	6.9%	n.a.
Genesys	7.5%	6.7%	n.a.	7.4%	7.0%	n.a.
SAP	6.3%	5.3%	n.a.	9.9%	8.5%	n.a.
Zendesk	3.0%	3.6%	n.a.	3.6%	4.1%	n.a.
Verint	3.1%	2.9%	n.a.	3.0%	2.9%	n.a.
NICE	2.7%	2.8%	n.a.	2.1%	2.1%	n.a.
Cisco	2.6%	2.6%	n.a.	2.8%	2.6%	n.a.
Microsoft	2.6%	2.5%	n.a.	3.0%	2.9%	n.a.
Avaya	1.8%	1.7%	n.a.	2.1%	1.8%	n.a.
Others	[40-50%]	[40-50%]	[90-100%]	[40-50%]	[40-50%]	[90-100%]
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Form CO, Tables 6.2-6.5, and Gartner (April 2020).<sup>230</sup>

- (174) The market share information shows that Kustomer is growing but is currently still a very small player in the broader market for the supply of CRM software overall and in the narrower customer service and support CRM software market, both globally and in the EEA. However, Meta (formerly Facebook)'s internal documents indicate that Meta (formerly Facebook) intends to [Meta's growth projections for Kustomer]<sup>231232</sup>.
- (175) Regarding competitors, with a share of around 20%, Salesforce is the largest player in the broader market for the supply of CRM software overall and in the narrower customer service and support CRM software market both in the EEA and worldwide. SAP and Oracle (and Genesys in the narrower customer service and support CRM software market) are the next biggest players in these markets with shares between 5-10%. The majority of the market is highly fragmented and split between a long tail of smaller competitors.

<sup>229</sup> Competitors' market shares cover the regions "Western Europe" and "Eastern Europe". These two regions include one non-EEA country, as well as relatively small "Rest of Western Europe" and "Rest of Eastern Europe" categories (which may include both EEA and non-EEA countries), but are considered to be a sufficient approximation of EEA market sizes given that the vast majority of countries included are EEA countries.

<sup>230</sup> Parties' reply to RFI 5, question 1.

<sup>231</sup> See Meta (formerly Facebook)'s internal document, Attachment E029 [...].

<sup>232</sup> See, e.g., Meta (formerly Facebook)'s internal document, [...], in which Meta (formerly Facebook) estimates [Business Plans]. See also Meta (formerly Facebook)'s internal document, [Business Plans].



7.2.2. B2C communication services

(176) Table 3, Table 4 and Table 5 set out the Parties' and their main competitors' market shares, in value terms, within the overall market for B2C communication services as well as within the market for asynchronous B2C communication services and, within this narrower market, the narrower market for OTT B2C messaging services, both in the EEA and worldwide, for 2018, 2019 and 2020.

**Table 3: B2C communication services shares (Worldwide and EEA, value terms, 2018-2020)**

Party	B2C communication services					
	Worldwide			EEA		
	2018	2019	2020	2018	2019	2020
Kustomer	-	-	-	-	-	-
<b>Meta (formerly Facebook)</b>	[0-5%]	[0-5%]	[5-10%]	[0-5%]	[0-5%]	[0-5%]
<i>Messenger</i>	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
<i>WhatsApp</i>	[0-5%]	[0-5%]	[5-10%]	[0-5%]	[0-5%]	[0-5%]
<i>Instagram</i>	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Phone	71%	67%	63%	67%	67%	67%
Email	20%	19%	18%	24%	24%	24%
Other messaging <sup>233</sup>	[5-10%]	[5-10%]	[10-20%]	[5-10%]	[5-10%]	[0-5%]
Others (e.g., letter, fax)	2%	1%	1%	2%	2%	2%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Form CO, Tables 6.7 and 6.8.

<sup>233</sup> The Notifying Party indicated that "Other messaging" includes other OTT providers, webchat (which includes Google's RCS and Apple Business Chat) and SMS, and that it was unable to separate conversation volumes for those channels in a reliable manner. However, the Notifying Party did provide the following breakdown on a worldwide basis for 2020 of "Other messaging" [10-20%]: Webchat [5-10%], OTT [0-5%] and SMS [0-5%]. See Form CO, paragraph 6.1.

**Table 4: asynchronous B2C communication services shares (Worldwide and EEA, value terms, 2018-2020)**

Party	Asynchronous B2C communication services <sup>234</sup>					
	Worldwide			EEA		
	2018	2019	2020	2018	2019	2020
Kustomer	-	-	-	-	-	-
<b>Meta (formerly Facebook)</b>	[0-5%]	[10-20%]	[10-20%]	[5-10%]	[5-10%]	[5-10%]
<i>Messenger</i>	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
<i>WhatsApp</i>	[0-5%]	[5-10%]	[10-20%]	[0-5%]	[0-5%]	[0-5%]
<i>Instagram</i>	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]	[0-5%]
Email	67.6%	56.8%	47.5%	72.5%	71.8%	71.2%
Other messaging	[20-30%]	[20-30%]	[20-30%]	[10-20%]	[10-20%]	[10-20%]
Others (e.g., letter, fax)	5%	4.2%	3.5%	6.1%	5.9%	5.4%
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Form CO, Tables 6.7 and 6.8.

**Table 5: OTT B2C messaging services shares (Worldwide and EEA, value terms, 2018-2020)**

Party	OTT B2C messaging services <sup>235</sup>					
	Worldwide			EEA		
	2018	2019	2020	2018	2019	2020
Kustomer	-	-	-	-	-	-
<b>Meta (formerly Facebook)</b>	[10-20%]	[30-40%]	[40-50%]	[30-40%]	[30-40%]	[40-50%]
<i>Messenger</i>	[5-10%]	[5-10%]	[5-10%]	[10-20%]	[10-20%]	[10-20%]
<i>WhatsApp</i>	[0-5%]	[10-20%]	[30-40%]	[0-5%]	[10-20%]	[10-20%]
<i>Instagram</i>	[5-10%]	[5-10%]	[5-10%]	[10-20%]	[10-20%]	[10-20%]

<sup>234</sup> These figures have been calculated by the Commission using figures for the overall B2C communications market provided by the Notifying Party in the Form CO, paragraph 6.54 Tables 6.7 and 6.8. Market shares may therefore not sum to 100% due to rounding.

<sup>235</sup> These figures have been calculated by the Commission using figures for the overall B2C communications market provided by the Notifying Party in the Form CO, paragraph 6.54 Tables 6.7 and 6.8. Market shares may therefore not sum to 100% due to rounding.

Party	OTT B2C messaging services <sup>235</sup>					
	Worldwide			EEA		
	2018	2019	2020	2018	2019	2020
Other messaging (excluding SMS <sup>236</sup> )	[80-90%]	[60-70%]	[50-60%]	[70-80%]	[60-70%]	[50-60%]
<b>Total</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>	<b>100%</b>

Source: Form CO, Tables 6.7 and 6.8.

- (177) The market share information shows that Meta (formerly Facebook)’s messaging channels have a small share in the overall market for B2C communication services in 2020, [5-10%] globally and [0-5%] in the EEA. Meta (formerly Facebook)’s market share has increased in the period from 2018 to 2020, both globally and in the EEA. Phone and email account for the majority of B2C conversations in 2020, 63% and 18% respectively globally and 67% and 24% respectively in the EEA, and have both been in decline globally between 2018 and 2020 in view of the shift away from more traditional B2C communication channels such as phone and email towards more modern channels, like the OTT B2C messaging channels offered by Meta (formerly Facebook). This trend is expected to continue in the coming years.<sup>237</sup> Moreover, it is important to note that the overall market for B2C communication services is highly fragmented since phone (63%), email (18%), as well as webchat [5-10%], other OTT [0-5%] and SMS [0-5%] (each part of “Other Messaging”) are in fact umbrella terms and each one is comprised of a multitude of larger and smaller players (e.g., national mobile network operators, different email providers, OTT messaging and webchat applications, etc.) none of which the Commission expects to have a material share or market power on the broad B2C communication service market at EEA or worldwide level. In addition, “phone” comprises not only traditional calls but also OTT calls (including OTT calls on Meta (formerly Facebook)’s channels).
- (178) Within the plausible narrower market for asynchronous B2C communication services (excluding phone), Meta (formerly Facebook) had a market share, in 2020, of [10-20%] worldwide and [5-10%] in the EEA. In the period from 2018 to 2020, the market shares of Meta (formerly Facebook) were increasing, while email has declined over the same period both globally and (to a lesser extent) in the EEA.<sup>238</sup> Moreover, as mentioned, email, as well as webchat, other OTT and SMS (each part of “Other Messaging”) are in fact umbrella terms and each one is comprised of a multitude of small players none of which the Commission expects to have a material share or market power.

<sup>236</sup> While the Notifying Party submitted that with regard to the category “Other messaging” it was unable to separate conversation volumes for those channels in a reliable manner, it did provide the following breakdown on a worldwide basis for 2020 of “Other messaging” ([10-20%]): Webchat ([5-10%]), OTT ([0-5%]) and SMS ([0-5%]). See Form CO, paragraph 6.1. On the basis of these figures, the Commission excludes from all “Other messaging” for 2018 to 2020, worldwide and in the EEA, the equivalent share occupied by SMS (i.e., [5-10%], representing [Market Shares] of SMS’ market share for other messaging worldwide in 2020).

<sup>237</sup> Replies to questionnaire 1 to CRM software providers, questions 47.1 and 47.2; replies to questionnaire 4 to business customers, questions 58.1 and 58.2.

<sup>238</sup> See reply to questionnaire 4 to business customers, question 58.1 (ID: 768), in which a business customer indicated that they consider that “Email shifted to Chat” over the past five years.

(179) Finally, within the potential market for OTT B2C messaging services, as a sub-segment of asynchronous B2C communication services, Meta (formerly Facebook) has a share of more than [40-50%] in 2020, both worldwide and in the EEA. Meta (formerly Facebook)'s market share has significantly and consistently increased in the period from 2018 to 2020, both globally and in the EEA. B2C messaging is a growing B2C communication channel, and discussions with market participants indicate that it is expected to become the primary B2C communication channel in the future.<sup>239</sup> Other messaging includes other OTT B2C messaging services (including Google's RCS-supported messaging channels and Apple Business Chat) and webchat. The Notifying Party submitted that with regard to those channels, it was not able to provide separate conversation volumes in a reliable manner. However, it did provide market share estimates for other OTT B2C messaging services and webchat on a worldwide market for 2020.<sup>240</sup> On this market, the market share for webchat would be around [Market shares]. The market shares of other OTT B2C messaging services would amount to approximately [10-20%].<sup>241</sup> As there are several providers of webchat services, as well as several other OTT B2C messaging services, Meta (formerly Facebook) appears to be the biggest single player in a potential market for OTT B2C messaging services.

### 7.2.3. *Online Display Advertising*

(180) Meta (formerly Facebook) has not provided market shares for online display advertising services and sub-markets/segments thereof. In previous decisions, the Commission found that, whilst overall the online display advertising market is fragmented, Meta (formerly Facebook) would be the largest player.<sup>242</sup>

(181) The Commission has thus reconstructed Meta (formerly Facebook)'s market shares for the national markets/sub-markets/segments for online display advertising, online display advertising on-social networks, online display advertising off-social networks, online display video advertising, online display non-video advertising, online display advertising on desktops and online display advertising on mobile, on the basis of data requested from the main market players on their revenues with online advertising services on their own properties as well as data on the annual value of the display advertising served to third parties publishers (i.e., including revenues received by publishers). Data was collected from 18 market players. The market size was calculated by summing the revenues of all respondents.<sup>243</sup> This may under-estimate the actual size of the market given that not all players responded to the Commission's RFI, but there are no reasons in the present case to believe that the estimated market size differs significantly from the actual size.

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<sup>239</sup> Agreed minutes of the call of 18 May 2021 with Zendesk, paragraph 10 (ID: 2090); agreed minutes of the call of 14 June 2021 with Twilio, paragraph 12 (ID: 2029); agreed minutes of the call of 26 June 2021 with Salesforce, paragraph 8 (ID: 2005).

<sup>240</sup> Form CO, Figure 6.1.

<sup>241</sup> These figures have been calculated by the Commission using figures for the overall B2C communications market provided by the Notifying Party in the Form CO, paragraph 6.54 Tables 6.7 and 6.8. These market shares are therefore estimates.

<sup>242</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 171-173.

<sup>243</sup> In cases where certain data were missing from players, the Commission has used certain assumptions that over-estimate the corresponding market sizes, for instance by double-counting revenues across sub-markets/segments of the online display advertising market. This may in turn under-estimate Meta (formerly Facebook)'s market shares. Further, the Commission notes that the allocation of revenues between sub-markets/segments of the online display advertising market has been made by the market player themselves.

- (182) The result of this exercise for the years 2018, 2019 and 2020 is presented in the Tables below. The market shares below reflect only display ads served on Meta (formerly Facebook)'s own properties, and do not include display ads Meta (formerly Facebook) served to third party publishers (via its intermediation service MAN). Meta (formerly Facebook) does not serve display ads off-social networks on its own properties, since Meta (formerly Facebook) has defined all of its properties as social networks, therefore no table for this potential segment has been included.<sup>244</sup>

**Table 6: Meta (formerly Facebook)'s market shares in online display advertising (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[50-75]%	[50-75]%	[50-75]%
Belgium	[75-100]%	[50-75]%	[50-75]%
Bulgaria	[50-75]%	[50-75]%	[30-50]%
Croatia	[50-75]%	[50-75]%	[50-75]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[50-75]%	[50-75]%	[50-75]%
Denmark	[50-75]%	[50-75]%	[50-75]%
Estonia	[50-75]%	[50-75]%	[30-50]%
Finland	[50-75]%	[50-75]%	[50-75]%
France	[50-75]%	[50-75]%	[50-75]%
Germany	[50-75]%	[50-75]%	[50-75]%
Greece	[50-75]%	[50-75]%	[50-75]%
Hungary	[50-75]%	[50-75]%	[50-75]%
Iceland	[50-75]%	[50-75]%	[50-75]%
Ireland	[30-50]%	[30-50]%	[30-50]%
Italy	[50-75]%	[50-75]%	[50-75]%
Latvia	[20-30]%	[20-30]%	[20-30]%
Liechtenstein	[20-30]%	[10-20]%	[20-30]%
Lithuania	[30-50]%	[20-30]%	[20-30]%
Luxembourg	[30-50]%	[20-30]%	[20-30]%
Malta	[30-50]%	[20-30]%	[10-20]%
Netherlands	[30-50]%	[30-50]%	[30-50]%
Norway	[50-75]%	[50-75]%	[50-75]%
Poland	[50-75]%	[50-75]%	[50-75]%
Portugal	[50-75]%	[50-75]%	[50-75]%
Romania	[50-75]%	[50-75]%	[50-75]%
Slovakia	[50-75]%	[50-75]%	[50-75]%

<sup>244</sup> Meta (formerly Facebook) does serve display ads off-social networks on third party properties, via its intermediation service MAN. See paragraph 184 below for further detail.

EEA Country	Market share		
	2018	2019	2020
Slovenia	[75-100]%	[75-100]%	[50-75]%
Spain	[50-75]%	[50-75]%	[50-75]%
Sweden	[50-75]%	[50-75]%	[50-75]%

*Source: Commission computation*

**Table 7: Meta (formerly Facebook)'s market shares in online video display advertising (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[75-100]%	[50-75]%	[50-75]%
Belgium	[75-100]%	[50-75]%	[50-75]%
Bulgaria	[75-100]%	[50-75]%	[30-50]%
Croatia	[75-100]%	[50-75]%	[50-75]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[50-75]%	[50-75]%	[50-75]%
Denmark	[50-75]%	[50-75]%	[50-75]%
Estonia	[50-75]%	[50-75]%	[30-50]%
Finland	[50-75]%	[30-50]%	[30-50]%
France	[50-75]%	[50-75]%	[50-75]%
Germany	[50-75]%	[50-75]%	[50-75]%
Greece	[75-100]%	[50-75]%	[50-75]%
Hungary	[75-100]%	[50-75]%	[50-75]%
Iceland	[75-100]%	[75-100]%	[50-75]%
Ireland	[50-75]%	[30-50]%	[30-50]%
Italy	[75-100]%	[50-75]%	[50-75]%
Latvia	[50-75]%	[30-50]%	[10-20]%
Liechtenstein	[75-100]%	[10-20]%	[20-30]%
Lithuania	[10-20]%	[0-10]%	[0-10]%
Luxembourg	[50-75]%	[20-30]%	[20-30]%
Malta	[50-75]%	[30-50]%	[10-20]%
Netherlands	[50-75]%	[30-50]%	[30-50]%
Norway	[75-100]%	[50-75]%	[50-75]%
Poland	[50-75]%	[50-75]%	[50-75]%
Portugal	[75-100]%	[50-75]%	[50-75]%
Romania	[75-100]%	[50-75]%	[50-75]%
Slovakia	[75-100]%	[50-75]%	[50-75]%
Slovenia	[75-100]%	[75-100]%	[30-50]%
Spain	[50-75]%	[50-75]%	[50-75]%
Sweden	[50-75]%	[50-75]%	[50-75]%

*Source: Commission computation*

**Table 8: Meta (formerly Facebook)’s market shares in online non-video display advertising (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[50-75]%	[50-75]%	[50-75]%
Belgium	[50-75]%	[75-100]%	[75-100]%
Bulgaria	[30-50]%	[30-50]%	[30-50]%
Croatia	[50-75]%	[50-75]%	[50-75]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[50-75]%	[50-75]%	[50-75]%
Denmark	[50-75]%	[50-75]%	[50-75]%
Estonia	[30-50]%	[50-75]%	[30-50]%
Finland	[50-75]%	[50-75]%	[50-75]%
France	[50-75]%	[50-75]%	[50-75]%
Germany	[30-50]%	[30-50]%	[30-50]%
Greece	[50-75]%	[50-75]%	[75-100]%
Hungary	[50-75]%	[50-75]%	[75-100]%
Iceland	[50-75]%	[50-75]%	[50-75]%
Ireland	[30-50]%	[30-50]%	[30-50]%
Italy	[50-75]%	[50-75]%	[50-75]%
Latvia	[20-30]%	[20-30]%	[20-30]%
Liechtenstein	[20-30]%	[20-30]%	[20-30]%
Lithuania	[30-50]%	[30-50]%	[30-50]%
Luxembourg	[20-30]%	[20-30]%	[20-30]%
Malta	[20-30]%	[20-30]%	[10-20]%
Netherlands	[30-50]%	[30-50]%	[30-50]%
Norway	[50-75]%	[50-75]%	[50-75]%
Poland	[50-75]%	[50-75]%	[50-75]%
Portugal	[50-75]%	[50-75]%	[50-75]%
Romania	[50-75]%	[50-75]%	[50-75]%
Slovakia	[50-75]%	[50-75]%	[50-75]%
Slovenia	[50-75]%	[75-100]%	[75-100]%
Spain	[30-50]%	[50-75]%	[50-75]%
Sweden	[50-75]%	[50-75]%	[50-75]%

*Source: Commission computation*

**Table 9: Meta (formerly Facebook)’s market shares in online display advertising on social-networks (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[75-100]%	[75-100]%	[75-100]%
Belgium	[75-100]%	[75-100]%	[75-100]%
Bulgaria	[50-75]%	[50-75]%	[50-75]%
Croatia	[50-75]%	[75-100]%	[75-100]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[50-75]%	[50-75]%	[50-75]%
Denmark	[75-100]%	[75-100]%	[75-100]%
Estonia	[50-75]%	[50-75]%	[50-75]%
Finland	[75-100]%	[75-100]%	[75-100]%
France	[50-75]%	[50-75]%	[50-75]%
Germany	[50-75]%	[50-75]%	[50-75]%
Greece	[75-100]%	[75-100]%	[75-100]%
Hungary	[75-100]%	[75-100]%	[75-100]%
Iceland	[75-100]%	[75-100]%	[75-100]%
Ireland	[50-75]%	[50-75]%	[50-75]%
Italy	[75-100]%	[75-100]%	[75-100]%
Latvia	[30-50]%	[50-75]%	[50-75]%
Liechtenstein	[30-50]%	[50-75]%	[50-75]%
Lithuania	[30-50]%	[20-30]%	[20-30]%
Luxembourg	[50-75]%	[30-50]%	[30-50]%
Malta	[50-75]%	[50-75]%	[50-75]%
Netherlands	[50-75]%	[50-75]%	[50-75]%
Norway	[75-100]%	[75-100]%	[75-100]%
Poland	[50-75]%	[50-75]%	[50-75]%
Portugal	[75-100]%	[75-100]%	[75-100]%
Romania	[50-75]%	[75-100]%	[75-100]%
Slovakia	[50-75]%	[50-75]%	[50-75]%
Slovenia	[75-100]%	[75-100]%	[50-75]%
Spain	[50-75]%	[50-75]%	[50-75]%
Sweden	[75-100]%	[75-100]%	[50-75]%

*Source: Commission computation*



**Table 10: Meta (formerly Facebook)’s market shares in online display advertising on desktop (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[30-50]%	[30-50]%	[30-50]%
Belgium	[50-75]%	[30-50]%	[30-50]%
Bulgaria	[30-50]%	[30-50]%	[20-30]%
Croatia	[30-50]%	[30-50]%	[30-50]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[30-50]%	[30-50]%	[30-50]%
Denmark	[30-50]%	[30-50]%	[30-50]%
Estonia	[50-75]%	[50-75]%	[30-50]%
Finland	[30-50]%	[30-50]%	[30-50]%
France	[30-50]%	[20-30]%	[20-30]%
Germany	[10-20]%	[10-20]%	[10-20]%
Greece	[50-75]%	[50-75]%	[30-50]%
Hungary	[50-75]%	[30-50]%	[30-50]%
Iceland	[30-50]%	[30-50]%	[20-30]%
Ireland	[10-20]%	[0-10]%	[0-10]%
Italy	[20-30]%	[20-30]%	[10-20]%
Latvia	[20-30]%	[20-30]%	[10-20]%
Liechtenstein	[0-10]%	[0-10]%	[0-10]%
Lithuania	[30-50]%	[30-50]%	[20-30]%
Luxembourg	[30-50]%	[20-30]%	[20-30]%
Malta	[30-50]%	[30-50]%	[20-30]%
Netherlands	[10-20]%	[10-20]%	[10-20]%
Norway	[30-50]%	[30-50]%	[30-50]%
Poland	[30-50]%	[20-30]%	[20-30]%
Portugal	[30-50]%	[30-50]%	[30-50]%
Romania	[30-50]%	[30-50]%	[30-50]%
Slovakia	[30-50]%	[30-50]%	[30-50]%
Slovenia	[50-75]%	[50-75]%	[50-75]%
Spain	[10-20]%	[10-20]%	[10-20]%
Sweden	[20-30]%	[20-30]%	[20-30]%

*Source: Commission computation*

**Table 11: Meta (formerly Facebook)’s market shares in online display advertising on mobile (2018-2020)**

EEA Country	Market share		
	2018	2019	2020
Austria	[75-100]%	[50-75]%	[50-75]%
Belgium	[75-100]%	[75-100]%	[75-100]%
Bulgaria	[50-75]%	[50-75]%	[30-50]%
Croatia	[50-75]%	[50-75]%	[50-75]%
Cyprus	[0-10]%	[0-10]%	[0-10]%
Czechia	[50-75]%	[50-75]%	[50-75]%
Denmark	[50-75]%	[50-75]%	[50-75]%
Estonia	[50-75]%	[50-75]%	[30-50]%
Finland	[50-75]%	[50-75]%	[50-75]%
France	[50-75]%	[50-75]%	[50-75]%
Germany	[50-75]%	[50-75]%	[50-75]%
Greece	[75-100]%	[50-75]%	[75-100]%
Hungary	[75-100]%	[75-100]%	[75-100]%
Iceland	[75-100]%	[75-100]%	[75-100]%
Ireland	[30-50]%	[30-50]%	[30-50]%
Italy	[50-75]%	[50-75]%	[50-75]%
Latvia	[20-30]%	[20-30]%	[20-30]%
Liechtenstein	[30-50]%	[20-30]%	[20-30]%
Lithuania	[30-50]%	[20-30]%	[20-30]%
Luxembourg	[30-50]%	[20-30]%	[20-30]%
Malta	[20-30]%	[20-30]%	[10-20]%
Netherlands	[50-75]%	[30-50]%	[50-75]%
Norway	[75-100]%	[50-75]%	[50-75]%
Poland	[50-75]%	[50-75]%	[50-75]%
Portugal	[50-75]%	[50-75]%	[50-75]%
Romania	[50-75]%	[50-75]%	[75-100]%
Slovakia	[50-75]%	[50-75]%	[50-75]%
Slovenia	[75-100]%	[75-100]%	[50-75]%
Spain	[50-75]%	[50-75]%	[50-75]%
Sweden	[50-75]%	[50-75]%	[50-75]%

*Source: Commission computation*

(183) As illustrated in the above Tables, in 2020 Meta (formerly Facebook)'s market shares was:

Above 30%<sup>245</sup>:

- In the supply of online display advertising services in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>246</sup>
- In the supply of online display advertising services on social networks in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>247</sup>
- In the supply of online display video advertising services in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>248</sup>
- In the supply of online display non-video advertising services in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Lithuania, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>249</sup>
- In the supply of online display advertising services on mobile in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>250</sup> and
- In the supply of online display advertising service on desktop in Austria, Belgium, Croatia, Czechia, Denmark, Estonia, Finland, Greece, Hungary, Norway, Portugal, Romania, Slovakia, and Slovenia.<sup>251</sup>

Above 50%<sup>252</sup>:

- In the supply of online display advertising services in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Hungary,

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<sup>245</sup> Please note these lists include markets where Meta (formerly Facebook)'s share is above 50% and above 75%.

<sup>246</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Malta.

<sup>247</sup> Following linguistic borders within the EEA, this may also include Cyprus.

<sup>248</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Malta.

<sup>249</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Malta.

<sup>250</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Malta.

<sup>251</sup> Following linguistic borders within the EEA, this may also include Cyprus, France, Germany, Liechtenstein, Luxembourg, and the Netherlands.

<sup>252</sup> Please note these lists include markets where Meta (formerly Facebook)'s share is above 75%.

Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>253</sup>

- In the supply of online display advertising services on social networks in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>254</sup>
- In the supply of online display video advertising services in Austria, Belgium, Croatia, Czechia, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Spain, and Sweden;<sup>255</sup>
- In the supply of online display non-video advertising services in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>256</sup>
- In the supply of online display advertising services on mobile in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>257</sup> and
- In the supply of online display advertising service on desktop in Slovenia.

Above 75%:

- In the supply of online display advertising services on social networks in Austria, Belgium, Croatia, Denmark, Finland, Greece, Hungary, Iceland, Italy, Norway, Portugal, and Romania;<sup>258</sup>
- In the supply of online display non-video advertising services in Belgium, Greece, Hungary, and Slovenia;<sup>259</sup> and
- In the supply of online display advertising services on mobile in Belgium, Greece, Hungary, Iceland, and Romania.<sup>260</sup>

(184) In addition to display advertising on its own properties, Meta (formerly Facebook) also serves display ads to third parties, via its intermediation service MAN. Although the associated revenues are shared between Meta (formerly Facebook) and those third party publishers, Meta (formerly Facebook) has a decisive role in determining the allocation of ads it serves to third parties. As such, even though these revenues

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<sup>253</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Netherlands.

<sup>254</sup> Following linguistic borders within the EEA, this may also include Cyprus and Luxembourg.

<sup>255</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Netherlands.

<sup>256</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, Germany and Netherlands.

<sup>257</sup> Following linguistic borders within the EEA, this may also include Cyprus, Luxembourg and Liechtenstein.

<sup>258</sup> Following linguistic borders within the EEA, this may also include Cyprus, France, Germany, Liechtenstein, Luxembourg and the Netherlands.

<sup>259</sup> Following linguistic borders within the EEA, this may also include Austria, Cyprus, France, Germany, Liechtenstein, Luxembourg and the Netherlands.

<sup>260</sup> Following linguistic borders within the EEA, this may also include Austria, Cyprus, France, Germany, Liechtenstein, Luxembourg and the Netherlands.

have not been included in Meta (formerly Facebook)'s market shares above, they may constitute an additional (aggravating) factor relevant to Meta (formerly Facebook)'s market position within display advertising. In 2020, the share of the national markets served by Meta (formerly Facebook) to third parties corresponded to (i) between [0-5%] and [10-20%] of the total revenues with display advertising off-social networks, (ii) between [0-5%] and [5-10%] of the total revenues with display video advertising, depending on the EEA country, and (iii) below [0-5%] for display advertising and all other potential segments thereof.

### **7.3. Assessment of vertical effects**

#### *7.3.1. Legal framework*

- (185) According to the Non-Horizontal Guidelines,<sup>261</sup> non-coordinated effects may significantly impede effective competition as a result of a vertical merger if such merger gives rise to foreclosure. Foreclosure occurs where actual or potential competitors' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing those companies' ability and/or incentive to compete.<sup>262</sup> Such foreclosure may discourage entry or expansion of competitors or encourage their exit.<sup>263</sup>
- (186) The Non-Horizontal Guidelines distinguish between two forms of foreclosure. Input foreclosure occurs where the merger is likely to raise the costs of downstream competitors by restricting their access to an important input. Customer foreclosure occurs where the merger is likely to foreclose upstream competitors by restricting their access to a sufficient customer base.<sup>264</sup>
- (187) Foreclosure may also take more subtle forms, such as the degradation of the quality of input supplied. In its assessment, the Commission may consider a series of alternative or complementary possible strategies.<sup>265</sup>
- (188) In assessing the likelihood of an anticompetitive foreclosure scenario, the Commission examines, first, whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs or customers, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition. In practice, these factors are often examined together as they are closely intertwined.<sup>266</sup>
- (189) Pursuant to Article 2(2) of the Merger Regulation, a concentration which would not significantly impede effective competition, in the internal market or in a substantial part of it, shall be declared compatible with the internal market. Conversely, pursuant to Article 2(3) of the Merger Regulation, a concentration which would significantly impede effective competition, in the internal market or in a substantial part of it, shall be declared incompatible with the internal market. In that regard, it is sufficient for the Commission to establish that the Transaction is likely to lead to a significant impediment of effective competition. In that regard, where it has been notified of a proposed concentration pursuant to the Merger Regulation, the Commission is, in principle, required to adopt a position, either in the sense of approving or of

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<sup>261</sup> Non-Horizontal Guidelines, pages 6-25.

<sup>262</sup> See Non-Horizontal Guidelines, paragraph 18.

<sup>263</sup> See Non-Horizontal Guidelines, paragraph 29.

<sup>264</sup> See Non-Horizontal Guidelines, paragraph 30.

<sup>265</sup> See Non-Horizontal Guidelines, paragraph 33.

<sup>266</sup> See Non-Horizontal Guidelines, paragraph 32.

prohibiting the concentration, in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue.<sup>267</sup> It follows that the Commission has to establish whether the Transaction is likely to lead to a significant impediment of effective competition.<sup>268</sup>

7.3.2. *Foreclosure of access to APIs to Meta (formerly Facebook)'s messaging channels to the detriment of competing providers of CRM software (input foreclosure)*

- (190) The Transaction gives rise to a vertical relationship<sup>269</sup> between Meta (formerly Facebook)'s activities in the upstream market for the supply of OTT B2C messaging services (and the broader market for B2C communication services) and Kustomer's activities in the downstream market for the supply of customer service and support CRM software (and the broader market for the supply of CRM software overall).
- (191) OTT B2C messaging channels, and indeed B2C communication channels more generally, constitute an important input for the supply of customer service and support CRM software. Customer service and support CRM software providers obtain API access to OTT B2C messaging channels to help businesses manage

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<sup>267</sup> Case C-413/06 P, *Bertelsmann a.o. v Impala*, EU:C:2008:392, paragraph 52.

<sup>268</sup> The Notifying Party argues that the standard of proof in order to establish a significant impediment to effective competition is a standard of a "strong probability", and refers in this respect to the judgment of the General Court in Case T-399/16 *CK Telecoms v Commission* (EU:T:2020:217, paragraph 118) (SO Response, paragraph 1.6(A)). The Commission disagrees that this is the correct test, and the judgment is currently under appeal (Case C-376/20 P, *Commission v CK Telecoms*). The Commission considers however that in any event, there is a strong probability that the Transaction would have significant negative effects on competition in the market for customer service and support CRM software (see Section 7.3.2.3 below).

<sup>269</sup> The assessment would not materially change if examined through the lenses of conglomerate non-coordinated effects. Foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices. Similarly to input foreclosure, conglomerate foreclosure may also take more subtle forms, such as the degradation of the quality of a product supplied on a standalone basis. In certain circumstances such practices may lead to a reduction in actual or potential competitors' ability or incentive to compete, which may in turn reduce the competitive pressure on the merged entity allowing it to increase prices. See Non-Horizontal Guidelines, paragraphs 91 and 93. As with vertical non-coordinated effects, in assessing the likelihood of such other exclusionary practices in the form of foreclosure, the Commission examines, first, whether the merged entity would have the ability to engage in such conduct by reducing the ability to compete of its actual or potential competitors, second, whether it would have the economic incentive to do so and, third, whether such strategy would have a significant detrimental effect on competition, thus causing harm to consumers. See Non-Horizontal Guidelines, paragraph 94. Given that in the case of exclusionary practices in the form of foreclosure the assessment framework for both vertical and conglomerate non-coordinated effects is largely the same, the Commission's assessment below will focus on vertical effects. However, the assessment would be largely the same for exclusionary practices under a conglomerate perspective. The link between Meta (formerly Facebook)'s activities in B2C communication services and Kustomer's activities in CRM software may also constitute a conglomerate relationship in cases where businesses obtain API access to B2C communications themselves directly from Meta (formerly Facebook) or other messaging channel providers, or via a CPaaS provider, and separately procure a customer service and support CRM solution from a CRM software provider. The Notifying Party argues that a conglomerate assessment is therefore more appropriate. However, businesses that use CRM software generally integrate the B2C communication channels (which they may have accessed via direct APIs or through CPaaS providers) into their chosen CRM software, and CRM software providers actively facilitate such integration. As such, for the purposes of this Decision, the Commission does not consider it to be necessary to carry out a separate conglomerate effects assessment as the vertical assessment carried out by the Commission addresses each of the various elements that may be necessary to determine the likelihood of foreclosure.

communications with consumers by unifying several interactions (phone, email, webchat, SMS, Messenger, WhatsApp, Instagram, Twitter, etc.) under a single tool.

- (192) While it is left open in Section 6.1.1.4 above whether there is a separate market for the supply of customer service and support CRM software or whether it is part of the overall market for the supply of CRM software, the Commission undertakes its assessment of vertical effects on the narrower market for the supply of customer service and support CRM software. The Commission considers that its assessment holds even if it would be based on the broader market for CRM software overall. This is in particular the case because, according to Gartner, [...].<sup>270</sup>
- (193) In the market for OTT B2C messaging, Meta (formerly Facebook) holds a market share of well above [40-50%] (with its WhatsApp, Messenger and Instagram messaging channels), both at worldwide and EEA level. Meta (formerly Facebook)'s share in this market has also been growing significantly over the past years. Kustomer's position on the downstream market is currently limited (less than [0-5%] in CRM software, as well as in the narrower market for customer service and support CRM software).<sup>271</sup>
- (194) The Commission has investigated whether Meta (formerly Facebook) has the ability and incentive to foreclose competing customer service and support CRM software providers, either through restricting API access to its channels, degrading rivals' API access to its channels, or upgrading Kustomer's API access to its channels relative to rivals' access. The Commission also assessed whether such a foreclosure strategy would have a negative impact on competition in the market for the supply of customer service and support CRM software (and the broader overall CRM software market).

#### 7.3.2.1. Notifying Party's views<sup>272</sup>

- (195) The Notifying Party submits that the merged entity will not have the ability or the incentive to restrict or degrade access to its B2C communication channels for downstream competitors of Kustomer post-Transaction (as an input into their CRM software offering)<sup>273</sup>. Moreover, the Notifying Party submits that such strategy would not have a significant impact in the CRM software market.<sup>274</sup> In relation to this theory of harm, the Notifying Party has submitted an economic paper.<sup>275</sup> The Notifying Party reiterated and expanded upon these points in the Article 6(1)(c) Response and in the SO Response.
- (a) Ability to foreclose
- (196) The Notifying Party submits that Meta (formerly Facebook) does not have the ability to foreclose Kustomer's rival CRM providers.

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<sup>270</sup> See Kustomer's internal document, [...].

<sup>271</sup> The Commission has therefore excluded possible standalone customer foreclosure concerns in the immediate future.

<sup>272</sup> In the Form CO, the Notifying Party submits its views on input foreclosure under the Section for conglomerate effects ("Conglomerate Foreclosure: B2C communication services and CRM software solutions (1) foreclosure of Kustomer's CRM rivals") as it considers there is significant overlap between the assessment of any conglomerate foreclosure strategy relating to Kustomer's rivals in CRM software and any assessment of input foreclosure under vertical effects (Form CO, paragraph 8.84.)

<sup>273</sup> Form CO, paragraph 6.86.

<sup>274</sup> Form CO, paragraph 6.109.

<sup>275</sup> Form CO, Annex 13.17, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects, and Annex 13.18, Acquisition by Facebook, Inc. of Kustomer, Inc. Vertical arithmetic analysis.

- (197) In the Form CO, the Notifying Party argues that it does not have any market power in B2C communication services that it could use as leverage to impose material switching to Kustomer from rival CRM providers. According to Meta (formerly Facebook), there is an overall market for B2C communications, including phone and email, in which Meta (formerly Facebook) would have a single-digit share ([5-10%] globally, [0-5%] in the EEA).<sup>276</sup>
- (198) Moreover, the Notifying Party submits that Meta (formerly Facebook)'s messaging channels are not "must-have" products for CRM software providers or their business customers (now or in the near future), and provides examples of CRM providers that do not integrate Meta (formerly Facebook)'s channels.<sup>277</sup> The Notifying Party also considers that end-consumers multi-home between and switch across B2C communication channels regularly and therefore do not consider Facebook or messaging as a "must-have" B2C communication channel.<sup>278</sup>
- (199) According to the Notifying Party, these conclusions are not altered by the fact that the importance of messaging channels for B2C communications is forecast to increase significantly in the coming years.<sup>279</sup>
- (200) Further, the Notifying Party explains that there are strong alternative third-party messaging providers, namely Google and Apple, who are investing heavily in B2C messaging and whose products would represent attractive alternatives to Meta (formerly Facebook)'s messaging channels in the event of an attempted foreclosure.<sup>280</sup>
- (201) In its Article 6(1)(c) Response, the Notifying Party further argues that its B2C messaging channels are not an important input for the downstream market for several reasons. First, the Notifying Party explains that its channels do not represent a significant cost factor, but rather around [Pricing Information] of a CRM's costs. Second, they are not a critical component for the sale of CRM software as Meta (formerly Facebook)'s messaging channels are not the only channels that can be used for B2C communications. Third, Meta (formerly Facebook)'s claims that its messaging channels do not represent a significant source of product differentiation for CRM software providers on the basis that integration of B2C messaging channels does not represent an important driver of competition in the downstream market. Fourth, Meta (formerly Facebook) claims that the cost of switching to alternative inputs is nil or negligible as all CRM software providers integrate several OTT B2C messaging channels, in addition to phone, email, SMS and other B2C channels.<sup>281</sup>
- (202) The Notifying Party argues that there is in reality "*minimal usage of Facebook's B2C channels*" compared to channels such as phone and email.<sup>282</sup> While accepting that the OTT B2C messaging market is fragmented, the Notifying Party nonetheless considers it to be dynamic with "*strong and growing rivals such as Google [RCS] and Apple [Apple Business Chat] and webchat providers*"<sup>283</sup> that would exert a competitive constraint on Meta (formerly Facebook)'s channels.

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<sup>276</sup> Form CO, paragraphs 6.88 - 6.92.

<sup>277</sup> Form CO, paragraphs 6.91 and 6.92.

<sup>278</sup> Form CO, paragraphs 6.98 and 6.99.

<sup>279</sup> Form CO, paragraph 6.94.

<sup>280</sup> Form CO, paragraph 6.95.

<sup>281</sup> Article 6(1)(c) Response, paragraph 3.11.

<sup>282</sup> Article 6(1)(c) Response, paragraphs 3.12-3.13.

<sup>283</sup> Article 6(1)(c) Response, paragraphs 3.15-3.16.



- (203) Contrary to the Commission’s conclusion in the Article 6(1)(c) Decision, the Notifying Party considers that the high penetration rates of Meta (formerly Facebook)’s messaging channels do not reflect market power in the OTT B2C messaging market as they only relate to consumer usage (or peer-to-peer (“P2P”) communications), and the “*out-of-market*” constraint exercised by channels such as phone and email, which still account for the majority of B2C communications overall, cannot be ignored.<sup>284</sup> The Notifying Party further argues that the Article 6(1)(c) Decision fails to consider the countervailing buyer power of major CRM software providers such as Salesforce, SAP and Oracle, which already integrate multiple OTT B2C messaging channels and could credibly threaten to switch within a short timeframe. According to the Notifying Party, they have the ability to influence businesses’ choice of which B2C channels to provide to their end customers.<sup>285</sup> For all of these reasons, the Notifying Party considers that it would not have the ability to engage in an input foreclosure strategy.
- (204) The Notifying Party argues that, in addition to not having the ability to engage in total input foreclosure (i.e., to deny access), Meta (formerly Facebook) would likewise not have the ability to engage in partial input foreclosure (i.e., degradation of access to third parties or granting inferior access to third parties compared to the access that Kustomer would have). First, the Notifying Party points out that, as outlined in the Form CO, since the average cost of integrating Meta (formerly Facebook)’s WhatsApp for Business API (as its Messenger API is free) accounts for a [Pricing information]) of the average price paid for Kustomer’s CRM product, a strategy of raising rivals’ costs by increasing the price of API access to its messaging channels would not lead to material switching, in particular — it is argued — because there are “*significant costs [involved in] switching CRM*” providers.<sup>286</sup>
- (205) The Notifying Party similarly argues that any reduction in the quality of API access relative to that of Kustomer would likely not result in successful foreclosure of Kustomer’s rivals due to the “*substantial costs involved in switching CRM*” provider, and would “*likely lead to severe reputational damage*” for Meta (formerly Facebook) and push businesses to rival OTT B2C messaging channels rather than to Kustomer’s CRM platform.<sup>287</sup>
- (206) Finally, the Notifying Party argues that Meta (formerly Facebook)’s ability to engage in targeted foreclosure would be “*limited*” because there is “*no group of customers that is especially reliant on Facebook’s B2C messaging channels*” and in any case Meta (formerly Facebook) would “*not be able to accurately identify a specific group of businesses which would be more profitable to target*”.<sup>288</sup> Even if it could identify those businesses, the Notifying Party considers that it would not be able to target them as it would not have the ability to “*withdraw or degrade access to its B2C channels for a subset of businesses that use*” a rival CRM platform.<sup>289</sup> In any case, the Notifying Party considers that there are “*workarounds*” available even if it was able to target specific businesses, who could “*regain access via some other*

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<sup>284</sup> Article 6(1)(c) Response, paragraph 3.16.

<sup>285</sup> Article 6(1)(c) Response, paragraph 3.16.

<sup>286</sup> Article 6(1)(c) Response, paragraph 3.18.i.

<sup>287</sup> Article 6(1)(c) Response, paragraph 3.18.ii.

<sup>288</sup> Article 6(1)(c) Response, paragraph 3.19. See also Notifying Party Submission on Foreclosure Issues dated 10 October 2021, footnote 1.

<sup>289</sup> Article 6(1)(c) Response, paragraph 3.19.

means”<sup>290</sup> “for example, through a CPaaS provider or via integrations with a third-party CRM provider”.<sup>291</sup>

- (207) In the SO Response, the Notifying Party restates a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.
- (208) First, the Notifying Party argues that the Commission unduly relies on responses from CRM providers in concluding that Meta (formerly Facebook)’s channels are important input, and ignores contrary evidence that a majority of business customers do not consider them to be important.<sup>292</sup> The Notifying Party goes on to refer to statistics previously submitted that Meta (formerly Facebook)’s B2C messaging channels are not extensively used by business customers of CRM providers today, pointing to the fact that of the c. [Customer information] of Kustomer’s customers that use Meta (formerly Facebook)’s channels today, the [Customer information].<sup>293</sup>
- (209) Second, the Notifying Party argues that the Commission simply infers that Meta (formerly Facebook) has market power from its “[...] share of B2C OTT communications” without any other assessment and wrongly relies on the [...] P2P penetration rates of Meta (formerly Facebook)’s channels as being indicative of market power in OTT B2C communications.<sup>294</sup> In particular, the Notifying Party states that the Commission ignores “clear and probative evidence of the strength of Facebook’s competitors”, in particular by taking a static view of the current positions of Google RCS and Apple Business Chat today, which are very small, but—it is submitted—ignoring the expected future growth of these rival channels, as well as the penetration rates of Google and Apple in operating systems (“74% and 23% respectively based on third party sources”).<sup>295</sup>
- (210) Third, the Notifying Party argues that the Commission ignores “clear evidence that businesses can and do switch easily between B2C communication channels” given that CRM providers typically integrate a range of different B2C communication channels. In particular, the Notifying Party provides an analysis of a recent Meta (formerly Facebook) outage on 4 October 2021, during which Meta (formerly Facebook)’s messaging channels were entirely unavailable for both businesses and end customers for approximately 6 to 8 hours. The Notifying Party argues that this is an analysis of [Information regarding customer behaviour during outage of Meta’s messaging channels].<sup>296297</sup>
- (211) Fourth, the Notifying Party argues that the Commission fails to acknowledge that beta testing<sup>298</sup> of new features and functionalities of a B2C messaging channel (e.g.,

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<sup>290</sup> Article 6(1)(c) Response, paragraph 3.19.

<sup>291</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, footnote 1.

<sup>292</sup> SO Response, paragraph 3.6.

<sup>293</sup> SO Response, paragraph 3.8(A).

<sup>294</sup> SO Response, paragraph 3.7.

<sup>295</sup> SO Response, paragraph 3.8(C).

<sup>296</sup> SO Response, Annex 3, paragraph 3.3.

<sup>297</sup> SO Response, Annex 3, paragraph 3.3.

<sup>298</sup> As explained by the Parties in reply to RFI 21, beta testing means testing of new API functionalities with a small group of customers before rolling out to all customers, e.g., to check for bugs or other software problems. For further background, alpha testing is the first phase of software testing - products at this phase often lack key features or functionalities and may contain serious errors. Beta testing occurs after alpha testing - products at this stage are likely to have more complete features and functionalities than at the alpha phase, but may still contain bugs.

to check for bugs or software problems) is a “*standard industry practice*”.<sup>299</sup> The Notifying Party points out that beta tests are typically only carried out with a subset of CRM partners and, and only a small proportion of a participating CRM provider’s business customers will be involved in such testing. This means beta tests are by definition not must-haves whereas the Notifying Party argues that the Commission “*effectively asserts that, not only are Facebook B2C channels a critical input, every single new feature of a Facebook B2C channel is a critical input (and before it has even completed the beta testing process)*.”<sup>300</sup>

- (212) Fifth, the Notifying Party restates arguments that Meta (formerly Facebook) would not be able to target close competitors of Kustomer as part of a targeted foreclosure strategy due to an inability to identify which CRM providers are used by businesses that connect to Meta (formerly Facebook)’s B2C messaging channels directly, or indirectly via non-CRM providers, e.g., CPaaS providers, which account for the vast majority of businesses using its channels.<sup>301</sup>
- (213) Sixth, and finally, the Notifying Party argues that it cannot be guaranteed that Meta (formerly Facebook)’s partners, such as CPaaS providers, would cooperate with Meta (formerly Facebook) in carrying out a targeted foreclosure strategy and that to rely on “*standard contractual language*” to enforce such a strategy would be to ignore “*rational commercial considerations*”.<sup>302</sup>
- (214) In the LoF Response, first, on the importance of Meta (formerly Facebook)’s B2C messaging channels, the Notifying Party argues that in assessing the market investigation results, the Commission wrongly excluded respondents that indicated “*don’t know*”, ignored contrary evidence in qualitative responses, and also relied on public statements by Meta (formerly Facebook)’s employees which it argues are less probative than other data provided.<sup>303</sup>
- (215) Second, the Notifying Party argues that the Commission’s assessment ignores evidence on the importance and growing competitive strength of Google RCS and Apple Business Chat, such as Google’s “*track record of successfully rolling out Google RCS without the support of carriers [in the US and in Italy]*”<sup>304</sup> and the fact that it is “*available...in all EEA member states*”.<sup>305</sup> It is further argued that the Commission ignored the importance of the “*near full penetration of the entire mobile user base in Europe [of Google and Apple’s operating systems] i.e. 73% and 25% respectively*”.<sup>306</sup>
- (216) Third, in relation to Meta (formerly Facebook)’s ability to engage in a targeted foreclosure strategy of specific customer service and support CRM software providers, the Notifying Party notes that this would “*require a complex and adversarial process*”<sup>307</sup> and the examples of Meta (formerly Facebook) having removed, threatened to remove or the allegations that it “*removed API access to*

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<sup>299</sup> SO Response, paragraph 3.13.

<sup>300</sup> SO Response, paragraph 3.13.

<sup>301</sup> SO Response, paragraph 3.16.

<sup>302</sup> SO Response, paragraph 3.18(B).

<sup>303</sup> LoF Response, paragraph 2.8-2.10.

<sup>304</sup> LoF Response, paragraph 2.3(B)(iii).

<sup>305</sup> LoF Response, paragraph 2.3(B)(v).

<sup>306</sup> LoF Response, paragraph 2.4(A).

<sup>307</sup> LoF Response, paragraph 2.5.

*specific businesses [have] no bearing on its ability to establish whether specific businesses are using specific CRMs”<sup>308</sup>.*

- (b) Incentive to foreclose
- (217) The Notifying Party submits that Meta (formerly Facebook) does not have the incentive to foreclose Kustomer’s rival CRM providers.
- (218) First, the Notifying Party considers that to prevent or degrade businesses’ access to its messaging channels is irreconcilable with Meta (formerly Facebook)’s strategy to [Details of Meta’s strategy and growth expectations for B2C communications].<sup>309</sup> The Notifying Party expects almost [Details of Meta’s strategy and growth expectations for B2C communications], and these upstream profits would be put at risk as a result of foreclosure.<sup>310</sup> Meta (formerly Facebook) expects B2C messaging rivals, such as Apple and Google, to capitalise on any foreclosure strategy and grow at the expense of Meta (formerly Facebook).<sup>311</sup>
- (219) Second, in addition to lost sales in the B2C communications market, the Notifying Party submits that such a foreclosure strategy would not result in substantially greater sales in the CRM software market.<sup>312</sup> The Notifying Party expects that the gains in downstream profits would be low, because there would be limited switching by business customers to Kustomer from CRM software rivals. This is because access to Meta (formerly Facebook)’s B2C channels is not a key driver of businesses’ choice of CRM software (but one of many factors, e.g., cloud-based systems, AI capabilities, price, and technical support), and so business customers would switch B2C channels rather than CRM software providers; the latter of which can often be resource intensive.<sup>313</sup> Further, the Notifying Party points out that Kustomer’s offering is not suited to many businesses.<sup>314</sup>
- (220) As part of the submitted economic paper, the Notifying Party provided a model that calculates the critical number of businesses that would need to switch to Kustomer for this foreclosure strategy to be profitable (taking into account both the potential losses and gains). The model concluded that this critical number of businesses is too high for a foreclosure strategy to be realistically profitable.<sup>315</sup> In its Article 6(1)(c) Response, the Notifying Party reiterates that its own model is robust and the shortcomings highlighted by the Commission are unfounded, because (i) the model accurately accounts for incremental ads revenues when they are envisaged to arrive, (ii) the information from Kustomer which the Commission references is not credible, and (iii) further modifications to the model are unfounded or do not change the conclusion.<sup>316</sup>

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<sup>308</sup> LoF Response, paragraph 2.6.

<sup>309</sup> Form CO, paragraphs 6.102 and 6.105.

<sup>310</sup> SO Response, paragraph 2.5.

<sup>311</sup> Article 6(1)(c) Response, paragraph 3.22.ii.

<sup>312</sup> Form CO, paragraphs 6.102, 6.106 and 6.107. Article 6(1)(c) Response paragraph 3.24.i.

<sup>313</sup> Article 6(1)(c) Response paragraph 3.24.iii.

<sup>314</sup> Article 6(1)(c) Response paragraph 3.24.iv.

<sup>315</sup> Form CO, Annex 13.7, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects, pages 21-24.

<sup>316</sup> Article 6(1)(c) Response, paragraph 3.29.

- (221) Third, the Notifying Party submits that foreclosure would be even less profitable in the future, because B2C messaging related revenues are expected to grow significantly over the next few years.<sup>317</sup>
- (222) Finally, the Notifying Party considers that partial or targeted foreclosure would be even less profitable than total market-wide foreclosure, because the reputational harm and negative impact on its other revenues streams would be greater under partial foreclosure. It expects that attempting to degrade the interoperability of rival CRM software with Meta (formerly Facebook)’s B2C channels would damage Meta (formerly Facebook)’s reputation among messaging partners, most importantly the leading CPaaS providers that are key to driving adoption of Meta (formerly Facebook)’s messaging channels.<sup>318</sup>
- (223) In the SO Response, the Notifying Party restates a number of its arguments from the Form CO and its Article 6(1)(c) Response, in addition to raising additional points and putting forward some new evidence.
- (224) First, the Notifying Party argues that the Commission’s assessment does not contain any proper, reasoned and quantitative assessment of Facebook’s incentive to foreclose, but instead relies on qualitative analysis;<sup>319</sup> and that the Commission offers no explanation of why Parties quantitative evidence is not reliable.<sup>320</sup>
- (225) Second, the Notifying Party argues that the Commission’s assessment alternates between different foreclosure strategies, and does not clearly assess the incentives to foreclose for each foreclosure strategy separately.<sup>321</sup>
- (226) Third, the Notifying Party argues that the Commission is wrong to dismiss the Parties’ historical switching data and the Parties’ estimated diversion ratios following foreclosure based on these historical data. The Notifying Party argues these data are indicative of switching post-Transaction and post-foreclosure.<sup>322</sup>
- (227) Fourth, the Notifying Party argues that the Commission makes a calculation error by calculating costs based on the population of [...], but calculates benefits based on [...] business customers most likely to consider Kustomer.<sup>323</sup>
- (228) Fifth, the Notifying Party argues that the SO overstates each category of hypothetical benefits from businesses that would switch to Kustomer, and understates each category of costs, including wider costs of foreclosure such as reputational harm.<sup>324</sup>
- (229) Finally, the Notifying Party also argues that businesses would be constrained from switching away from a chosen CRM provider due to the integrations and features (other than OTT B2C messaging channels) offered by that CRM provider and which are not available at Kustomer, noting that “*for example, Kustomer offers [Details about Kustomer’s integrations] of the integrations available in[Details about Kustomer’s integrations], and offers only [Details about Kustomer’s integrations] of the integrations available in[Details about Kustomer’s integrations]*”.<sup>325</sup> The

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<sup>317</sup> Article 6(1)(c) Response, paragraph 3.27.

<sup>318</sup> Form CO, paragraph 6.108.

<sup>319</sup> SO Response, paragraph 4.4.

<sup>320</sup> SO Response, paragraph 4.5.

<sup>321</sup> SO Response, paragraph 4.6.

<sup>322</sup> SO Response, paragraph 4.9.

<sup>323</sup> SO Response, paragraph 4.9(B).

<sup>324</sup> SO Response, paragraph 4.10 and 4.14.

<sup>325</sup> SO Response, paragraph 4.20(B).

Notifying Party deduces from this that “*the lack of overlap between apps integrated by different CSCRM providers will make switching difficult or impossible.*”<sup>326</sup>

- (230) In the LoF Response, the Notifying Party restates a number of its arguments from the SO Response, but does not raise any additional points or put forward any new evidence.<sup>327</sup>
- (c) Effects on competition
- (231) The Notifying Party submits that a foreclosure strategy would at most lead to only a limited diversion of sales to Kustomer, without material harm to its CRM rivals, given that Kustomer is a very small player in the CRM market. The Notifying Party explains that to the extent that a foreclosure strategy could cause some diversion, that could not give rise to a significant detrimental effect on competition: businesses would continue to be well served by Kustomer’s larger rivals and remain able to easily compete for any customers in the event of any price increase or deterioration in quality.<sup>328</sup>
- (232) In its Article 6(1)(c) Response, the Notifying Party further elaborates that such strategy would not have a significant detrimental effect on competition because (i) Kustomer is and will remain a tiny player (even post-foreclosure) and so the effect on the downstream market would not be to create a dominant position or a significant impediment of effective competition<sup>329</sup>, (ii) CRM software rivals will react by promoting Apple and Google’s OTT B2C messaging channels and competing along different parameters, such as the integrations, services and customisations offered, thereby negating the anticompetitive effects of foreclosure<sup>330</sup>, (iii) smaller CRM providers are not more innovative than the larger players who have significant R&D<sup>331</sup>, and (iv) partial and targeted foreclosure must by definition have a smaller effect than total and market-wide foreclosure.<sup>332</sup>
- (233) In its SO Response, the Notifying Party further argues that the SO does not show competitive harm given that most rivals are totally non-foreclosed.<sup>333</sup>
- (234) The Notifying Party submits that, in the event of total foreclosure, the number of close competitors mentioned by the Commission (in paragraph 308 of the SO) would represent [Regulatory submission] of the market, and other small players around [Regulatory submission]. The Notifying Party adds that the SO relies on the assumption that the large non-foreclosed competition would be insufficient to restrain Kustomer which is implausible and contradicts the Commission’s conclusion in *Microsoft/LinkedIn*, where a foreclosure of less than 30% of the CRM market was considered not to affect a sufficiently important proportion of Microsoft’s

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<sup>326</sup> SO Response, paragraph 4.21. In Annex 3 to the SO Response, paragraph 2.99 states that “*Zendesk has 1,314 integrations compared to only 61 for Kustomer. This makes Zendesk businesses particularly unlikely to switch away from Zendesk, as a substantial proportion of Zendesk’s business customers are likely to have integration needs which are unmet by many of the potential alternative CSCRM providers (and in particular, which are unmet by Kustomer).*”

<sup>327</sup> LoF Response, paragraphs 3.1-3.19.

<sup>328</sup> Form CO, paragraph 6.109.

<sup>329</sup> Article 6(1)(c) Response, paragraphs 3.36 and 3.37.

<sup>330</sup> Article 6(1)(c) Response, paragraphs 3.38-3.41.

<sup>331</sup> Article 6(1)(c) Response, paragraphs 3.42-3.44.

<sup>332</sup> Article 6(1)(c) Response, paragraphs 3.45 and 3.46.

<sup>333</sup> SO Response, paragraph 5.1. This argument as well as the ones presented in the following paragraphs were also in the Notifying Party Submission on Foreclosure Issues dated 10 October 2021.

competitors to result in a price increase or reduction of market incentives to innovate.<sup>334</sup>

- (235) The Notifying Party further submits that the SO fails to explain how an (undefined) small group of smaller customer service and support CRM providers and the innovation they bring stand out from their competitors in terms of impact on competition. The Notifying Party argues the examples of innovation provided in the SO were all introduced by larger players first (and one by Kustomer itself).<sup>335</sup> The Notifying Party also submits that industry reports do not support the Commission’s conclusion that smaller players have a disproportionate impact on competition through innovation (as the Gartner’s “Magic Quadrant” Report 2020 and 2021 editions only refer to one smaller player as a “Visionary” and confirm that large players are innovative).<sup>336</sup> Further, the Notifying Party argues there is also some out of market innovation that the Commission does not take into account.<sup>337</sup>
- (236) The Notifying Party submits the SO does not explain why partially foreclosed rivals could not continue to innovate on the parameters for competition indicated in the results of the market investigation.<sup>338</sup> The Notifying Party also argues the SO does not consider whether there are any other factors (beyond smaller customer service and support CRM providers’ innovative role) to assess whether the foreclosed “close competitors” play a significant competitive role in the market (such as their pricing policies; market share evolution; number of new customers won after the launch of innovations etc.).<sup>339</sup>
- (237) The Notifying Party adds that the market feedback the Commission received confirms that the CRM market is highly competitive and is expected to remain so post-Transaction.<sup>340</sup>
- (238) In its LoF Response, the Notifying Party submits that the additional evidence presented by the Commission is not sufficient nor factually accurate, reliable and consistent. In this regard, the Notifying Party submits that the feedback from larger customer service and support CRM providers shows they serve SMB customers<sup>341</sup> and develop key innovations for both enterprises and SMB customers<sup>342</sup> but that the Commission solely relies on the responses of two small CRM players.<sup>343</sup>
- (239) Furthermore, the Notifying Party argues that even though they are key innovators, larger CRM players are necessarily excluded from Gartner’s “Cool Vendors” report as well as from the “Visionary” category in Gartner’s “Magic Quadrant” report, which require the vendor to be a small or not yet complete or established company, respectively.<sup>344</sup> The Notifying Party also submits that many of the businesses listed in the 2021 lists of CRM start-ups and companies in several EEA countries published in the website Beststartup.eu (which are cited by the Commission in the LoF) no longer exist or are not a CRM (they are either unrelated businesses or out-of-market

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<sup>334</sup> SO Response, paragraphs 5.10(A)-(C).

<sup>335</sup> SO Response, paragraphs 5.16-5.17.

<sup>336</sup> SO Response, paragraphs 5.17(B).

<sup>337</sup> SO Response, paragraphs 5.17(C).

<sup>338</sup> SO Response, paragraph 5.20.

<sup>339</sup> SO Response, paragraph 5.24.

<sup>340</sup> SO Response, paragraph 5.42.

<sup>341</sup> LoF Response, paragraph 4.5(A).

<sup>342</sup> LoF Response, paragraph 4.5(B)(ii).

<sup>343</sup> LoF Response, paragraph 4.5(B)(i).

<sup>344</sup> LoF Response, paragraph 4.5(C)(i).

actors that may integrate with a CRM).<sup>345</sup> Moreover, the Notifying Party submits that the growth of the SMB segment (in the CRM software market) has no bearing on the impact of smaller CRM players on innovation.<sup>346</sup> The Notifying Party reiterates the alleged examples of innovations by small CRM players focussed on SMB customers referred by the Commission are imitative and not innovative.<sup>347</sup> The Notifying Party adds that the internal documents cited by the Commission [Details of internal documents describing certain CRM software providers].<sup>348</sup>

- (240) Finally, according to the Notifying Party, the Transaction will create the following efficiencies and customer benefits: (i) increase take-up of messaging for B2C communications, (ii) drive innovation and competition in the B2C messaging space; (iii) drive innovation and competition in the CRM market, and (iv) facilitate access to higher quality ads services for businesses.<sup>349</sup>

#### 7.3.2.2. Commission's Assessment

- (241) For the reasons set out below and based on the results of the market investigation, the Commission has reached the conclusion that it is likely, and there is even a strong probability, that Meta (formerly Facebook) has the ability and will have the incentive to foreclose competing providers of customer service and support CRM software by restricting or degrading API access to its messaging channels. Moreover, if Meta (formerly Facebook) engaged in such a foreclosure strategy, it is likely, and there is even a strong probability, that the anticompetitive effects would be significant.

(a) Ability to foreclose

- (242) For the reasons set out below, the Commission has reached the conclusion that Meta (formerly Facebook) would have the ability to engage in a foreclosure strategy with regard to competing providers of customer service and support CRM software. First, API access to OTT B2C messaging channels is an important input for customer service and support CRM software providers (and their business customers). Second, Meta (formerly Facebook) has market power on the EEA-wide, if not worldwide, upstream OTT B2C messaging market, and within a broader EEA-wide or worldwide upstream market for B2C communications overall. Third, Meta (formerly Facebook) has the ability — both technically and contractually — to restrict or degrade API access to its messaging channels, including the ability to target such a foreclosure strategy at Kustomer's close rivals, which are typically smaller CRM software providers focussed on serving SMBs.

(a.i) Important input for the downstream market

- (243) According to the Non-Horizontal Guidelines, input foreclosure may raise competition problems only if it concerns an important input for the downstream product. This is the case, for example, when the input concerned represents a significant cost factor relative to the price of the downstream product. Irrespective of its cost, an input may also be important for other reasons. For instance, the input may be a critical component without which the downstream product could not be manufactured or effectively sold on the market, or it may represent a significant

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<sup>345</sup> LoF Response, paragraph 4.5(D).

<sup>346</sup> LoF Response, paragraph 4.5(E).

<sup>347</sup> LoF Response, paragraph 4.5(F).

<sup>348</sup> LoF Response, paragraph 4.5(G).

<sup>349</sup> Form CO, paragraph 9.1.



source of product differentiation for the downstream product. It may also be that the cost of switching to alternative inputs is relatively high.<sup>350</sup>

- (244) Customer service and support software tools integrate a wide range of different B2C communication channels, both traditional channels such as phone and email, as well as more modern channels such as OTT messaging channels.<sup>351</sup> As outlined by a leading CRM provider, “*for most customers, the various B2C communications channels are complementary and allow customers a range of options for communicating with end-customers, and are thus not substitutable.*”<sup>352</sup> Similar views were expressed by businesses that use CRM software tools, with one such business indicating that its “*customers are demanding service via multiple channels and we need to respond to that need.*”<sup>353</sup> As a result, and as set out in Section 6.2.1 above, there is not one overall market for B2C communication services in which phone, SMS, Instagram, Twitter, etc. are substitutable for one another. Rather, there is evidence to support the existence of a standalone product market for OTT B2C messaging channels, excluding at least phone, email and SMS.
- (245) The results of the market investigation were inconclusive as to whether webchat should be included or excluded<sup>354</sup> so the Commission has — on a conservative basis — carried out its assessment on the basis that webchat does form part of the relevant market for OTT B2C messaging channels. Likewise, the market investigation and other evidence — [Business Plans] — were mixed on whether rich cellular-based B2C messaging channels, i.e., Google RCS and Apple Business Chat, and OTT B2C messaging channels are substitutable with OTT B2C messaging channels.<sup>355</sup> The Commission has nonetheless carried out its assessment on the basis that rich cellular-based messaging channels and OTT B2C messaging channels form part of the same relevant product market, in particular since this does not impact the Commission’s conclusions given the current minimal share and uncertain future growth of such channels, i.e., Google RCS and Apple Business Chat, as explained further in Section 7.3.2.2.(a.ii) below. In addition to the above, and contrary to what is argued by the Notifying Party, the market investigation showed that API access to Meta (formerly Facebook)’s messaging channels (which account for a large and important part of the overall OTT B2C messaging market, as shown in Section 7.3.2.2.(a.ii) below) is considered an important input for customer service and support CRM software providers and their business customers.<sup>356</sup> In that regard, the vast majority of CRM software providers that responded to the market investigation indicated that it would be difficult to effectively sell their customer service and support CRM product without such access.<sup>357</sup> One business customer stated that Meta (formerly Facebook)’s channels are “*must-have features*” for communicating with its end customers<sup>358</sup>, while a CRM provider said that “*Facebook Messenger and WhatsApp are the leading players in certain geographies where we sell our CRM software. Having the ability to integrate with these B2C communication channels via APIs*

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<sup>350</sup> See Non-Horizontal Guidelines, paragraph 34.

<sup>351</sup> Replies to questionnaire 1 to CRM software providers, questions 49.1, 49.2, and 50.1.

<sup>352</sup> Reply to questionnaire 1 to CRM software providers, question 32.1 (ID: 846).

<sup>353</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1339).

<sup>354</sup> See Section 6.2.1.3. above.

<sup>355</sup> See Section 6.2.1.3. above.

<sup>356</sup> Replies to questionnaire 1 to CRM software providers; replies to questionnaire 4 to business customers, questions 50.1 and 61.1.

<sup>357</sup> Replies to questionnaire 1 to CRM software providers, questions 51, 52 and 53.

<sup>358</sup> Reply to questionnaire 4 to business customers, question 61.1 (ID: 527).

would allow us to effectively compete on the market for CRM software in those geographies.”<sup>359</sup> Indeed, the Parties were unable to provide meaningful examples of CRM software providers that integrate B2C communications channels but none of Meta (formerly Facebook)’s messaging channels (the CRM software providers they listed had very limited revenues and a combined share of only c. 0.1%).<sup>360</sup> Moreover, the majority of business customers<sup>361</sup> and the vast majority of CRM software providers<sup>362</sup> that expressed a view indicated that they consider that the integration of Meta (formerly Facebook)’s messaging channels will become even more important for businesses’ choice of customer service and support CRM provider in the coming five years, with one business customer explaining that, in its view, “a growing number of people will use Facebook’s messaging channels in the upcoming years. Due to this and the goal of companies being to offer different and more innovative ways to communicate with customers, an integration of Facebook’s messaging channels will become more important.”<sup>363</sup>

- (246) Contrary to what is argued in the SO Response, the Commission has taken into account not only evidence from CRM software providers, i.e., the targets of any foreclosure strategy, but also evidence from business customers to reach the conclusion that that Meta (formerly Facebook)’s B2C messaging channels are important inputs to CRM software providers. Indeed, this conclusion is supported by the following evidence from business customers’ responses to the Commission’s market investigation. Overall, in response to the question “How important is access to Facebook’s messaging channels, through API-access or otherwise, to your business now and in the near future (for communications with your customers)”, a sizeable portion of business customers that expressed a view (30%) indicated that they are essential or important, while a further 60% indicated that they are beneficial. This compares to only 10% of business customers expressing a view which considered that they were not important.<sup>364</sup> This was further supported by the following narrative responses by businesses: “Facebook brings better user engagement for customer care,”<sup>365</sup> which is a particularly important observation given the relevant downstream market is CRM software designed for customer service and support, i.e., customer care, and “Facebook connects us to a larger audience and allows us to interact with them, while also giving users a possibility to contact us more conveniently.”<sup>366</sup> The importance of Meta (formerly Facebook)’s channels did not mean they had to be used by businesses for all of their interactions with their customers. As one business customer stated, “The Facebook messaging channels are mainly used for interactions with community members, which is a small but still important part of the customer base.”<sup>367</sup> Similarly, in response to the question “To what extent is integration with Facebook’s messaging channels

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<sup>359</sup> Reply to questionnaire 1 to CRM software providers, question 50.1 (ID: 759).

<sup>360</sup> Parties’ reply to RFI 1, question 30(b)(i).

<sup>361</sup> Replies to questionnaire 5 to business customers, question 12.2.

<sup>362</sup> Replies to questionnaire 7 to CRM software providers, question 38. This shift may have even been accelerated by the Covid-19 pandemic, with one CRM software provider noting that “A lot of traditional / physical small businesses moved to WhatsApp worldwide since COVID-19. I think this trend will continue.” See reply to questionnaire 7 to CRM software providers, question 38.1 (ID: 1633).

<sup>363</sup> Reply to questionnaire 5 to business customers, question 12.2.1 (ID: 1366).

<sup>364</sup> Replies to questionnaire 4 to business customers, question 61. Note that Crisp’s response has been excluded from the above, as Crisp is a provider of customer service and support CRM services.

<sup>365</sup> Replies to questionnaire 4 to business customers, question 61.1 (ID: 842).

<sup>366</sup> Replies to questionnaire 4 to business customers, question 61.1 (ID: 776).

<sup>367</sup> Replies to questionnaire 4 to business customers, question 61.1 (ID: 830).

(including the ability to integrate with such channels or the quality of the integration) an important factor in a business' choice of customer service and support CRM provider)", a sizeable portion of business customers that expressed a view (40%) indicated that such integrations are essential or important, while a further 48% indicated that they are beneficial. This compares to only 12% of business customers expressing a view which considered that they were not important.<sup>368</sup> Again, many business customers that expressed a view echoed this view in narrative responses: "We use Facebook channels so having them integrated would be helpful"<sup>369</sup>, "Many of our customers do like to utilize Facebook products to communicate"<sup>370</sup>, "Facebook grants access to relevant audiences (via Facebook, Instagram, WhatsApp). From a company perspective, this enables more touch points with customers. Having this data integrated allows for a more complete picture of the customer and thus a better service (eg a conversation started by a customer via Facebook can be continued via email)"<sup>371</sup>, "a lot of our users are active on social media so it is important to be able to interact with them on a channel they are familiar with and use frequently"<sup>372</sup> and "Customers are using this channel frequently so they expect their loved brand to do it as well."<sup>373</sup>

- (247) Asked whether they expected the integration of Meta (formerly Facebook)'s messaging channels to become more or less important for a business' choice of customer service and support CRM provider in the coming 5 years, the majority of business customers that expressed a view (53%) indicated that such integrations would become more important. This compares to only 12% of business customers expressing a view which considered that this would become less important.<sup>374</sup> This was further supported by the following narrative responses by businesses: "Social media is mature and considered as a serious platform for business, therefore it is important to integrate messaging channels to be in direct contact with your audience"<sup>375</sup> and "A growing number of people will use Facebook's messaging channels in the upcoming years. Due to this and the goal of companies being to offer different and more innovative ways to communicate with customers, an integration of Facebook's messaging channels will become more important."<sup>376</sup> In the LoF Response, the Notifying Party argued that the Commission failed to take into account responses of market participants that were uncertain about the future growth of Meta (formerly Facebook)'s channels, such as Microsoft which said it would be "difficult to predict" whether Meta (formerly Facebook)'s channels would grow in importance over the coming five years.<sup>377</sup> However, the Commission did take account of all responses to the market investigation in a holistic manner before drawing conclusions. Where respondents express uncertainty or indicate that they do not know the answer to a market investigation question, the Commission typically

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<sup>368</sup> Replies to questionnaire 5 to business customers, question 12.

<sup>369</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1369).

<sup>370</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1516).

<sup>371</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1342).

<sup>372</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1624).

<sup>373</sup> Reply to questionnaire 5 to business customers, question 12.1 (ID: 1490).

<sup>374</sup> Replies to questionnaire 5 to business customers, question 12.2.

<sup>375</sup> Reply to questionnaire 5 to business customers, question 12.2.1 (ID: 1428).

<sup>376</sup> Reply to questionnaire 5 to business customers, question 12.2.1 (ID: 1366).

<sup>377</sup> LoF Response, paragraph 2.4. The Commission notes that Microsoft separately indicated that it "expects digital channels to continue to increase in popularity [as a means of B2C communication] as more customers spend more time online." Reply to questionnaire 1 to CRM software providers, question 47.2 (ID: 726).

weighs the responses which take a concrete position in the first instance, and then does a control screening of qualitative reasons provided by respondents, including those that did not express a concrete view, such as Microsoft in this case. In the control screening that was performed in the present case (as set out in the paragraph 246 above), there were however a larger number of quantitative and well-reasoned qualitative responses pointing to Meta (formerly Facebook)'s B2C messaging channels remaining important or growing in importance in the coming five years, such as the response of a rival B2C communication service provider which indicated that “*the Facebook B2C communications channels are expected to continue to rule the market in 5 years*”.<sup>378</sup>

- (248) In view of the fact that customer service and support CRM software providers consider OTT B2C messaging channels, and in particular Meta (formerly Facebook)'s B2C messaging channels, to be must-have inputs in order to effectively compete downstream, it is not necessary, contrary to what the Notifying Party argues, to also show that such inputs constitute a “*significant cost factor*” in proportion to the overall cost or price of the downstream product.<sup>379</sup> The importance OTT B2C messaging channels, and in particular Meta (formerly Facebook)'s B2C messaging channels, for CRM software provider is also the same irrespective of whether the downstream market is defined as EEA-wide or worldwide in scope.
- (249) The Notifying Party also argues that OTT B2C messaging channels, and in particular Meta (formerly Facebook)'s B2C messaging channels, do not constitute important inputs since customer service and support CRM software products integrate several OTT B2C messaging channels, as well as other B2C communication channels such as phone, email and SMS, enabling businesses to quickly and easily switch between channels at little cost. For the reasons outlined in Section 6.2.1.3 above, OTT B2C messaging channels and other B2C communication channels do not form part of the same relevant product market, as market participants see them as complementary rather than substitutable. Pointing to the fact that a CRM tool integrates a range of different B2C communication channels ignores the fact that businesses, and their customers, may not view these as substitutable.
- (250) In its SO Response, the Notifying Party further argues that the temporary outage on 4 October 2021 of all of Meta (formerly Facebook)'s messaging channels is “[Details regarding Meta’s temporary outage]”.<sup>380</sup> For a range of reasons, the Commission considers that this temporary outage offers little to no indication of business customer switching behaviour in the event of a foreclosure strategy aimed at competitors of Kustomer. First, the likelihood of switching or the substitutability of two products cannot be concluded from a temporary or transitory, and total, unavailability of one of the products. It would instead be necessary to look at a lasting, i.e., non-transitory, change in the relative price or quality of the products in order to draw any clear conclusions. In any case, the Commission notes that [Details regarding Meta’s temporary outage]<sup>381</sup><sup>382</sup>. Second, during the outage all end users, all businesses and all CRM software providers, including Kustomer, lost access to Meta (formerly Facebook)'s messaging channels. There was therefore no control group

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<sup>378</sup> Reply to questionnaire 8 (Commitments Market Test), question 19.1 (ID: 2608).

<sup>379</sup> Indeed, the Non-Horizontal Guidelines, paragraph 34, refer to this as just one “*example*” of a situation where an input may be important for the downstream product.

<sup>380</sup> SO Response, paragraph 3.8(D).

<sup>381</sup> SO Response, Annex 3, paragraph 3.10.

<sup>382</sup> SO Response, Annex 3, paragraph 3.10.

that remained using Meta (formerly Facebook)'s channels during the outage period against which any comparisons could be made. This outage therefore does not shed light on how businesses and end users would react in a situation where end users, businesses and Kustomer retained access to Meta (formerly Facebook)'s channels, but where only competing CRM software providers did not. Third, Meta (formerly Facebook) itself acknowledged that the outage demonstrated how much businesses rely on its channels for B2C communications, with the head of WhatsApp tweeting that the outage was “*a humbling reminder of how much people and organizations rely on our app every day*”<sup>383</sup> (emphasis added).

- (251) Similarly, even if customer service and support CRM software providers integrate third party OTT B2C messaging channels (e.g., Twitter or Google RCS), it is clear from Section 7.3.2.2.(a.ii) below that Meta (formerly Facebook) has market power in this market, since based on the shares, penetration rates, and the relative positions of Meta (formerly Facebook) and other OTT B2C messaging channels, Meta (formerly Facebook) accounts for a large and important part of the OTT B2C messaging market. This, combined with the observations by market participants, including a major CRM software provider, that, “*in the customer service segment of CRM, it is necessary to be where the customer is*”<sup>384</sup> (i.e., to integrate the channels that customers already use for P2P communications), and “*the best customer experience is one where everything happens on the same app ... to change to another messaging channel is to provide a bad customer experience*”<sup>385</sup>, shows that the technical ability to switch to other OTT B2C messaging channels, or other B2C communications channels, does not detract from the importance of Meta (formerly Facebook)'s B2C messaging channels in particular (and for OTT B2C messaging channels in general) as inputs for customer service and support CRM software providers.
- (252) Accordingly, the Commission concludes that the EEA-wide, if not worldwide, upstream market for OTT B2C messaging channels (of which Meta (formerly Facebook)'s channels represent a large and important part, as shown in Section 7.3.2.2.(a.ii) below) constitutes an important input in order to be able to effectively compete in the downstream customer service and support CRM software market. In support of this conclusion, all CRM software providers that responded to the market investigation indicated that they currently integrate OTT B2C messaging channels into their CRM software, including in each case at least one of Meta (formerly Facebook)'s B2C messaging channels.<sup>386</sup>
- (253) Finally, the Commission's investigation has revealed that the market for OTT B2C messaging channels is growing in importance relative to more traditional means of B2C communications such as phone and email. This supports the conclusion that the market for OTT B2C messaging channels will in fact become an increasingly important input for companies active in the downstream customer service and support CRM market. Indeed, the market participants that expressed a view unanimously considered that the integration of B2C messaging channels into customer service and support CRM software solutions will become a more important factor in a business' choice of customer service and support CRM software in the

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<sup>383</sup> See <https://twitter.com/wcathcart/status/1445202016049844229>, last accessed on 29 November 2021 (ID: 2454).

<sup>384</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 15 (ID: 2008).

<sup>385</sup> Agreed minutes of the call of 14 June 2021 with Twilio, paragraph 11 (ID: 2029).

<sup>386</sup> Replies to questionnaire 1 to CRM software providers, question 46.

coming 5 years.<sup>387</sup> All else being equal, the Commission considers that Meta (formerly Facebook)'s channels will likewise further increase in importance as inputs for customer service and support CRM software providers in the future.<sup>388</sup> One CRM software provider indicated that *“there has been a generalized trend away from email and phone to digital channels, social media in particular”*,<sup>389</sup> while another respondent noted that they have *“seen a growth of conversations on Social Messaging channels first dominated by Facebook Messenger and then WhatsApp”*.<sup>390</sup> In a similar vein, a provider of B2C messaging services expressed the view, in respect of B2C messaging channels, that *“it seems intuitive that integration of methods to communicate with consumers will become an increasingly important factor in a business's choice of customer service and [support] CSM software in the coming years.”*<sup>391</sup>

- (254) On the basis of all these elements, and for the purposes of this Decision, the Commission has reached the conclusion that the EEA-wide, if not worldwide upstream market for OTT B2C messaging channels constitutes an important input for companies active in the EEA-wide, if not worldwide, downstream market for customer service and support CRM software.
- (255) This conclusion would be the same for a potential broader EEA-wide or worldwide downstream market for CRM software overall because the finding of such a potential broader market would be based on supply-side substitutability arguments (as set out in Section 6.1.1.3 above) and customer service and support CRM software constitutes an important segment of an overall market for CRM software.<sup>392</sup> Therefore API access to OTT B2C messaging channels (and Meta (formerly Facebook)'s B2C messaging channels in particular) would be a similarly important input on the basis of such a broader market.
- (256) This is moreover the case because, in the downstream customer service and support CRM market it is important, if not essential, to carry a broad range of communication channels to enable “omnichannel” communications between businesses and their customers. As a major CRM software provider stated, *“in the customer service segment of CRM, it is necessary to be where the customer is, so being present on all the channels and to have an ‘omnichannel’ offering is the minimum entry requirement for the customer service CRM market. For SAP, access to Facebook APIs is essential as it is for any CRM software provider active in the customer service CRM market.”*<sup>393</sup> This conclusion would not change if the customer service and support CRM software market, or the overall CRM software market, were to be segmented based on (i) business customer size, (ii) mode of deployment

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<sup>387</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 14.

<sup>388</sup> Several market participants that expressed a view also considered, aside from the growing in importance of B2C messaging overall, that Meta (formerly Facebook)'s messaging channels specifically will become more important for businesses' choice of customer service and support CRM provider in the coming five years. See replies to questionnaire 7 to CRM software providers, question 37.

<sup>389</sup> Reply to questionnaire 1 to CRM software providers, question 47.1 (ID: 726).

<sup>390</sup> Reply to questionnaire 1 to CRM software providers, question 47.1 (ID: 762).

<sup>391</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 14.1 (ID: 1604).

<sup>392</sup> Customer service and support software accounts for 36% of the overall CRM software market by revenues in 2020, both on a worldwide basis and in the EEA. See Form CO paragraph 6.47 Tables 6.2-6.5.

<sup>393</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 15 (ID: 2008).

or (iii) the industry sector of the business customer, because OTT B2C messaging channels would remain an equally important input irrespective of such further segmentation. This conclusion also remains the same irrespective of whether the relevant upstream and downstream markets (and potential segments of such markets) are defined as EEA-wide or worldwide in geographic scope.

- (a.ii) Meta (formerly Facebook) holds market power on the upstream market for OTT B2C messaging
- (257) *High and increasing market share and penetration rates.* In the upstream market for OTT B2C messaging services, Meta (formerly Facebook) has a share exceeding [40-50%] both worldwide and in the EEA, and [...], as follows from Table 5 above.
- (258) Further, Meta (formerly Facebook)’s messaging channels have very high EEA penetration rates (c. [40-50%] for Messenger and Instagram, and over [50-60%] for WhatsApp), and the penetration rate has also been increasing steadily year-on-year between 2018 and 2020 across each of Meta (formerly Facebook)’s channels, as can be seen from Table 12 below. In several individual Member States, the penetration rates are significantly higher, exceeding [70-80%] or even [90-100%] in some cases.<sup>394</sup> Indeed, market participants confirmed that the importance of Meta (formerly Facebook)’s channels for B2C communications is linked to their high market penetration rates.<sup>395</sup> In this regard, a leading CRM software provider indicated that *“The importance of Facebook messaging channels (Messenger, WhatsApp, Instagram) depends on how widely they are used. In geographies where one or more of these channels are used more widely, it is more important to offer such channels to customer service and support CRM customers.”*<sup>396</sup> Google similarly expressed the view, contrary to what is argued in the SO Response, that *“having a large user base in Person-to-Person (‘P2P’) messaging can help create an audience in B2C messaging.”*<sup>397</sup>

**Table 12 – EEA Penetration Rate of Meta (formerly Facebook)’s Messaging Channels (2018-2020)**

Channel	2018	2019	2020
WhatsApp	[40-50%]	[50-60%]	[50-60%]
Instagram	[30-40%]	[30-40%]	[40-50%]
Messenger	[30-40%]	[30-40%]	[30-40%]

*Source: Form CO, Annex 26 – Annex RFI.6.004. Note: The figures are percentages of the total EEA populations, including people aged below 18.*

- (259) As a result of their high (and increasing) market penetration rates across the EEA as set out in Table 12 above, Meta (formerly Facebook)’s messaging channels therefore benefit from strong network effects, which, even if primarily reflective of P2P communication trends as the Notifying Party argues, nonetheless contribute to barriers to entry and expansion for competing OTT B2C messaging channels. As

<sup>394</sup> Form CO, Annex 26, RFI.6.004, Tab Q22. In multiple Member States, the penetration rate of Meta (formerly Facebook)’s messaging channels is (materially) above 70% (e.g., the penetration of WhatsApp in the Netherlands is over 90%).

<sup>395</sup> Replies to questionnaire 1 to CRM software providers, question 50.2.

<sup>396</sup> Reply to questionnaire 1 to CRM software providers, question 50.2.1 (ID: 846).

<sup>397</sup> Agreed minutes of the call of 20 September 2021 with Google, paragraph 15 (ID: 2127).

stated by one respondent to the market investigation, “*WhatsApp and Facebook are two of the more popular platforms in the EEA, which could make it difficult for a new or existing solution to gain market share*”<sup>398</sup> since, in the customer service and support CRM software market, it is necessary to integrate the channels that customers already use for P2P communications (i.e., “*to be where the customer is*”<sup>399</sup>).

- (260) *Remainder of the market is fragmented.* The remainder of the OTT B2C messaging market is rather fragmented. In the Form CO, the Parties indicated they were unable to provide data for OTT B2C messaging on a standalone basis (or for any segments of an overall B2C communications market).<sup>400</sup> However, indications — based on [...], the Commission’s own investigation on the basis of publicly available information and the results of the market investigation — are that other OTT messaging channels (such as Twitter, Viber, WeChat, Telegram or Line) would each have a modest share of the market for OTT B2C messaging services, and indeed that the combined share of all other OTT messaging channels (excluding webchat) would be at least three times smaller than the standalone share of Meta (formerly Facebook) in the OTT B2C messaging market, both worldwide and in the EEA.<sup>401</sup>
- (261) It even appears that the market penetration rates of other OTT messaging channels is not only lower than those of Meta (formerly Facebook)’s channels but also less consistent across regions, in particular within the EEA. For example, Twitter, which is likely to be the largest OTT B2C messaging channel after Meta (formerly Facebook), appears to have a far lower market penetration than Meta (formerly Facebook)’s channels. In the U.S., its main market, it has a market penetration of less than 20% according to public sources<sup>402</sup>, and it would be reasonable to deduce that it would therefore have an even lower market penetration in the EEA. Other OTT messaging channels that are used for B2C communications (and which certain CRM software providers indicated that they integrate into their offerings) may have meaningful market penetration only in one or a small number of Member States, or may have a primary focus outside the EEA. For example, Viber is more widely used in Eastern Europe and the Middle East, WeChat is primarily used in China, Line’s main market is Japan and Telegram appears to be most widely used outside the EEA (e.g., in Russia).<sup>403</sup>
- (262) *Webchat is a collection of individual channels with minimal standalone shares.* To the extent webchat may form part of the same market as OTT B2C messaging, it is important to recall that webchat is not a single product but rather an umbrella term

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<sup>398</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, questions 54.1 (ID: 886).

<sup>399</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 15 (ID: 2008).

<sup>400</sup> Form CO, Table 6.7.

<sup>401</sup> According to the Notifying Party’s calculations, Meta (formerly Facebook)’s channels accounted for [5-10%] of the worldwide B2C communications market in 2020, while all other OTT channels accounted for just [0-5%] (Form CO, Figure 6.1, and Table 3 above). In a market for OTT B2C Messaging (i.e., Table 5 above, which excludes phone and email), Meta (formerly Facebook)’s own OTT B2C messaging channels account for more than [40-50%] of the market and (based on the breakdown provided by the Notifying Party in the Form CO, Figure 6.1, for “Other messaging”) the combined share of all non-Meta (formerly Facebook) OTT B2C messaging channels (excluding webchat) accounts for less than [10-20%] the market, both on a worldwide basis and in the EEA.

<sup>402</sup> See <https://www.statista.com/statistics/183466/share-of-adult-us-population-on-twitter/>, last accessed on 15 December 2021 (ID: 2810).

<sup>403</sup> See, for example, <https://www.similarweb.com/corp/blog/research/market-research/worldwide-messaging-apps/>, last accessed on 15 December 2021 (ID: 2809).



covering a plethora of different individual webchat applications, each of which may only enable communication with a specific business and — [Customer Information]<sup>404</sup> — may have the disadvantage of requiring end customers in certain circumstances to download a new app on mobile devices or tablets to speak to a specific business (as opposed to Meta (formerly Facebook)’s channels, which end customers may typically have already downloaded, e.g., for P2P communication purposes, and which can be used more broadly to communicate with businesses). Webchat applications would therefore individually have a minimal market share and be unlikely as a result to have market power in a market for OTT B2C messaging services.

- (263) *Google RCS and Apple Business Chat have minimal presence today with growth highly uncertain.* The picture does not significantly change if Google RCS and Apple Business Chat are included, which the Commission understands currently have very low market penetration rates in the EEA and there is significant uncertainty regarding the likelihood and extent of their future growth.<sup>405</sup>
- (264) Evidence of the current negligible penetration rates and usage of Google RCS and Apple Business Chat includes (i) direct evidence from Google and Apple,<sup>406</sup> (ii) [Customer information]<sup>407</sup> and (iii) responses to the Commission’s market investigation.<sup>408</sup> Accordingly, including these channels within the relevant market, which the Commission has done in a conservative approach, will not have a material impact on the assessment as they would account for a minimal share of the relevant market, irrespective of the precise definition.
- (265) It is moreover highly uncertain if such channels, in particular Google RCS (which is currently only available as a built-in functionality on certain android devices and, unlike OTT B2C messaging channels, cannot be installed as applications on most mobile devices), will become more important in the coming years, since, as an OTT B2C messaging provider indicated, “*Google needs to build up different partnerships with, for example, Apple, and carriers [i.e., mobile network operators], which takes many years. The process is very complex compared to working with an OTT messaging channel that works on any device, and on any network.*”<sup>409</sup> Contrary to what is argued in the SO Response<sup>410</sup>, the Commission has therefore factored the potential future growth of Google RCS and Apple Business Chat in its assessment.
- (266) In addition, Google, having responded “*Don’t know / It depends*” to the Phase II market investigation questionnaire question of whether its own B2C messaging channel (and that of Apple) would “*become a more important means of B2C*

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<sup>404</sup> Article 6(1)(c) Response, page 23 Figure 3.1 [Meta assessment of channel usage patterns by end customers in communicating with businesses].

<sup>405</sup> Replies to questionnaire 1 to CRM software providers and to questionnaire 4 to business customers, questions 46 and 57.

<sup>406</sup> Google said it was unable to estimate the penetration rate of RCS in the EEA, despite stating that it was available in all EEA member states (Google’s reply to RFI dated 15 November 2021 (ID: 2307)). Apple indicated that despite being “*available in every EEA member state*”, Apple Business Chat has a very low penetration rate in the EEA today, namely “*less than 50,000 ... daily conversations*” in 2020 (compared to over [Customer Information] daily conversation on Meta (formerly Facebook)’s OTT B2C messaging channels in 2020 ) (Apple’s reply to RFI dated 15 November 2021 (ID: 2319)).

<sup>407</sup> Article 6(1)(c) Response, page 23 Figure 3.1 [Meta internal assessment of RCS].

<sup>408</sup> Replies to questionnaire 5 to business customers, question 5.2.1 (ID: 1484) (“*RCS is a new technology that is not yet fully deployed and the effectiveness of the RCS channel is not yet fully demonstrated.*”).

<sup>409</sup> Agreed minutes of the call of 16 September 2021 with Viber, paragraph 4 (ID: 2033).

<sup>410</sup> SO Response, paragraph 3.8(C).

communication in the coming 5 years”<sup>411</sup>, later explained the reasons for its uncertainty, such as the fact that the adoption of Google RCS “faced several headwinds. The most important of these headwinds was the relatively limited adoption by carriers, including in the EEA.” Google acknowledged that “the carrier-led approach [which it has chosen to adopt] can lead to slow adoption, fragmentation which produces operational complexity (e.g., brands and their partners may need to go through multiple different verification processes depending on the number of self-managed carriers in a given market) and potentially misaligned ecosystem incentives as carriers may not be incentivised to promote RCS over SMS.” It went on to note that “Despite being available for over 10 years, the RCS standard itself has not achieved widespread adoption” (emphasis added). Finally, Google indicated that it “hopes that its efforts will help accelerate the adoption of the RCS standard in EEA” but has not been able to provide concrete estimates of the extent of any such accelerated adoption, if it were to materialise.<sup>412</sup>

- (267) Apple expressed a similar level of uncertainty as regards the future growth of Apple Business Chat. Apple indicated that despite being “available in every EEA member state”, Apple Business Chat has a very low penetration rate in the EEA today, namely “less than 50,000 ... daily conversations” in 2020 (compared to over [Customer information] daily conversation on Meta (formerly Facebook)’s OTT B2C messaging channels in 2020<sup>413</sup>). In other words, based on Meta (formerly Facebook)’s [40-50%] share of the EEA OTT B2C messaging market in 2020, Apple’s share would be less than c. 0.2%. Apple also pointed to numerous “technical requirements to participate in Apple Business Chat” including creating a “Messages for Business account”, for which the business in question “must have an asynchronous messaging platform staffed by live agents during business hours [and] must use an Apple-approved [Messaging Service Provider]”.<sup>414</sup> In the Commission’s view, given the current low adoption rate and the potential cumbersome steps required to adopt Apple Business Chat for businesses of different sizes, it is unsurprising that Apple indicated that it was “unable to speculate as to whether Business Chat will gain “widespread adoption” in the EEA in the timeframe indicated [i.e., within the coming five years].”<sup>415</sup>
- (268) Similar uncertainty about the future growth of rich cellular-based B2C messaging has been expressed by respondents to the Commission’s market investigation. One such respondent indicated that “To our knowledge, this technology has been available [i.e. Google RCS has been available for several years] and that switch has not happened.”<sup>416</sup> In the LoF Response, the Notifying Party argued that the Commission ignored the fact that Google RCS is available in all EEA member states.<sup>417</sup> However, this is rather suggests that the current low penetration rate and share of Google RCS in the OTT B2C messaging market may not be explained by lack of availability. Another respondent said that rich cellular-based B2C messaging channels would

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<sup>411</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 8 (ID: 1667).

<sup>412</sup> Google’s reply to RFI dated 15 November 2021 (ID: 2307).

<sup>413</sup> Form CO, Table 6.8.

<sup>414</sup> See <https://register.apple.com/resources/messages/messaging-documentation/>, last accessed on 29 November 2021 (ID: 2462).

<sup>415</sup> Apple’s reply to RFI dated 15 November 2021 (ID: 2319).

<sup>416</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 8.1 (ID: 1513).

<sup>417</sup> LoF Response, paragraph 2.3(B).

likely become even less important in the coming five years because it considered that uptake will be driven primarily by the penetration rate in P2P communications, which Google RCS and Apple Business Chat lack: “*No it will become less important, the prevalence [sic] and uptake of new messaging channels and their richness comes to the fore-front. B2C will go where the highest denominator of their customer base will be - this is most likely social media based channels for public communications (Twitter, Instagram), and then direct messaging (Whatsapp, Viber, etc) for private communications*”<sup>418</sup> (emphasis added). This response makes a correlation between P2P penetration rates and B2C penetration rates, a point also made by other market participants. In the LoF Response, the Notifying Party argues that the operating system penetration rates of Google and Apple should be similarly seen as providing a foundation for a strong share in the B2C messaging market.<sup>419</sup> However, the Commission considers that there is at best a weak correlation between the use of an operating system and the use of a messaging channel on the operating system for B2C communications, especially relative to the stronger correlation between the use of a messaging channel for personal or P2P communications and the use of the same messaging channel for B2C communications. If anything, the fact that Google RCS and Apple Business Chat are limited to Google’s and Apple’s respective operating systems may represent a significant disadvantage compared to OTT B2C messaging channels which are not restricted to a particular operating system.

(269) Even assuming, in a conservative approach, that Google RCS and Apple Business Chat experience significant growth in the coming years relative to their positions today, and ignoring the structural ceiling on such growth as a result of the penetration rates of Google and Apple in operating systems, given such channels each have a minimal market presence today, any such growth would be expected to result in only a modest share of the overall OTT B2C messaging market given the fact that Google RCS and Apple Business Chat each have a minimal market presence today. Meta (formerly Facebook)’s channels on the other hand, account for over [40-50%] of the OTT B2C messaging market today, have experienced significant growth in the past three years and are expected to continue to grow in the coming years. It is therefore improbable that any future growth of rich cellular-based B2C messaging channels, even if substantial relative to their position today, would result in Meta (formerly Facebook)’s B2C messaging channels ceasing to represent a large and important part of the overall OTT B2C messaging market. For the same reason, it is equally improbable that any such growth of rich cellular-based B2C channels would undermine the Commission’s conclusion that Meta (formerly Facebook)’s OTT B2C messaging channels have, and will continue in the coming years to have, market power in the upstream market for OTT B2C messaging services, as well as in the broader upstream market for B2C communications overall.

(270) *Interim conclusion based on multiple sources of evidence.* In circumstances where, as one market participant indicated, “*Businesses increasingly need and expect to reach and be available to their customers in popular OTT messaging channels, such as WhatsApp and Facebook*”,<sup>420</sup> an important element in usefulness of a messaging channel for B2C communications (and therefore as an input for customer service and

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<sup>418</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 8.1 (ID: 1658).

<sup>419</sup> LoF Response, paragraph 2.4.

<sup>420</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, questions 55.1 (ID: 886).

support CRM software providers) is the popularity (as measured through the proxy of market penetration) of that channel. By contrast to the other channels listed above, as can be seen from Table 12 above and in line with the observations of one market participant, “*FB, Instagram and Whatsapp have a strong penetration rate in most countries, making them a critical channel for business which wish to use B2C messaging channels.*”<sup>421</sup>

- (271) In view of the above, and contrary to what is argued in the SO Response, the Commission has not simply inferred that Meta (formerly Facebook) has market power from its “*relatively higher share of B2C OTT communications*” without any other assessment.<sup>422</sup> Rather, based on the shares, penetration rates, and the relative positions of Meta (formerly Facebook)’s and other OTT B2C messaging channels, it is apparent that Meta (formerly Facebook) accounts for a large and important part of the OTT B2C messaging market, both in the EEA and at worldwide level. On the basis of all these elements, the Commission has reached the conclusion that Meta (formerly Facebook) has market power in the EEA-wide, if not worldwide, upstream market for OTT B2C messaging channels.
- (272) *Conclusion holds for the broader overall market for B2C communication channels.* Further, in view of the importance of Meta (formerly Facebook)’s messaging channels for B2C communications more generally and the complementary nature of different channels (as confirmed by several major CRM software providers in response to the Commission’s market investigation<sup>423</sup>), the Commission also concludes that Meta (formerly Facebook) has market power even on a broader EEA-wide, if not worldwide, market for B2C communications channels. This is the case in particular because, while Meta (formerly Facebook)’s own B2C messaging channels are unified under a single undertaking, this broader market is highly fragmented since phone (63%), email (18%), as well as webchat ([5-10%]), other OTT ([0-5%]) and SMS ([0-5%]) (each aggregated under “Other Messaging” in the data provided by the Notifying Party) are in fact umbrella terms and each one is comprised of a multitude of players of varying size, none of which the Commission expects to have a material share or market power on an individual basis. Moreover, as shown in Tables 3, 4 and 5 above, the shares of both phone and email have declined from 2018 to 2020 in the EEA and worldwide, while Meta (formerly Facebook)’s share has increased over the same period, both in the EEA and worldwide, and is expected to further increase in the future. This corroborates the market investigation results evidencing a continuing decline in the use of more traditional B2C communication channels such as phone and email towards an increased usage of more modern channels, like the OTT B2C messaging channels offered by Meta (formerly Facebook), even if there will remain certain instances where the use of phone and email are more suitable.<sup>424</sup> In further support of the importance of Meta (formerly

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<sup>421</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, questions 55.1 (ID: 741).

<sup>422</sup> SO Response, paragraph 3.7.

<sup>423</sup> See, e.g., replies to questionnaire 7 to CRM software providers, question 24.1.1 (ID: 1710) (“*Most communication channels are not wholly interchangeable. Each channel reaches slightly different audiences and serves slightly different purposes. Customers expect providers of service CRM software to provide a variety of digital messaging channels to reach their own customers.*”); and replies to questionnaire 7 to CRM software providers, question 24.1.1 (ID: 1655) (“*We see the various communication channels as complementary to one another, and not necessarily substituting each other.*”).

<sup>424</sup> Replies to questionnaire 1 to CRM software providers, questions 47.1 and 47.2; replies to questionnaire 4 to business customers, questions 58.1 and 58.2.

Facebook)’s B2C channels, including within this broader market for B2C communications overall, a major CRM software provider indicated that “*it is necessary to be where the customer is, so being present on all the channels and to have an ‘omnichannel’ offering is the minimum entry requirement for the customer service CRM market. For SAP, access to Facebook APIs is essential as it is for any CRM software provider active in the customer service CRM market.*”<sup>425</sup>

- (a.iii) Meta (formerly Facebook) has the ability to restrict or degrade access to its APIs
- (273) As set out above (in particular in Section 5 on the Industry Overview), customer service and support CRM software solutions will typically integrate a range of B2C communications channels, including OTT B2C messaging channels (e.g., Kustomer’s CRM tool integrates 11 different communication channels). Such integration is made possible through API access, which enables access to the communication channel by multiple agents/employees in a business. OTT B2C messaging channel providers (as well as other B2C communication channel providers) may choose to offer free access to their channels, such as via an open, public API access (which is currently the case for Messenger API).<sup>426</sup> They can also opt to refuse access, to selectively grant access only to certain counterparties, and to charge a fee for API access. As will be shown below, (A) Meta (formerly Facebook) has the ability to restrict or block API access to its B2C messaging channels outright or on a selective basis, (B) Meta (formerly Facebook) has the ability to degrade or reduce the features or functionality provided by API access to its messaging channels, including on a selective or targeted basis, (C) Meta (formerly Facebook) would be able to identify a specific group of CRM providers to target, and (D) foreclosed CRM providers would not be able to evade or workaroud such targeting by other means. However, for the reasons in part (E) below, Meta (formerly Facebook) would likely not have the ability to obtain data on CRM competitors of benefit to Kustomer.

A. Meta (formerly Facebook) has the ability to restrict access to its APIs outright or on a selective basis

- (274) While Meta (formerly Facebook)’s Messenger and Instagram APIs are currently openly accessible, its WhatsApp for Business API (also referred to as “WABAPI”) is not. For example, Meta (formerly Facebook)’s WhatsApp for Business API is currently only provided to certain “*channel partners*”,<sup>427</sup> such as CPaaS providers Twilio and MessageBird, which can then sell such access to businesses and CRM software providers. There are however certain businesses (e.g., [Customer Information] and [Customer Information]) and CRM software providers (e.g., [Customer Information]) to whom Meta (formerly Facebook) has opted to provide direct API access to its WhatsApp for Business API.<sup>428</sup>
- (275) The fact that Meta (formerly Facebook) has opted to allow different degrees of openness depending on the B2C messaging channel in question (and has even adopted varying approaches to access for the same API, e.g., [Customer Information])

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<sup>425</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 15 (ID: 2008).

<sup>426</sup> Meta (formerly Facebook)’s Messenger API is also available through “channel partners”. See Form CO, paragraph 8.19.

<sup>427</sup> Form CO, paragraph 6.105. This was confirmed by one such partner which said that “*WABAPI is not yet a publicly accessible API and its availability is limited through select providers like Twilio.*” (Agreed minutes of the call of 14 June 2021 with Twilio, paragraph 3 (ID: 2029)).

<sup>428</sup> Form CO, paragraph 8.19.

and [Customer Information] were provided direct API access to WhatsApp for Business, while many businesses need to go through an intermediary such as a CPaaS provider) shows that Meta (formerly Facebook) has the ability — both technically and contractually — to restrict API access to its OTT B2C messaging channels should it so wish. This conclusion was corroborated and further confirmed by the Commission’s market investigation, and in particular by the vast majority of CRM software providers that expressed a view<sup>429</sup>, with one such provider stating that, in its opinion, “*Facebook could close off all of its open APIs at any time.*”<sup>430</sup>

- (276) The Commission has also reached the conclusion that Meta (formerly Facebook) has the ability to restrict API access to its messaging channels to specific rivals of Kustomer (e.g., close competitors with a particular focus on SMB customers) and to prevent new entrants in the customer service and support CRM software market from obtaining such access (which may deter them from seeking to enter the market).
- (277) As observed above, Meta (formerly Facebook) provides businesses and CRM software providers with access to its messaging channels both directly, and through channel partners, such as CPaaS providers like Twilio and MessageBird.
- (278) Since Meta (formerly Facebook) is the one providing API access, its ability to grant API access on a selective basis (and therefore to exclude access to others, such as new entrants or close competitors of Kustomer) is clear. For example, Meta (formerly Facebook) currently chooses to make access to its Messenger and Instagram APIs open, whereas it is more selective as regards to which businesses and partners it grants access to its WhatsApp for Business API, which is currently only made available to a relatively small number of “partners”.
- (279) Where API access to Meta (formerly Facebook)’s messaging channels is obtained not directly from Meta (formerly Facebook) itself but via a third party intermediary, such as a CPaaS provider like Twilio or MessageBird (that may themselves have obtained API access directly from Meta (formerly Facebook)), Meta (formerly Facebook) would need to have the ability to control who CPaaS providers can offer access to. Irrespective of whether Meta (formerly Facebook) has the technical ability to do so, [Commercial Contracts] that Meta (formerly Facebook) would, from a contractual standpoint, have the means to prevent CPaaS providers from supplying specific customer service and support CRM software providers, such as new entrants or close competitors of Kustomer.
- (280) In its agreements with CPaaS providers, a clause — which appears to be [Information about Meta’s contractual rights].”<sup>431</sup> In view of the [Information about Meta’s contractual rights], there would be nothing to prevent Meta (formerly Facebook) from requiring its CPaaS providers to refuse API access to its messaging channels to close competitors of Kustomer or new entrants in the customer service and support CRM market.<sup>432</sup> In its SO Response,<sup>433</sup>[Information about Meta’s contractual rights].”<sup>434</sup> However, the likelihood Meta (formerly Facebook) actually

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<sup>429</sup> Replies to questionnaire 7 to CRM software providers, question 50.

<sup>430</sup> Reply to questionnaire 7 to CRM software providers, question 50.1 (ID: 1707).

<sup>431</sup> See for example, clause 4.2 of the strategic partnership agreements that Meta (formerly Facebook) entered into with [Commercial Contracts], provided as Meta (formerly Facebook)’s internal documents, [Commercial Contracts].

<sup>432</sup> [Confidential details on termination provisions of Meta contracts with CPaaS providers] See e.g., Meta (formerly Facebook)’s internal documents, [...] and [...].

<sup>433</sup> See Section 7.3.2.1.(a) above.

<sup>434</sup> LoF Response, paragraph 2.5

engaging in a strategy that it has the technical ability to engage in depends primarily on whether it would have an economic incentive to do so, and for the reasons set out in Section 7.3.2.2.(b) below, the Commission concludes that Meta (formerly Facebook) would have the incentive to engage in such a targeted foreclosure strategy. The Commission further notes that Meta (formerly Facebook) [Information about Meta’s contractual rights]<sup>435</sup>. Based on this agreement, Meta (formerly Facebook) would have the contractual ability [Information about Meta’s contractual rights].<sup>436</sup>

- (281) In view of the above, and irrespective of whether Meta (formerly Facebook) provides API access to its B2C messaging channels (i.e., Messenger, Instagram and WhatsApp for Business) directly or through third party intermediaries such as CPaaS providers, the Commission concludes that Meta (formerly Facebook) has the ability to restrict (i.e., to prevent) third parties from accessing the APIs to its B2C messaging channels, including on a selective basis, e.g., by specifically targeting close competitors of Kustomer or new entrants in the customer service and support CRM market.

B. *Meta (formerly Facebook) has the ability to degrade API access to its messaging channels for all third parties or on a selective basis*

- (282) In addition to the ability to restrict API access, the Commission has also reached the conclusion that Meta (formerly Facebook) would have the ability to degrade API access to its B2C messaging channels. Meta (formerly Facebook) could do so on a general basis, i.e., vis-à-vis all third parties that access its channels through APIs, or on a selective basis by targeting certain businesses, certain competitors of Kustomer, or certain regions.
- (283) The ability of Meta (formerly Facebook) to degrade API access was confirmed by the vast majority of respondents to the Commission’s market investigation.<sup>437</sup> In fact, the Commission received confirmation that “*Facebook has a wide variety of options for how to degrade the quality of API access to its messaging channels. Facebook can introduce rate limits to allow fewer transactions in a given period of time, can restrict the features that are possible do through the API, and can limit types of data that can be sent through the API.*”<sup>438</sup>
- (284) Internal documents of Meta (formerly Facebook) [Business Plans Regarding Pricing Strategy]<sup>439</sup>, [Business Plans Regarding Pricing Strategy]<sup>440</sup> (emphasis added).
- (285) An EEA-based CRM software provider and competitor of Kustomer that took part in the Commission’s market investigation suggested that Meta (formerly Facebook) may even have previously degraded API access to its B2C messaging channels: “*This already happened to us in the past: Facebook removed some access to Messenger API data essential to provide customer support [...] - Profile pictures -*

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<sup>435</sup> See Meta (formerly Facebook)’s internal document, [...], clause 4.2.

<sup>436</sup> See, e.g., Form CO, paragraph 6.67 Table 6.13. Separately, at Form CO, paragraph 9.16, the Notifying Party indicated that following the Transaction [Meta strategic plans in relation to growth of Kustomer post-Transaction].

<sup>437</sup> Replies to questionnaire 1 to CRM software providers, question 51.

<sup>438</sup> Reply to questionnaire 1 to CRM software providers, question 52.1 (ID: 762).

<sup>439</sup> Parties’ reply to RFI 7, question 3.

<sup>440</sup> Meta (formerly Facebook)’s internal document, Attachment [...]. Meta (formerly Facebook), in its reply to RFI 7, question 3, indicated that [...] is a member of the “*Deal Support Team*” and was one of [...] ... *who evaluated the Kustomer transaction from a business or strategic perspective, [...].*”

*Audio messages - User timezone - User spoken language.*<sup>441</sup> Internal documents of Meta (formerly Facebook) [Business Plans Regarding API Availability].<sup>442</sup> [Business Plans Regarding API Availability]<sup>443</sup>, the Commission concludes that this is nonetheless evidence of Meta (formerly Facebook)'s ability to degrade API access to or the functionalities of its B2C messaging channels for third parties, even on the basis of geographic location should it wish to do so.

- (286) Other similar examples include Meta (formerly Facebook)'s removal of certain specific APIs or features of the Meta (formerly Facebook) B2C messaging channels (i.e., degrading access to such channel) for specific business users considered to be non-compliance with Meta (formerly Facebook)'s applicable policies, e.g., [Information about User Removal from Messaging Channels]<sup>444</sup> (emphasis added). Relatedly, in the case of the consumer version of WhatsApp, Facebook previously threatened users that did not accept its updated policy that the *“messaging app will gradually degrade and eventually cease to function if [the users] don't accept the changes”*<sup>445</sup>, which may point to an ability to adopt a similar approach vis-à-vis businesses and CRM software providers that access the relevant channels via APIs. Indeed, Meta (formerly Facebook) has faced and is facing antitrust scrutiny in the United States, in which the charges refer to past practices of allegedly degrading API access to players it perceived as competitors to its messaging channels.<sup>446</sup> The Notifying Party, in the LoF Response, argues that these examples are not relevant to Meta (formerly Facebook)'s ability to identify which CRM software provider to target for a selective foreclosure strategy, since they have *“no bearing on its ability to establish whether specific businesses are using specific CRMs”*.<sup>447</sup> This is not however what the Commission is arguing. As explained by the Parties during technical sessions in the week of 20 September 2021, for a business to use a B2C messaging channel via a CRM software tool, it is necessary for the CRM software provider to itself have an integration with the relevant B2C communication channel, e.g., Meta (formerly Facebook)'s B2C messaging channels. Therefore, if Meta

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<sup>441</sup> Reply to questionnaire 4 to business customers, question 70.1 (ID: 527).

<sup>442</sup> The Commission understands that a similar email may have been sent to a wide range partners (including CRM software providers and CPaaS providers). See, by way of example, Meta (formerly Facebook)'s internal documents, [...].

<sup>443</sup> See Meta (formerly Facebook)'s internal document, [...].

<sup>444</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>445</sup> See <https://www.wired.com/story/whatsapp-privacy-policy-facebook-data-sharing/>, last accessed on 2 December 2021 (ID: 2517).

<sup>446</sup> See Case No.: 1:20-cv-03590-JEB, *Federal Trade Commission v Facebook, Inc.*, First Amended Complaint For Injunctive And Other Equitable Relief, filed 19 August 2021 with the U.S. District Court for the District of Columbia, e.g., paragraph 154 (*“In or around April 2013, Facebook terminated Path's access to key API functionality, and Path's growth subsequently slowed significantly.”*) and paragraph 157 (*“a. In January 2013, Facebook cut off key API access to Voxer, a mobile messaging app featuring voice communication, shortly after Messenger launched competing voice functionality. ...b. In February 2013, messaging app MessageMe soared in popularity and achieved nearly one million users within a week of release. But shortly after MessageMe reached one million users, Facebook shut off key API access ... In August 2013, Facebook undertook an enforcement strike against a number of messaging apps simultaneously, with the Head of Developer Enforcement directing colleagues to restrict them from “accessing any read APIs beyond basic info[.]” instructing that “we will not be communicating with the [developers] in any way about these restrictions. ... d. In October 2016, Facebook cut off certain API functionality to Tribe, a video-messaging app that was generating buzz around that time”* (emphasis added), available at: [https://www.ftc.gov/system/files/documents/cases/ecf\\_75-1\\_ftc\\_v\\_facebook\\_public\\_redacted\\_fac.pdf](https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf), last accessed on 29 November 2021 (ID: 2515).

<sup>447</sup> LoF Response, paragraph 2.6(B).



(formerly Facebook) were to target such CRM software providers, just as it engaged in targeted foreclosure in the above examples, Meta (formerly Facebook) would not necessarily need to identify *ex ante* the business users using or wishing to use that CRM software solution. Even if such a business user had its own access to the relevant channel already (which the Commission also understands from the technical sessions to typically be the case), that business would not be able to have Meta (formerly Facebook)'s B2C channels integrated into the foreclosed provider's CRM software tool, or would only be able to have them integrated in a degraded manner, i.e., depending on the foreclosure strategy adopted by Meta (formerly Facebook).

- (287) Meta (formerly Facebook) could alternatively, or in addition, upgrade the quality of API access that Kustomer would have relative to third parties, or require data in return for entering into API access partnerships.<sup>448</sup> [Business Plans Regarding API Availability]<sup>449</sup> (emphasis added). The Commission considers that this shows [...], Meta (formerly Facebook) considered that following its acquisition of Kustomer it would have the ability to engage in a strategy of differentiated API access as between Kustomer and rivals.
- (288) There also appears to be evidence of Meta (formerly Facebook) having provided a version of its APIs with enhanced features to certain partners and not others in the past. Following technical sessions in the week of 20 September 2021, the Notifying Party submitted information clarifying that its WhatsApp for Business API and Messenger API are in fact each [Business Plans Regarding API Availability]<sup>450</sup> Despite statements that such features [Business Plans Regarding API Availability], the Commission considers that Meta (formerly Facebook) has the ability to restrict access to certain features to certain businesses. The fact that Meta (formerly Facebook) [Details about Meta's beta testing]<sup>451</sup><sup>452</sup> appears to support this conclusion.
- (289) Although the Notifying Party points out that [Details about Meta's beta testing].<sup>453</sup><sup>454</sup><sup>455</sup> Contrary to what is argued in the SO Response<sup>456</sup>, the Commission does not consider that genuine beta testing, which the Notifying Party states is a common industry practice, would of itself raise competition concerns. Rather, given the duration of such testing is uncertain, and at the discretion of Meta (formerly Facebook) and not necessarily public knowledge<sup>457</sup>, the Commission considers that third parties (e.g., competitors of Kustomer) are unlikely to have visibility of whether a new API feature — even if initially tested with Kustomer — would be ready for wider roll-out, and there would be nothing to prevent Meta (formerly Facebook) from delaying (or deciding against) such a wider-roll out following successful testing if it provided an advantage to Kustomer compared to rival CRM software providers.

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<sup>448</sup> Replies to questionnaire 4 to business customers, question 77.

<sup>449</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>450</sup> Parties' reply to RFI 21, question 4. A list of the [Regulatory Submission] APIs that make up the Messenger (40 APIs), Instagram (16 APIs) and WhatsApp ([Regulatory Submission] APIs) APIs respectively were provided in the Parties' reply to RFI 24, Annex 1.

<sup>451</sup> Meta (formerly Facebook) has also sometimes rolled out new features to all API users at the same time, without prior testing with a sub-set of partners. See Parties' reply to RFI 21, question 5(c)(iii).

<sup>452</sup> Parties' reply to RFI 21, question 5(a).

<sup>453</sup> Parties' reply to RFI 21, question 4.

<sup>454</sup> Parties' reply to RFI 21, question 5(c)(i).

<sup>455</sup> Parties' reply to RFI 21, question 5(j).

<sup>456</sup> See Section 7.3.2.1(a) above.

<sup>457</sup> Replies to questionnaire 8 (Commitments Market Test), question 13.

- (290) While the Notifying Party points out that [Details about Meta’s beta testing]<sup>458459</sup> Market participants that the Commission spoke to during its market investigation referred to additional examples: “*One specific example of this is the WhatsApp API provided to the airline KLM. KLM through this API has access to unique WhatsApp features (regarding boarding passes) that are not available through the API the rest of the world has access to (e.g., via Facebook partners such as CPaaS providers). In other words, Facebook has the ability to create tailored APIs with additional features for certain partners. It is therefore entirely possible that Facebook may offer Kustomer additional features not available to CRM competitors.*”<sup>460</sup> Accordingly, the Commission considers that Meta (formerly Facebook) would likely have the ability to roll out new (tailored) features to its messaging channels to Kustomer, and certain select partners and businesses (e.g., larger customer service and support CRM software providers to whom Kustomer may not be a particularly close competitor), while refusing to make the same features available to Kustomer’s close rivals or new entrants into the customer service and support CRM software market.
- (291) The Notifying Party argues, without providing supporting evidence, that such a strategy “*would not give any material “advantage” to Kustomer ...[but even if it did] ...any such advantage would be truly de minimis*”<sup>461</sup>. The Commission notes however that Meta (formerly Facebook) is [Meta’s plans for new features to be introduced in its messaging channels].<sup>462</sup> If some or all of these were restricted to Kustomer the Commission considers that these additional functionalities could provide a material advantage to Kustomer over competitors in the customer service and support CRM software market. [Internal details regarding reasons for customer switching]<sup>463</sup>[Internal details regarding reasons for customer switching]. Contrary to the Notifying Party’s argument in its SO Response<sup>464</sup>, the above conclusions do not require the Commission to demonstrate that each individual feature of a particular B2C channel is, in itself, an important input. Rather, in view of the fact that OTT B2C messaging channels are defined by reference to their richness of features, the fact, or even the perception in the market, that rivals of Kustomer could only access a less rich versions of Meta (formerly Facebook)’s channels or versions lacking certain features, could over time result in a material advantage for Kustomer, in particular in view of the fact that, first, and as outlined above, Meta (formerly Facebook)’s channels are expected to further increase in importance for B2C communications in the coming years and, second, as one business customer pointed out, the features that may be important are typically determined by the end customer, rather than by the CRM software provider or the business customer: “*The most convenient feature will be preferred by the customer and develop to an expected functionality over time. It can be estimated that companies would consider switching to CS CRM provider that is able to offer these functionalities or features to avoid unsatisfied customers.*”<sup>465</sup>
- (292) In addition to differentiation on the basis of features, the Commission considers that Meta (formerly Facebook) would have the ability to provide for a differentiated degree of functionality or quality for all or a sub-set of third parties using its APIs as

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458 Parties’ reply to RFI 21, question 5(f).

459 Meta (formerly Facebook)’s internal document, [...].

460 Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 3 (ID: 2085).

461 Parties’ reply to RFI 21, question 5(j).

462 Parties’ reply to RFI 21, question 5(i).

463 Parties’ reply to RFI 21, question 16(6).

464 SO Response, paragraph 3.13.

465 Reply to questionnaire 8 (Commitments Market Test), question 10 (ID: 2622).

compared to the quality or level of functionality enjoyed by Kustomer. This point was made by several respondents to the Commission’s market investigation, for example, by differentiating, “*the speed, data rate limits, and parity with natively available features.*”<sup>466</sup> [Details regarding Meta’s envisaged strategies in relation to the Transaction] In an internal Meta (formerly Facebook) document from 2019 entitled [Details regarding Meta’s envisaged strategies in relation to the Transaction]<sup>467</sup>

- (293) In view of the above, the Commission concludes that Meta (formerly Facebook) has the ability to introduce important differences in the quality of API access to its channels enjoyed by Kustomer compared to the access granted to third parties, including on the basis of feature availability and quality or level of functionality (e.g., rate limits). Meta (formerly Facebook) would be able to do this by degrading the features and/or functionality provided to third party API access seekers, or by improving the features and/or functionality made available to Kustomer, or through a combination of such strategies. It could also engage in such a relative degradation strategy in a targeted way, focusing on certain CRM software providers, e.g., close competitors of Kustomer or new entrants for the reasons outlined in part A. above.

C. Meta (formerly Facebook) would be able to identify a specific group of CRM providers to target

- (294) As outlined above, the Notifying Party argues that Meta (formerly Facebook)’s ability to engage in targeted foreclosure would be “*limited*” because there is “*no group of customers that is especially reliant on Facebook’s B2C messaging channels*” and in any case Meta (formerly Facebook) would “*not be able to accurately identify a specific group of businesses which would be more profitable to target*”.<sup>468</sup> Similar arguments were made in the SO Response, as summarised in Section 7.3.2.1.(a) above, in particular that Meta (formerly Facebook) cannot identify which CRM software providers are used by businesses that access its channels directly or via third party intermediaries, such as CPaaS providers. Even if it could identify those businesses, the Notifying Party considers that it would not be able to target them as it would not have the ability to “*withdraw or degrade access to its B2C channels for a subset of businesses that use*” a rival CRM platform.<sup>469</sup>
- (295) The Commission however considers that Meta (formerly Facebook) would have the ability to identify and selectively target, for example, certain close competitors of Kustomer (and even certain businesses using those CRM software providers) with a sufficient degree of certainty.
- (296) First, the targets of foreclosure are rival customer service and support CRM providers, not business users, and Kustomer would be expected to be able to identify its own close competitors. More specifically, through using Kustomer’s (albeit historic) win/loss data, together with its general industry knowledge, and the large variety of public sources and industry reports (e.g., Gartner) that analyse the customer service and support CRM software market and often include profiles on specific providers (e.g., whether they focus on e-commerce businesses, SMB clients,

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<sup>466</sup> Reply to questionnaire 1 to CRM software providers, question 52.1 (ID: 782).

<sup>467</sup> Meta (formerly Facebook)’s, internal document].

<sup>468</sup> Article 6(1)(c) Response, paragraph 3.19. See also Notifying Party Submission on Foreclosure Issues dated 10 October 2021, footnote 1.

<sup>469</sup> Article 6(1)(c) Response, paragraph 3.19.

etc.), the merged entity would be able to identify close competitors of Kustomer,<sup>470</sup> which could be included in any targeted foreclosure strategy. In addition, many CRM software providers publish relatively extensive lists of their customer on their websites, in many cases with the option to filter by industry and/or by region.<sup>471</sup> All of this could also inform a targeted foreclosure strategy. Second, there would be nothing to prevent Meta (formerly Facebook), which has a significant number of businesses on its platforms (and using its B2C messaging channels) today, from conducting a survey of the businesses that have a Facebook page and that use its messaging channels in interacting with their customers (which Meta (formerly Facebook) could verify) through which it asks that they identify their current customer service and support CRM software provider allow Facebook to identify the relevant. This could enable Meta (formerly Facebook) to determine if such incumbent CRM software provider is a (close) competitor of Kustomer and if so, whether to engage in a targeted foreclosure strategy toward that CRM software provider. The Commission notes that the SO Response did not contradict this observation. Indeed, Meta (formerly Facebook) has indicated that [Business Plans]<sup>472</sup> for which it would be expected to draw on data it holds or could readily obtain from businesses that use its B2C messaging channels.

- (297) In light of the above, the Commission concludes that contrary to what the Notifying Party argues, Meta (formerly Facebook) would have the ability to identify, for example, certain close competitors of Kustomer (and even certain businesses using those CRM software providers) in order to carry out a targeted foreclosure strategy.

D. Foreclosed CRM providers would not be able to evade or workaroud such targeting by other means

- (298) The Notifying Party also considers that there are “workarounds” available even if it was able to target specific customer service and support CRM software providers and/or businesses, who could “regain access via some other means”<sup>473</sup> “for example, through a CPaaS provider or via integrations with a third-party CRM provider”.<sup>474</sup>
- (299) As outlined above, its agreements with partners such as [Information about Meta’s contractual partners], give Meta (formerly Facebook) the contractual ability to [Information about Meta’s contractual rights]<sup>475</sup> In view of the [Information about Meta’s contractual rights], there would be nothing to prevent Meta (formerly Facebook) from requiring its CPaaS providers to refuse API access to its messaging channels to close competitors of Kustomer or new entrants in the customer service and support CRM market, thereby preventing CPaaS providers being used as a “workaround” as the Notifying Party argues. In the SO Response, the Notifying Party argues that this would require the cooperation of such CPaaS providers.<sup>476</sup> However, the Commission considers that the ability of Meta (formerly Facebook) to terminate any of its agreements with channel partners such as CPaaS providers,

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<sup>470</sup> See, e.g., Form CO, paragraph 6.67 Table 6.13.

<sup>471</sup> See, e.g., HubSpot (<https://www.hubspot.com/case-studies>, last accessed on 15 December 2021 (ID: 2804)), Zendesk (<https://www.zendesk.com/why-zendesk/customers/>, last accessed on 15 December 2021 (ID: 2808)) and Freshdesk (<https://freshdesk.com/customers>, last accessed on 15 December 2021 (ID: 2803)).

<sup>472</sup> Form CO, paragraph 9.16, indicates that following the Transaction [Meta strategic plans in relation to growth of Kustomer post-Transaction].

<sup>473</sup> Article 6(1)(c) Response, paragraph 3.19.

<sup>474</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, footnote 1.

<sup>475</sup> See for example, [...]. Meta (formerly Facebook)’s internal documents, [...] and [...].

<sup>476</sup> SO Response, paragraph 3.18.

[Information about Meta’s contractual rights], would likely act as a strong incentive for such partners to cooperate with any requests by Meta (formerly Facebook) to cease providing access to specific CRM software providers.<sup>477</sup>

- (300) The Notifying Party also argues that an integration with a third-party CRM provider could be used as a workaround in the case of targeted foreclosure.<sup>478</sup> In that regard, the Commission notes however that, first, this would require that the third-party CRM provider in question would not be foreclosed by Meta (formerly Facebook), that the third party CRM provider in question offers an integration with Meta (formerly Facebook)’s B2C communication services (the Commission understands that this may not universally be the case) and that Meta (formerly Facebook) would not have a similar contractual ability as it does with CPaaS providers to prohibit them from granting access to certain customers (e.g., it has such a contract with Zendesk). In addition to the fact that it is uncommon for businesses to multi-home as regards CRM software with the same functionality (such as customer service and support), the Notifying Party’s argument also ignores the fact that business customers, in particular SMBs, which are the main focus of Kustomer’s offering, are particularly price sensitive<sup>479</sup> and are unlikely to pay for two customer service and support CRM tools at the same time. Indeed, as one market participant indicated, a main obstacle to multi-homing is “*subscription fees with different providers.*”<sup>480</sup>
- (301) Contrary to what the Notifying Party argues<sup>481</sup>, it would not be possible for a foreclosed CRM software provider to regain access to the particular Meta (formerly Facebook) B2C messaging channel directly from Meta (formerly Facebook). Even if their business customers have access to the relevant channels, Meta (formerly Facebook) accepted that businesses — in particular SMBs that tend to favour off-the-shelf CRM software solutions and which, unlike large enterprise businesses, would typically not have the resources or the need to build a customised in-house solution — usually require that “*those B2C channels are then generally integrated in the chosen CRM*”,<sup>482</sup> which presumably would not be possible where Meta (formerly Facebook) has blocked or degraded the API integration available to the relevant CRM (e.g., using its “*gating capability [to ensure that the API] ...is not inadvertently accessed by a non-participating developer*”<sup>483</sup>, or through other means). This means that even if the relevant business user can regain access to Meta (formerly Facebook)’s channels via other means (e.g., direct access), it would not be able to integrate it into the software of the CRM provider. SMBs would in many case also not have the resources or inclination to build their own CRM software tool, or to use a fragmented customer service set-up where only some B2C communication channels are integrated into the CRM solution and other channels (e.g., those of Meta (formerly Facebook)) are not, as this would be less efficient and more costly to operate. The more plausible outcome is that business customers, and in particular SMBs, i.e., the main focus of Kustomer’s offering, which are particularly price

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<sup>477</sup> [Confidential details on termination provisions of Meta contracts with Cpaas providers] See e.g., Meta (formerly Facebook)’s internal documents, Attachments [...] and [...].

<sup>478</sup> See Section 7.3.2.1(a) above.

<sup>479</sup> The vast majority of business customers indicated that price is an important or very important factor in a business’ choice of customer service and support CRM provider. See replies to questionnaire 5 to business customers, question 15.

<sup>480</sup> Reply to questionnaire 4 to business customers, question 11.2 (ID: 842).

<sup>481</sup> See Section 7.3.2.1.(a) above.

<sup>482</sup> Meta (formerly Facebook)’s Comments on State of Play Meeting, 22 July 2021, paragraph 5.1(B).

<sup>483</sup> Parties’ reply to RFI 21, question 5(a).

sensitive<sup>484</sup>, would switch to using a customer service CRM software tool in which all B2C communication channels, including in particular Meta (formerly Facebook)'s OTT B2C messaging channels, are integrated, namely Kustomer.

- (302) In light of the above, the Commission concludes that CRM software providers (and their business customers) would not be able to evade or workaroud a targeted foreclosure strategy.

E. *Meta (formerly Facebook) is unlikely to have the ability to obtain data on CRM competitors to provide a competitive advantage to Kustomer*

- (303) For completeness, the Commission investigated whether Meta (formerly Facebook) may be able to obtain data on competitors of Kustomer, e.g., directly or via partners such as CPaaS providers, which it could use to provide a material advantage to Kustomer.

- (304) Meta (formerly Facebook) confirmed that while it [Confidential information on Meta's ability to obtain data].<sup>485</sup> Meta (formerly Facebook) further pointed out that it "[Confidential information on Meta's ability to obtain data]."<sup>486</sup>

- (305) Where Meta (formerly Facebook)'s messaging channels are accessed via third parties, [Commercial Contracts].<sup>487</sup>

- (306) While some of this information could theoretically be competitively sensitive and/or capable of providing a strategic advantage to Kustomer, such a scenario appears to be remote. Rather, based on the explanations provided by Meta (formerly Facebook), it appears that there may be an objective reason for Meta (formerly Facebook) requiring that such information be provided, such as ensuring integrity of the service, confirming the identity and authenticity of the API access seeker or user, to allow for the provision of the service (e.g., for a business' name and identifying information to be displayed in the relevant messaging channel as part of a conversation with an end customer, that information would need to be communicated to Meta (formerly Facebook).

- (307) In light of the above, the Commission concludes that Meta (formerly Facebook) is unlikely to have the ability to obtain data on CRM competitors to provide a competitive advantage to Kustomer.

(a.iv) *Conclusion*

- (308) On the basis of the assessment in Section 7.3.2.2.(a) above, the Commission concludes that Meta (formerly Facebook) would have the ability to foreclose access by customer service and support CRM software providers, both in the EEA and worldwide, to a large and important part of the EEA-wide, if not worldwide, OTT B2C messaging market. This conclusion also holds for the broader EEA-wide, if not worldwide, upstream market for B2C communication services overall, given the importance of Meta (formerly Facebook)'s channels for CRM software providers and their business customers, as well as the complementarity of different channels in

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<sup>484</sup> The vast majority of business customers indicated that price is an important or very important factor in a business' choice of customer service and support CRM provider. See replies to questionnaire 5 to business customers, question 15.

<sup>485</sup> Parties' reply to RFI 24, question 3(d).

<sup>486</sup> Parties' reply to RFI 24, question 3(e).

<sup>487</sup> [Commercial Contracts].

such a wider market<sup>488</sup>, as well as the broader downstream EEA-wide, if not worldwide, market for CRM software overall, given the importance of customer service and support CRM software within an overall CRM software market.<sup>489</sup> As outlined in Section 7.3.2.2.(a.i) above, the Commission’s conclusion would not change on the basis of the potential segments of the customer service and support CRM software market, or the overall CRM software market, based on (i) business customer size, (ii) mode of deployment or (iii) the industry sector of the business customer because OTT B2C messaging channels would remain an equally important input irrespective of such further segmentation. This conclusion remains the same irrespective of whether the relevant upstream and downstream markets, and potential segments thereof, are defined as EEA-wide or worldwide in geographic scope.

(b) Incentive to foreclose

(309) The Commission has reached the conclusion that the merged entity would have the incentive to engage in a foreclosure strategy with regard to competing providers of customer service and support CRM software. A foreclosure strategy would, on the one hand, increase the number of businesses using Kustomer (resulting in gains to the merged entity), and, on the other hand, decrease the use of Meta (formerly Facebook)’s messaging channels by those businesses that do not switch to Kustomer (resulting in losses to the merged entity). Sub-section (b.i) concludes that the gains to the merged entity from a foreclosure strategy appear numerous, diverse and significant. This includes gains from SaaS revenue, additional data for online ads purposes, and CTM ads, as well as longer-term benefits from steering businesses into the Meta (formerly Facebook) ecosystem of products. Sub-section (b.ii) concludes that the losses to the merged entity from a foreclosure strategy can be limited to a sufficient degree by Meta (formerly Facebook) by targeting Kustomer’s close competitors (sub-section A) and through further aggravating factors (sub-section B), thereby sufficiently minimizing the number of business customers that do not switch to Kustomer and the associated losses. In light of the significantly larger gains relative to losses and the available evidence on business customer switching post-foreclosure, the Commission concludes that the level of switching to Kustomer would be sufficient so that the merged entity would have the incentive to engage in a foreclosure strategy.

(310) The Commission considers that in the context of this case a purely quantitative assessment of the exact gains from a potential input foreclosure strategy is not possible. Whilst the Commission undertakes a quantitative assessment of the quantifiable gains and losses, a qualitative approach is required to analyse the unquantifiable gains. The Commission does not consider there to be any unquantifiable losses, and so the quantitative assessment, which does not take into account certain unquantifiable gains, is therefore conservative. Indeed, during the

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<sup>488</sup> For example, one respondent to the market investigation indicated that “*We see the various communication channels as complementary to one another, and not necessarily substituting each other*” (reply to questionnaire 1 to CRM software providers, question 31.1 (ID: 759). For the same reasons as for the broader market for B2C communication services overall, the conclusion equally holds on the basis of the potential intermediate product market for asynchronous B2C communication services. Any conclusion in this Decision in relation to the broader market for B2C communication services overall should be read as also referring to the potential intermediate market for asynchronous B2C communication services.

<sup>489</sup> In 2020, customer service and support CRM software accounted for a large portion (c. 36%) of the overall CRM market on both a worldwide and EEA basis. See Form CO, paragraph 6.45 and paragraph 6.47 Tables 6.2 to 6.5.

deal process, the Notifying Party itself [Information about deal valuation].<sup>490</sup> Further, during the investigation, the Notifying Party has still not been able to quantify all the benefits and costs associated with such a foreclosure strategy. This includes, for example, the reputational costs that the Notifying Party argues would significantly reduce its incentive to undertake such a strategy.<sup>491</sup>

- (311) Firstly, as will be demonstrated in the remainder of this Section, certain gains from foreclosure are inherently forward-looking and uncertain, since they are likely to only become salient after a number of years. It is therefore difficult to meaningfully quantify them. In addition, any indirect positive spill overs to Meta (formerly Facebook)'s other businesses are similarly difficult to meaningfully quantify.<sup>492</sup>
- (312) Secondly, it is also unclear how many business customers would, post-Transaction and as a result of foreclosure, switch to Kustomer downstream and away from Meta (formerly Facebook) upstream. The Notifying Parties' internal estimates of the potential number of business customers that could switch to Kustomer [Information about parties' switching estimates].<sup>493</sup> Further, it remains difficult to quantify the number of business customers that would switch to Kustomer as a result of foreclosure, because a foreclosure strategy may occur in parallel with other Meta (formerly Facebook) strategies to encourage increased use of Kustomer, for example, offering Kustomer for free or below market price. The Notifying Party concludes that business customers would not switch sufficiently to Kustomer based on *historical* win/loss data.<sup>494</sup> The Commission considers that these data are not informative in this respect because there has not been an example in the past where the owner of a leading B2C channel owns a CRM (i.e., the pre-Transaction scenario is significantly different to the post-Transaction scenario). As such, in all cases where a business customer decided to switch for reasons other than to get a better integration to OTT B2C messaging channels (e.g., AI functionalities, third-party integrations, price, etc.) historical switching rates would not be indicative of switching following a foreclosure strategy, i.e., in response to a deterioration of Meta (formerly Facebook) access for some of Kustomer's competitors but not for Kustomer, and can at best provide a lower bound for the switching rates to Kustomer in response to such a deterioration. Indeed, accounting for some of these shortcomings overturns the Parties' conclusion that foreclosure could not be profitable.
- (313) Overcoming the degree of uncertainty inherent with certain benefits of foreclosure would require the use of strong assumptions. As such, any conclusions drawn from a pure quantitative analysis conducted on this basis would likely lack reliability and meaning.
- (314) In this regard, the Commission considers that the vertical arithmetic analysis submitted by the Notifying Party does not provide a reliable and sufficiently complete assessment of the incentive for the merged entity to engage in a foreclosure strategy.<sup>495</sup> As part of the economic submission, Meta (formerly Facebook) provided a model, based on a standard vertical arithmetic framework, which calculates the critical number of businesses that would need to switch to Kustomer for a total

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<sup>490</sup> See, for example, Meta (formerly Facebook)'s internal document, Attachment E0548 – [...].

<sup>491</sup> Article 6(1)(c) Response, paragraph 3.29.iii.

<sup>492</sup> The Commission's quantitative analysis therefore (conservatively) excludes these unquantifiable gains.

<sup>493</sup> See, for example, Form CO, Annex 13.17, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects, footnote 64; Meta (formerly Facebook)'s internal document, Attachment E0551 – [...].

<sup>494</sup> SO Response, Annex 3, Figure 1.

<sup>495</sup> Form CO, Annex 13.17, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects.



foreclosure strategy to be profitable. However, whilst the Parties' analysis mirrors in large parts the Commission's assessment closely (with both relying on the same sources and data), the Commission's assessment below demonstrates that firstly the assumptions underlying the Parties' model are not consistent with the available evidence, most importantly with respect to the level of switching that will occur following a targeted foreclosure strategy, and that secondly the model overstates the amount of losses Meta (formerly Facebook) would incur following foreclosure (specifically with respect to CTM ad revenues). By addressing some of these shortcomings in the Parties' quantitative assessment, the Parties' conclusion that a foreclosure strategy would be unprofitable for the merged entity is overturned. Moreover, the Parties' analysis does not assess (qualitatively or otherwise) any of the unquantifiable gains identified by the Commission.

- (315) In light of the above, the Commission considers the most appropriate approach to assess the Parties' incentives to engage in input foreclosure consists of a qualitative assessment of both the quantifiable and unquantifiable gains and losses, as well as a quantitative assessment of only the quantifiable gains and losses, which is itself conservative since only certain gains are unquantifiable.
- (316) As outlined in Section 7.3.2.2.(a), Meta (formerly Facebook) has multiple avenues through which it could restrict or degrade CRM competitors' API access to its channels. This includes the ability to totally or partially foreclose rivals, as well as to target specific CRM software providers, potential entrants and even specific business customers. Whilst these various potential foreclosure strategies would change the magnitude of gains and losses from foreclosure, they would not significantly impact the question of whether the merged entity has the incentive to foreclose, i.e., whether the gains outweigh the losses, because the benefits would remain significant relative to the limited losses across the different foreclosure strategies. For example, and as demonstrated below, a total foreclosure strategy compared to a partial foreclosure strategy would not significantly change the gains and losses per business customer, or the ratio with which business customers would switch from foreclosed CRM software providers to Kustomer or non-foreclosed CRM software providers. As such, the relative gains and losses would remain largely the same between these two foreclosure strategies, i.e., if total foreclosure is profitable (with the gains outweighing the losses), then partial foreclosure would also be profitable, and vice versa. In other words, whilst total foreclosure would encourage more switching away from foreclosed CRM software providers (and therefore provide more gains in absolute terms to Meta (formerly Facebook)), whether the gains outweigh the losses depends on the gains and losses per business customer and the ratio of switching to Kustomer versus non-foreclosed CRM software providers, which would be similar between total and partial foreclosure strategies; and hence the direction of profitability would be the same between these different foreclosure strategies. As such, the analysis of benefits and costs of foreclosure proceeds with each benefit and cost in turn, and noting in each instance whether the different foreclosure strategies available to the merged entity would significantly impact the analysis of the benefit or cost. On the basis of the assessment, and as noted at the beginning of this Section, the Commission considers that the benefits from foreclosure are significant, and that losses would be sufficiently limited, because Meta (formerly Facebook) is able to sufficiently steer business customers towards Kustomer. This conclusion holds for both total and partial foreclosure strategies, as well as irrespective of the specific CRM providers or business customers targeted by the foreclosure.

(b.i) Benefits from foreclosure are numerous, diverse and significant

(317) The Commission considers that the benefits to the merged entity from an input foreclosure strategy, i.e., from steering business customers towards Kustomer, are numerous, diverse and significant. Meta (formerly Facebook) is a large business both in terms of its market share (e.g., in the online display advertising market or OTT B2C messaging market) and in absolute (revenue) terms.<sup>496</sup> Accordingly, the benefits the merged entity is able to realise from an input foreclosure strategy are significant, precisely because of the scale and network effects it can build upon. Meta (formerly Facebook)'s products are also numerous and diverse as well as large in scale, and include, for example, its online advertising business and ecommerce products. Meta (formerly Facebook)'s many different closely related products provide it with many avenues from which to benefit from foreclosure, and in particular from business customers switching to Kustomer. This is the case in the short-term (with the quantifiable gains), but the Commission considers in light of the many longer-term gains (which are themselves difficult to quantify), that a longer timing horizon must also in parallel be taken into account (e.g., within the next 5 years). Sub-sections A-D proceed by discussing in detail each of the benefits from foreclosure in turn, demonstrating that each of the numerous and diverse benefits to the merged entity from steering a business customer to Kustomer is significant (per business customer). This applies equally to steering a business customer to Kustomer by foreclosing current CRM software competitors and potential entrants into the market. Sub-section (b.ii) subsequently demonstrates that the number of businesses switching to Kustomer will be sufficiently large such that the overall benefit to the merged entity from foreclosure will be significant and thereby also the losses limited.

#### A. SaaS revenues

(318) A successful foreclosure strategy would mean that the merged entity gains market share downstream, as rivals' CRM offerings become less attractive compared to Kustomer's offering. The merged entity would gain from businesses that switch away from their current CRM provider to Kustomer as a result of foreclosure. The most direct of these benefits comes from SaaS revenues generated when a business customer purchases Kustomer's CRM software.

(319) [Information about Transaction Rationale].<sup>497</sup> A review of the Notifying Parties' internal documents indicates that [Information about Transaction Rationale].<sup>498</sup>

(320) However, the Commission notes that sales from CRM software could nevertheless constitute a significant and growing stream of revenue for the merged entity. Kustomer's internal data for 2020 indicates that Kustomer would earn on average USD [Revenue Information] profit a year from each business customer that switches to Kustomer.<sup>499</sup> Meta (formerly Facebook) has estimated that Kustomer may be a feasible CRM software option for [Customer Information] businesses.<sup>500</sup> This can be

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<sup>496</sup> See, for example, Commission decision of 17 December 2020 in case M.9960 – *Google/Fitbit*, paragraph 463.

<sup>497</sup> See, for example, Meta (formerly Facebook)'s internal document, Attachment E20130 - [...]; Parties' reply to RFI 9, question 26.

<sup>498</sup> Meta (formerly Facebook)'s internal documents discussing the deal rationale [Confidential information on Meta's valuation of Kustomer]. See Form CO, paragraphs 3.2.11-3.2.12.

<sup>499</sup> Parties' reply to RFI 9, question 26. In addition, this assumes a [Revenue Information] % gross margin for Kustomer's CRM software services, which is taken from Meta (formerly Facebook)'s internal document, [...].

<sup>500</sup> Meta (formerly Facebook)'s internal document, Attachment E20130 – [...].

contrasted to Meta (formerly Facebook)’s projection of growing Kustomer’s customer portfolio from [Customer Information] businesses today to [Customer Information] businesses in [years].<sup>501</sup> If all the customers for which Kustomer may be a feasible solution were to switch to Kustomer as a result of the foreclosure strategy, this would imply a maximum possible gain of over USD [Revenue Information] year from CRM SaaS alone as a result of such a foreclosure strategy. While the actual gain depends on the number of business customers who would switch to Kustomer as result of the foreclosure strategy, it shows at least that there is a large pool of businesses out of which Meta (formerly Facebook) would potentially be able to gain new customers by engaging in a foreclosure strategy. And, as outlined in Section 7.3.2.2.(b.ii) below, it seems likely that a significant proportion of the relevant market would switch to Kustomer following a foreclosure strategy. The Commission notes that Kustomer’s [Business Plans], which would imply a higher maximum possible gain from foreclosure.<sup>502</sup>

- (321) In addition, the Commission notes that revenues from SaaS are likely to grow exponentially. A model from Meta (formerly Facebook), used to estimate the SaaS revenue to be gained as a result of the Transaction, assumes that revenue from business customers increases by [Revenue Information] every 12 months as a result of “upselling”, i.e., from either purchasing a higher quantity of Kustomer’s products or a more expensive version of them.<sup>503</sup> For illustration, over five years, an annual increase of [Revenue Information] leads to a more than [Revenue Information] increase in revenues. Indeed, this model predicts that by [Revenue Information]. As such, one expects that this benefit from foreclosure will become more and more significant in the future. Indeed, the slides from the technical session dated 22 September 2021 note that “[Business Plans]”.<sup>504</sup> One would expect any SaaS revenues the merged entity gains through foreclosure to grow similarly.
- (322) Lastly, as discussed in Section 7.3.2.2.(b.ii) below, the merged entity might combine a foreclosure strategy with parallel aggravating factors designed to encourage business customers to switch to Kustomer, which – even if legitimate on their own – would aggravate the impact of the foreclosure. For example, Meta (formerly Facebook) may (in line with historical behaviour) offer Kustomer for free or below market price. In such a scenario, the merged entity would therefore forgo the SaaS revenues from Kustomer. However, as will be shown, the benefits from foreclosure to Meta (formerly Facebook)’s current business activities likely far outweigh these SaaS revenues.

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<sup>501</sup> Meta (formerly Facebook)’s internal document, Attachment E029 – [...].

<sup>502</sup> Form CO, Attachment E0551. This document prepared by Kustomer includes strategies for Kustomer to win customers following its possible acquisition by Meta (formerly Facebook), and estimates Kustomer could potentially gain between [40,000-300,000] Torso customers post-Transaction, which is more than the critical number of businesses estimated by any version of the model submitted by the Parties. In the Parties’ reply to RFI 10, Meta (formerly Facebook) stated that it does not consider Kustomer’s growth projections as set out in Attachment E0551 to be a realistic or reliable benchmark against which to assess the extent to which it would be able to profitably acquire new customers post-Transaction (with or without foreclosure).

<sup>503</sup> Meta (formerly Facebook)’s internal document, Attachment E20130 – [...].

<sup>504</sup> PowerPoint presentation session 2 “Facebook’s proposed acquisition of Kustomer - Kustomer and the CRM Market” of the site visit held on 22 September 2021, slide 11.

B. Additional data for online ads purposes

- (323) By engaging in a foreclosure strategy and steering businesses away from their current CRM provider to Kustomer, Meta (formerly Facebook) would also gain additional data from these business customers. [Business Plans].<sup>505</sup>
- (324) Meta (formerly Facebook) [Business Plans in relation to Data Sharing].<sup>506</sup>
- (325) Meta (formerly Facebook) currently offers businesses a number of tools to share data with Meta (formerly Facebook) for ads purposes. Meta (formerly Facebook) Business Tools include Facebook Pixel, Conversions API, App Events via Meta (formerly Facebook) software development kits (“SDKs”), Offline Conversions API, and App Events API. Data shared with Meta (formerly Facebook) via Meta (formerly Facebook) Business Tools generally originates outside Meta (formerly Facebook)’s channels or surfaces. Depending on the relevant solution and the features used, business customers may choose to share different types of information with Meta (formerly Facebook).<sup>507</sup>
- (326) In its valuation model of Kustomer, Meta (formerly Facebook) [Business Plans].<sup>508</sup> [Business Plans].<sup>509</sup>
- (327) In this regard, Meta (formerly Facebook) has estimated that in [Year] it would earn on average USD [Revenue information] profit a year from each business customer that switches to Kustomer.<sup>510511</sup> Meta (formerly Facebook) has estimated that Kustomer may be a feasible CRM software option for [Customer information] businesses.<sup>512</sup> This can be contrasted to Meta (formerly Facebook)’s projection of growing Kustomer’s customer portfolio from [Customer information] businesses today to [Customer information].<sup>513</sup> If all the customers for which Kustomer may be a feasible solution were to switch to Kustomer as a result of the foreclosure strategy, this would imply a maximum possible gain of over USD [Revenue Information] a year from additional data alone as a result of such a foreclosure strategy. As noted above, while the actual gain depends on the number of business customers who would switch to Kustomer as result of the foreclosure strategy, it shows at least that there is a large pool of businesses out of which Meta (formerly Facebook) would potentially be able to gain new customers by engaging in a foreclosure strategy. And, as outlined in Section 7.3.2.2.(b.ii) below, it seems likely that a significant proportion of the relevant market would switch to Kustomer following a foreclosure strategy. The Commission notes that Kustomer’s own estimates for the number of potential business customers it could serve post-Transaction are far higher than those

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<sup>505</sup> See, for example, Meta (formerly Facebook)’s internal document, Attachment E029 – [...]; Parties’ reply to RFI 1, question 33.

<sup>506</sup> Parties’ reply to RFI 1, questions 8. 34 and 35; Parties’ reply to RFI 6, question 9.

<sup>507</sup> Parties’ reply to RFI 16, question 12.

<sup>508</sup> Parties’ reply to RFI 10, question 20.

<sup>509</sup> Parties’ reply to RFI 10, question 20.

<sup>510</sup> Parties’ reply to RFI 9, question 26. [Future revenue calculation methodology and assumptions]. See Parties’ reply to RFI 1, question 33.

<sup>511</sup> It is worth noting that the model assumes that [Business Plans in relation to Data], but, as demonstrated later in this Section, this data is highly valuable for online advertising and therefore may have a higher incremental value than Facebook assumes for the purposes of its deal valuation.

<sup>512</sup> Meta (formerly Facebook)’s internal document, Attachment E20130 – [...].

<sup>513</sup> Meta (formerly Facebook)’s internal document, Attachment E029 – [...].

estimated by Meta (formerly Facebook), which would imply a higher maximum possible gain from foreclosure.<sup>514</sup>

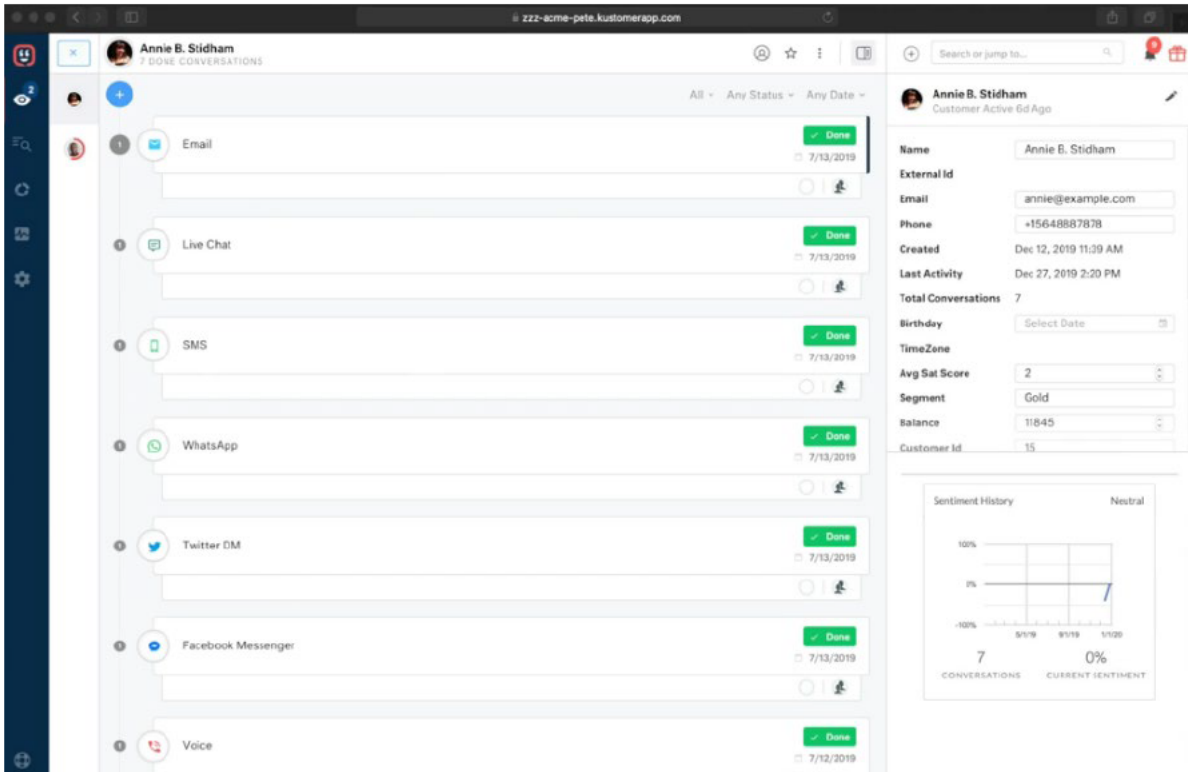
- (328) Meta (formerly Facebook) included in its valuation model of Kustomer the benefits from [Business Plans about Data Sharing].<sup>515</sup> [Business Plans about Data Sharing]. A market participant notes that “*online advertising service providers cannot easily access this kind of data through other means. There is some sharing between vendors, but not a lot, and it is becoming more difficult to share data because of regulation and legislation around the world, and because of the privacy policies of firms like Apple or Google (Android) which limit the ability of apps on a phone to exchange third-party data between them*” and “*in the current, privacy-focused, environment, the Transaction is a way for Facebook to get direct access to this data*”.<sup>516</sup> In light of the decreasing availability of third-party data, the value of gaining additional data through Kustomer is significant and growing. These benefits from additional data would similarly come about as a result of foreclosure, and to a greater extent if a foreclosure strategy encourages a greater level of switching to Kustomer (than absent any foreclosure strategy).
- (329) The next part of this Section discusses in detail, first the data Meta (formerly Facebook) could potentially get access to through Kustomer, and second the relevance of that data to Meta (formerly Facebook)’s online advertising business. In light of this information, the Commission considers that the data Meta (formerly Facebook) could obtain following the acquisition of Kustomer is highly relevant and valuable for improving Meta (formerly Facebook)’s targeting capabilities for the online display advertising services it provides. Additional data would therefore constitute a significant benefit from foreclosure.
- (330) Meta (formerly Facebook) qualifies the types of data that it would potentially get access to through the acquisition of Kustomer as Customer Transaction Data and Other Event data, pursuant to the terms for Meta (formerly Facebook) Business Tools.
- (331) In this context, Customer Transaction Data (or conversions data) relates to data on completed transactions that businesses may share with Kustomer. More specifically, this data could include, for example, personal data such as customer contact information, their gender or date of birth, together with order and purchase history, payment information, return data and customer interaction data.
- (332) Customer interaction data, meaning conversations between a particular customer and a customer service agent of a business, are uniquely presented in Kustomer’s CRM software. A conversation may take place over several B2C communication channels and Kustomer’s CRM software shows this conversation in a single timeline:

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<sup>514</sup> Form CO, Attachment E0551. This document prepared by Kustomer includes strategies for Kustomer to win customers following its possible acquisition by Meta (formerly Facebook), and estimates Kustomer could potentially gain between [Business Plans] Torso customers post-Transaction, which is more than the critical number of businesses estimated by any version of the model submitted by the Parties. In the Parties’ reply to RFI 10, Meta (formerly Facebook) stated that it does not consider Kustomer’s growth projections as set out in Form CO, Attachment E0551 to be a realistic or reliable benchmark against which to assess the extent to which it would be able to profitably acquire new customers post-Transaction (with or without foreclosure).

<sup>515</sup> Attachment E0548 – [...].

<sup>516</sup> Agreed minutes of the call of 3 June 2021 with a market participant, paragraph 20 and 21 (ID: 2104).



Source: Kustomer Timeline, Omnichannel Customer Service Product Overview video.<sup>517</sup>

- (333) Currently, Kustomer’s CRM software allows for the integration of the following B2C communication channels:

#	B2C Communication channel	Provider
1	Voice <i>(not including traditional telecommunication network providers but rather voice over IP (“VOIP”) solutions)</i>	Amazon Web Services – Amazon Connect Aircall Dialpad Five9 Genesys Masvoz Talkdesk Ujet 8x8
2	Email	Google - Gmail Wildbit - Postmark

<sup>517</sup> Kustomer Timeline, Omnichannel Customer Service Product Overview video, available at: <https://www.kustomer.com/demo-videos/>, last accessed on 21 July 2021.

#	B2C Communication channel	Provider
3	Chat	Kustomer's webchat Olark Solvvy UJET
4	SMS	Messagebird Twilio Zipwhip
5	Messenger	Facebook – Messenger
6	WhatsApp	Messagebird Twilio
7	Instagram comments	Facebook – Instagram
8	Instagram direct messages	
9	Twitter tweets	Twitter
10	Twitter direct messages	
11	Form messages	Kustomer's Form messages

*Source: Form CO, Table 2.2.*

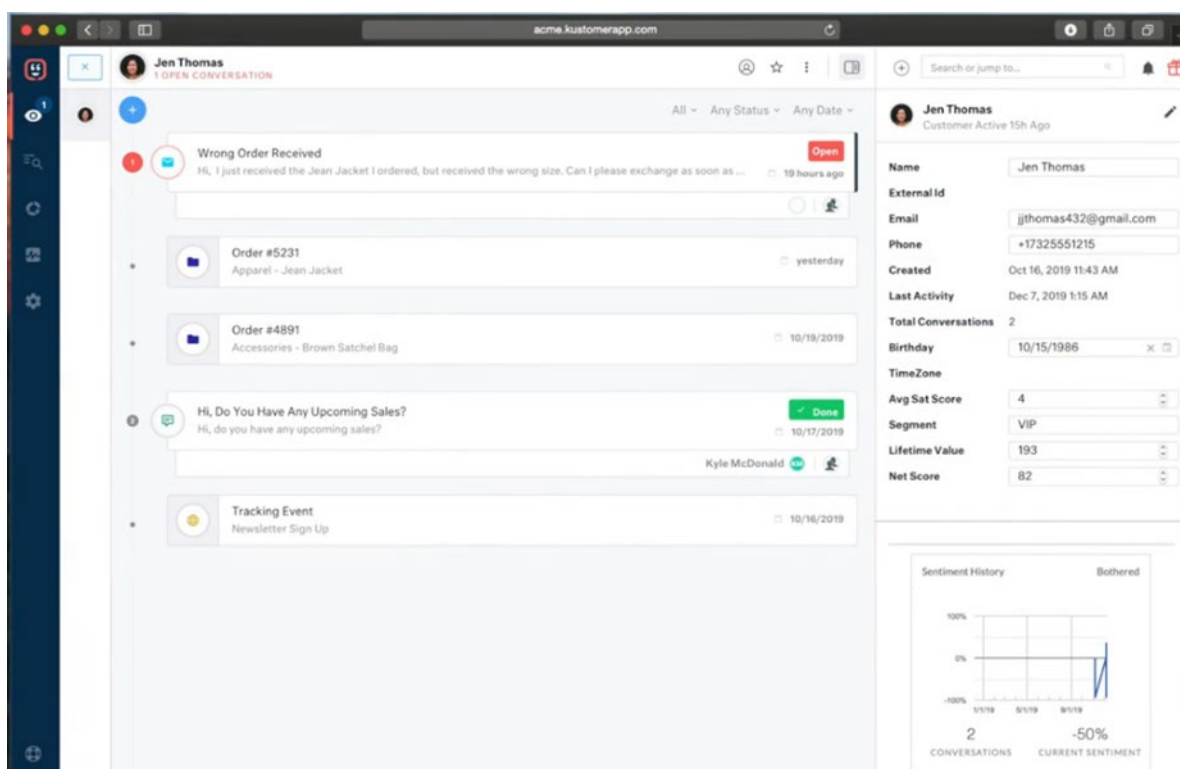
- (334) The second type of data that Meta (formerly Facebook) identified as data it would obtain through Kustomer, “Other Event Data”, relates to other data on customer actions falling short of purchases (sometimes referred to as “mid-funnel” events). This includes website views, adds to cart, adds to wish-list, store visits, app downloads, or other “custom events” that a business may decide to record and share.
- (335) As regards this Other Event Data that a business may decide to share with Kustomer, the Notifying Party clarified that Kustomer's CRM software allows businesses to upload data in relation to their end customers, including data in relation to incomplete transactions so that it appears in their Kustomer CRM software interface. This is achieved through incorporating a snippet of code on the business' website.<sup>518</sup> The data will be integrated into the relevant business' account as custom object data. Moreover, according to a training video demonstrating Kustomer's CRM software, what makes Kustomer “*unique*” is that it is able to bring into its CRM software data from other systems, such as, for example, e-commerce platforms (such as Shopify), a

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<sup>518</sup> Form CO, footnote 226. According to the Notifying Party, currently only around [Customer Information] of customers of Kustomer actually made use of this function

business' back-end system, and through widgets that are included in for example e-commerce platforms.<sup>519</sup>

- (336) Finally, Kustomer's CRM software may also separately generate some of its own data. For example, Kustomer's CRM software calculates a "customer sentiment" score. This score allows a business to evaluate how a customer's current sentiment compares to that customer's average sentiment, or what the impact is of a customer service agent interaction on the customer's sentiment:



Source: Kustomer Timeline, Product Overview video.<sup>520</sup>

- (337) The data that is available to a business on Kustomer's CRM software may be used for specific searches and can be used for a specific advertisement campaign. One Kustomer live demo shows for example how a search can be done among VIP customers of a business that did not make a purchase in the last 30 days, that spent more than a certain amount with the business in its lifetime, and that had a negative sentiment during the last customer service agent interaction.<sup>521</sup>
- (338) The Commission assessed the volume, value, variety and velocity of the data that Meta (formerly Facebook) could obtain on the basis of its review of internal documents as well as on the results of the market investigation.
- (339) First, as regards the volume of data, it must be noted that, at the time of notification, Kustomer had around [Customer Information] customers worldwide. According to Meta (formerly Facebook)'s growth plans, this would increase to approximately

<sup>519</sup> Kustomer live demo dated 24 April 2019, available at: <https://kustomer.wistia.com/medias/aj050eenqj>, last accessed on 21 July 2021 (ID: 2801).

<sup>520</sup> Kustomer Timeline, Product Overview video, available at: <https://www.kustomer.com/demo-videos/>, last accessed on 21 July 2021.

<sup>521</sup> Kustomer live demo dated 24 April 2019, available at: <https://kustomer.wistia.com/medias/aj050eenqj>, last accessed on 21 July 2021.



[Business Plans] customers by 2025.<sup>522</sup> However, no information is available on the total number of customers with whom business customers of Kustomer have recorded interactions. For each customer of a business customer of Kustomer, there are many data points that Meta (formerly Facebook) could obtain as set out above, including both Customer Transaction Data and Other Event Data (as described above).

- (340) The Notifying Party submits that through the acquisition of Kustomer, Meta (formerly Facebook) would not get access to any new types of data that it could not access before the Transaction.<sup>523</sup> In particular, the Notifying Party states with regard to the custom object data that businesses may decide to upload into their Kustomer CRM software, that businesses are already able to share such data with Meta (formerly Facebook) for ads purposes through the various Meta (formerly Facebook) Business Tools available to them (e.g., SDKs, Facebook Pixel, Conversions API, Offline Conversions API, App Events API, etc.).<sup>524</sup>
- (341) The Commission considers that, while Meta (formerly Facebook) might already have access to similar types of data, it may not currently have a full overview of customer transactions (both before, during and after) on and off Meta (formerly Facebook)’s platforms. This is confirmed by one respondent to the market investigation, stating that getting access to data through the acquisition of Kustomer “*will help to close the loop on the customer funnel from Awareness – Conversion – Repurchase*”.<sup>525</sup>
- (342) Moreover, a presentation from the CEO of Kustomer states the following regarding the fact that joined data creates new ads opportunities: “[Business Plans]?”<sup>526</sup> The same presentation contains the following overview of data that might be available to respectively Meta (formerly Facebook) and Kustomer:

[Business Plans]

*Source: Form CO, Attachment E.*<sup>527</sup>

- (343) [Regulatory Submission]. Moreover, any customer interaction that takes place between a customer and a business on any B2C communication channel other than those owned by Meta (formerly Facebook) captured by Kustomer (during the Inquiry, Delivery and Support stages mentioned above) would also become available to Meta (formerly Facebook).
- (344) [Business Plans about Data Sharing], the Notifying Party submitted that it currently already has access to some of this data. For example, Meta (formerly Facebook) now also has a Shopify integration and businesses using Shopify can choose to share their Shopify data relating to “[Business Plans about Data Sharing]” with Meta (formerly Facebook).<sup>528</sup> Moreover, Meta (formerly Facebook) submitted that data relating to “[Business Plans about Data Sharing]” can be shared by businesses as Other Event Data through Meta (formerly Facebook)’s existing Meta (formerly Facebook) Business Tools, such as Facebook Pixel.<sup>529</sup>

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<sup>522</sup> Form CO, paragraph 3.2.10.

<sup>523</sup> Form CO, paragraph 6.122.

<sup>524</sup> Form CO, footnote 227.

<sup>525</sup> Reply to questionnaire 4 to business customers, question 66.1 (ID: 852).

<sup>526</sup> Form CO, Attachment E, [...].

<sup>527</sup> Form CO, Attachment E, [...].

<sup>528</sup> Reply to RFI 17, question 8(d).

<sup>529</sup> Reply to RFI 21, Table 12.1.

- (345) The Commission considers however that, while Meta (formerly Facebook) can receive in theory most of these types of the data mentioned through its Meta (formerly Facebook) Business Tools as Other Event Data, this does not mean that Meta (formerly Facebook) actually receives this data. In that regard, the Notifying Party [Regulatory Submission]<sup>530</sup> Moreover, the Commission cannot rule out that the content of messages (i.e., unstructured customer interaction data) from B2C communication channels other than those of Meta (formerly Facebook), which is not regularly shared with Facebook today, could be a potentially rich source of information.
- (346) The Notifying Party further submits that any accretive data signal that could be available to Meta (formerly Facebook) via Kustomer would be reliant on the agreement of the businesses making use of Kustomer.<sup>531</sup> This could have an impact on the volume of data that would become available to Meta (formerly Facebook) following the Transaction. More specifically, the Notifying Party submits that end-customer's consent is first and foremost governed by the terms of the relevant business with which that end-customer is transacting.<sup>532</sup> As regards data that is stored within Kustomer on business customer's behalf, the Notifying Party submits that the relevant consents are governed by the contracts and policies concerning Kustomer's use of that data.<sup>533</sup>
- (347) Internal documents show [Information from internal documents about ads data]<sup>534</sup> [Information from internal documents about ads data]. In this regard, the Notifying Party submits that Meta (formerly Facebook) [Information from internal documents about ads data]<sup>535</sup>
- (348) The results of the market investigation confirm that respondents do not consider that the need to obtain such an agreement would hinder Meta (formerly Facebook) in its ability to obtain a significant volume of data through its acquisition of Kustomer. All B2C communication channel providers and online ads service providers expressing an opinion indicate that Meta (formerly Facebook) could encourage businesses using Kustomer to share more data through its ownership of Kustomer.<sup>536</sup> Moreover, a majority of customers of Meta (formerly Facebook) and Kustomer that responded to the market investigation indicate that, following the Transaction, they would be willing as a customer of CRM software to share data with Meta (formerly Facebook) for online display advertising purposes.<sup>537</sup>
- (349) Similarly, all B2C communication channel providers and online ads service providers expressing an opinion consider that access to data through Kustomer would provide Meta (formerly Facebook) with an increment of data that materially improves its ability to personalize its online display advertising services for end

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<sup>530</sup> Reply to RFI 21, Table 12.1.

<sup>531</sup> Form CO, paragraph 6.122.

<sup>532</sup> Form CO, footnote 231.

<sup>533</sup> Meta (formerly Facebook)'s comments on the State of Play Meeting, 22 July 2021, paragraph 4.2.

<sup>534</sup> Form CO, Attachment E2344.

<sup>535</sup> Form CO, paragraph 6.122.

<sup>536</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 70.

<sup>537</sup> Replies to questionnaire 4 to business customers, question 64.

customers having had interaction with the businesses using Kustomer's CRM software.<sup>538</sup>

- (350) Taking into account all of the above the Commission considers that Meta (formerly Facebook) could obtain access to a significant volume of new types of valuable data or at least significant new volumes of existing types of valuable data through its acquisition of Kustomer.
- (351) As regards the value of the data Meta (formerly Facebook) would obtain, the Commission considers, and the Notifying Party does not dispute, that any Customer Transaction Data could be highly relevant for improving Meta (formerly Facebook)'s advertisement targeting capabilities as well as for getting better insight in conversions from advertising campaigns to actual sales (the return on investment). It appears that these data that Meta (formerly Facebook) might obtain are particularly valuable as regards the profiling and targeting relating to the end-customers interacting with the businesses that use Kustomer's CRM software. However, these data that Meta (formerly Facebook) might obtain are also valuable for modelling and profiling of users at large (i.e., extrapolating or 'optimising' data obtained for the profiling of users that are not interacting themselves with businesses that use Kustomer's CRM software). Finally, Other Event Data could potentially be used for very targeted, product-specific ads that might achieve high conversion ratios.
- (352) The value of the data as it relates to individual customers is [Business Plans]. It is stated that Meta (formerly Facebook) [Business Plans].<sup>539</sup>
- (353) In another internal document, [Business Plans] is discussed. [Business Plans].<sup>540</sup>
- (354) The results of the market investigation confirm the value of the data shared by business customers with a customer service and support CRM provider such as Kustomer. One responding CRM provider indicates that data stored on customer service and support CRM software is generally useful for online display advertising: *"[d]ata in a customer service CRM platform can be useful for online display advertising because it can reveal customer brand loyalty and sentiment, propensity to spend wealth, specific intent (e.g. item added to shopping cart), post-purchase experience (e.g. was item returned?), etc. This data would be valuable to online advertisers so they could place a more accurate value on an advertising impression."*<sup>541</sup>
- (355) Furthermore, a large majority of the respondents indicate that the access to this data is important or very important for Meta (formerly Facebook).<sup>542</sup> One respondent states that it *"it could substantially increase their targeting ability and be a game changer in differentiating their platform as an ads solution even further than it is now"*.<sup>543</sup> Another respondent adds that *"[b]y using Kustomer's CRM data, Facebook*

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<sup>538</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 68.

<sup>539</sup> Form CO, Attachment E, [...].

<sup>540</sup> Form CO, Attachment E14223, page 2.

<sup>541</sup> Reply to questionnaire 1 to CRM software providers, question 61.1 (ID: 762).

<sup>542</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 65; replies to questionnaire 4 to business customers, question 67.

<sup>543</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 65.1 (ID: 741).

*will be able to build “super-profiles” about its users, enabling Facebook to increase its already dominant market share in the online advertising market”.*<sup>544</sup>

- (356) Several respondents also refer to the impact of the rapidly evolving privacy landscape for the availability of customer transaction data. One respondent states in this regard that *“due to changes in the regulatory landscape and the shift towards differential treatment of third party cookies (e.g., by browsers), having access to this level of first party data is increasingly valuable and important for companies that provide targeted advertising”.*<sup>545</sup> Further, the ability of certain companies to block Meta (formerly Facebook)’s access to data through, for example, Apple’s new privacy policy relating to its mobile operating system iOS is also considered relevant by respondents. One respondent states: *“[i]t has a large impact, consumers need to opt int [sic] to be targeted and tracked with relevant metadata in advertising targeting. Opting out, through IOS, removes the ability to target users based on specific interests incurred within the mobile application.”*<sup>546</sup>
- (357) On this basis, the Commission considers that the value of Kustomer’s data may only increase over time in particular because Meta (formerly Facebook) would receive data directly from businesses without being dependent on third parties, such as CRM software competitors. After all, the Customer Transaction Data and Other Event Data that Meta (formerly Facebook) currently collects through the use of its Meta (formerly Facebook) Business Tools (including e.g., Facebook Pixel, Conversions API, Offline Conversions API, App Event API etc.)<sup>547</sup> might become less readily available due to more limited possibilities to track end-users outside Meta (formerly Facebook)’s own platforms, comparatively increasing the value of a direct source of data such as Kustomer.
- (358) In addition, the Commission notes that Kustomer itself generates data from Kustomer’s own proprietary webchat, i.e., anything an end-customer types into the webchat. Meta (formerly Facebook) would likely have access to this data following the Transaction, and could use it to target advertising to those end-customers or other end-customers more generally. The Parties have [Business Plans]. Kustomer states that [Business Plans].<sup>548</sup> [Business Plan<sup>2</sup>]. This data may therefore constitute a valuable addition for Meta (formerly Facebook).
- (359) Taking into account all of the above, the Commission considers that the data that Meta (formerly Facebook) could obtain through the acquisition of Kustomer is highly valuable to improve its online ads services.
- (360) Also as regards the variety of data, the Commission mentioned above that the data that Meta (formerly Facebook) could obtain through its acquisition of Kustomer would permit it to “close the loop”, by having access to data at all stages of a transaction (discovery, inquiry, purchase, delivery, support and retargeting/upsell). Further, the Transaction may allow Meta (formerly Facebook) to get access to data relating to businesses that might not (yet) be active on some or all of Meta (formerly Facebook)’s platforms, to data relating to customers of those businesses that might

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<sup>544</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 65.1 (ID: 886).

<sup>545</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 65.1 (ID: 873).

<sup>546</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 65.2 (ID: 723).

<sup>547</sup> Form CO, footnote 227.

<sup>548</sup> Parties’ reply to RFI 17, question 5.

not be active on (all of) Meta (formerly Facebook)'s platforms, or interactions between businesses and their customers that take place outside Meta (formerly Facebook)'s platforms. Finally, Meta (formerly Facebook) might also get access to the entire purchase and interaction history of a particular customer. The Commission therefore considers that the data that Meta (formerly Facebook) could obtain through the acquisition of Kustomer is highly varied.

- (361) Finally, as regards the velocity of data, the Commission notes that, by its nature, data that is stored in a business' CRM software is the most complete and the most recent (where it relates to direct interactions) data that can be collected. The Commission therefore considers that the data that Meta (formerly Facebook) could obtain through the acquisition of Kustomer is significant in terms of volume, value, variety and velocity.
- (362) On the basis of all of the above, the Commission considers that the additional data Meta (formerly Facebook) could obtain following the acquisition of Kustomer is highly relevant for improving Meta (formerly Facebook)'s targeting capabilities for the online display advertising services it provides. Additional data would therefore constitute a significant benefit from foreclosure.

### C. CTM ads

- (363) By engaging in a foreclosure strategy and steering businesses away from their current CRM provider to Kustomer, Meta (formerly Facebook) would expect [Business Plans].<sup>549</sup>
- (364) CTM ads are a format of advertising available to advertisers. CTM ads are generated when end-customers click on an ad and are taken to a WhatsApp, Messenger or Instagram messaging experience. The Parties state that the key driver of this incremental revenue is that Kustomer's business customers will be more likely to buy CTM ads where they are using a CRM tool that is optimised to work well with messaging channels (i.e., a business is more likely to buy CTM ads if that business is well-positioned to handle the resulting messages).<sup>550</sup>
- (365) Meta (formerly Facebook) expects to [Business Plans].<sup>551</sup> [Business Plans].
- (366) In this regard, Meta (formerly Facebook) has estimated that in [Year] it would earn on average USD [Revenue information] profit a year from each business customer that switches to Kustomer.<sup>552</sup> Meta (formerly Facebook) has estimated that Kustomer may be a feasible CRM software option for [Customer Information] businesses. This can be contrasted to Meta (formerly Facebook)'s projection of growing Kustomer's customer portfolio from [Customer Information] businesses today to [Customer Information].<sup>553</sup> If all the customers for which Kustomer may be a feasible solution were to switch to Kustomer as a result of the foreclosure strategy, this would imply a maximum possible gain of over USD [Revenue Information] a year from CTM ads alone as a result of such a foreclosure strategy. As noted above, while the actual gain

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<sup>549</sup> See, for example, Meta (formerly Facebook)'s internal document, Attachment E029 – [...]; see Parties' reply to RFI 1, question 33.

<sup>550</sup> Parties' reply to RFI 1 question 33.

<sup>551</sup> Form CO, Figure 3.4; Parties' reply to RFI 1 question 33.

<sup>552</sup> This figure assumes that the incremental ads revenue [Internal Assumptions and Ad Revenue Projections]. See Parties' reply to RFI 1, question 33. For the avoidance of doubt, this revenue [Internal Assumptions and Ad Revenue Projections], which is taken from Meta (formerly Facebook)'s internal document, Attachment E20128 – [...].

<sup>553</sup> Meta (formerly Facebook)'s internal document, Attachment, E029 – [...].

depends on the number of business customers who would switch to Kustomer as a result of the foreclosure strategy, it shows at least that there is a large pool of businesses out of which Meta (formerly Facebook) would potentially be able to gain new customers by engaging a foreclosure strategy. And, as outlined in Section 7.3.2.2.(b.ii), it seems likely that a significant proportion of the relevant market would switch to Kustomer following a foreclosure strategy. The Commission notes that Kustomer's own estimates for the number of potential business customers it could serve post-Transaction are far higher than those estimated by Meta (formerly Facebook), which would imply a higher maximum possible gain from foreclosure.<sup>554</sup>

- (367) CTM ad revenues are also growing. Meta (formerly Facebook) currently earns USD [Revenue Information] globally from CTM ads and in fact estimates that [Revenue Information] of its revenues related to B2C messaging will come from CTM ads.<sup>555</sup> By [Year], Meta (formerly Facebook) forecasts generating USD [Revenue Information] globally from CTM ads.<sup>556</sup> It is unclear however how reliable these forecasts are. Meta (formerly Facebook) separately provided an estimate that its [Year] CTM ad revenues would reach USD [Revenue Information], but when asked to provide detail on the basis for these forecasts, Meta (formerly Facebook) conceded that they “*are contingent on a range of assumptions that are subject to considerable uncertainty and hence there is significant uncertainty around the forecasts themselves.*”<sup>557</sup> A model from Meta (formerly Facebook), used to estimate the SaaS revenue to be gained as a result of the Transaction, assumes that the growth in business messaging will [Business Plans] year-on-year<sup>558</sup>, and, in relation to this estimate, the Parties confirmed that [Business Plans].<sup>559</sup> For illustration, an annual [Business Plans] growth corresponds to an almost [Business Plans] increase over [Year]. As such, one expects that this benefit from foreclosure will become more and more significant in the future.
- (368) In a similar regard, Meta (formerly Facebook) has indicated that only Twitter and Snapchat may currently offer CTM ads as part of their respective ads portfolios.<sup>560</sup> The benefits from CTM ads would therefore be almost unique to Meta (formerly Facebook). Business customers would have little to no alternative for the supply of CTM ads. As such, one expects that this benefit from foreclosure will remain significant in the future.
- (369) The Form CO and the Parties' response to various RFIs further supports the conclusion that there is a causal link between businesses switching to Kustomer and incremental CTM ad revenue for Meta (formerly Facebook), irrespective of the

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<sup>554</sup> Form CO, Attachment E0551. This document prepared by Kustomer includes strategies for Kustomer to win customers following its possible acquisition by Meta (formerly Facebook), and estimates Kustomer could potentially gain between [40,000-300,000] Torso customers post-Transaction, which is more than the critical number of businesses estimated by any version of the model submitted by the Parties. In the Parties' reply to RFI 10, Meta (formerly Facebook) stated that it does not consider Kustomer's growth projections as set out in Attachment E0551 to be a realistic or reliable benchmark against which to assess the extent to which it would be able to profitably acquire new customers post-Transaction (with or without foreclosure).

<sup>555</sup> Parties' reply to RFI 1, question 43.

<sup>556</sup> Parties' reply to RFI 1, question 31.

<sup>557</sup> Parties' reply to RFI 22, question 2.

<sup>558</sup> Form CO, Attachment E0686.

<sup>559</sup> Parties' reply to RFI 10, question 21.

<sup>560</sup> Parties' reply to RFI 6, question 15.

reason for or cause of such switching (i.e., whether as a result of foreclosure or otherwise).

- (370) In the Form CO, the Notifying Party notes that: [Regulatory Submission].<sup>561</sup>
- (371) In response to RFI 1, the Notifying Party notes that: “*to the extent Kustomer’s customers do choose to do these things as a result of the Transaction, that is because those choices benefit their business by providing a greater return on investment for CTM ad purchases and ultimately benefit consumers by providing them with more personalized ads*”.<sup>562</sup>
- (372) In response to RFI 6, the Notifying Party notes: “*CTM ads are generated when end-customers click on an ad and are taken to a WhatsApp, Messenger or Instagram messaging channels. The better businesses can manage messaging traffic and build consumer trust and engagement through those channels, the more they may decide to use messaging to capture queries that can be converted to sales following a B2C conversation - for example, through increased usage of CTM ads. Where a business is using CRM software that is optimised to work well with messaging channels they may have the capacity and resources to better manage the increased messaging volume that one would hope to receive as a result of a CTM ads campaign*”.<sup>563</sup> The Notifying Party notes further that: “*while most major CRM providers offer some degree of integration with messaging channels (e.g. providing the ability to read and respond to messages within the CRM software), the integration between messaging channels, other communication channels and businesses’ systems is often clunky*”<sup>564</sup>, which may indeed explain why the Notifying Party considers that switching to Kustomer (as a result of foreclosure) will result in increased CTM ad revenues.
- (373) In response to RFI 9, the Notifying Party notes that “*Facebook estimates the rate of CTM ad incrementality within a range of [Regulatory Submission]*”.<sup>565</sup>
- (374) In response to RFI 10, the Notifying Party notes that it forecasts receiving “*an uplift in CTM revenue. In particular, Facebook forecasts that it will generate [Revenue Information] through increased sales of CTM ads to businesses using Kustomer. [Business plans regarding CTM Revenue]*”.<sup>566</sup> The Notifying Party goes on to state that “*The vast majority of businesses use email, phone and SMS to communicate with customers. CRM software from more established providers like Salesforce, Oracle and SAP, as well as some CPaaS software, is built around these channels, ...[while]... Kustomer, on the other hand, is a messaging-first customer support CRM software by design and [Business plans regarding CTM Revenue]. The better businesses can manage messaging traffic and build consumer trust and engagement through those channels, the more they may decide to use messaging to capture queries that can be converted to sales following a B2C conversation - for example, through increased usage of CTM ads*”.<sup>567</sup> The Notifying Party goes on to conclude that “*This is not because those businesses [i.e., using established CRM software providers] would be restricted in any way from purchasing CTM ads but simply because they may be less equipped to handle inbound enquiries from a Facebook*

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<sup>561</sup> Form CO, footnote 239.

<sup>562</sup> Parties’ reply to RFI 1, question 36c.

<sup>563</sup> Parties’ reply to RFI 6, question 24.

<sup>564</sup> Parties’ reply to RFI 6, question 24.

<sup>565</sup> Parties’ reply to RFI 9, question 2.

<sup>566</sup> Parties’ reply to RFI 10, question 10.

<sup>567</sup> Parties’ reply to RFI 10, question 10.

*CTM ad campaign if they do not have a way of dealing with these at scale (e.g. through CRM, CPaaS or in-house technology)”*.<sup>568</sup>

- (375) On the basis of the above, the Commission considers that the benefits Meta (formerly Facebook) could gain from CTM ads by a foreclosure strategy are significant.

*D. Meta (formerly Facebook)’s ecosystem of products*

- (376) By engaging in a foreclosure strategy and steering businesses away from their current CRM provider to Kustomer, Meta (formerly Facebook) will also be able to gain by bringing these businesses into the Meta (formerly Facebook) “ecosystem”, i.e., Meta (formerly Facebook)’s suite of business and personal products (including Meta (formerly Facebook)’s ecommerce products, e.g., Marketplace and Shops, and Workplace). The Transaction would provide Meta (formerly Facebook) with another avenue through which it could bring businesses into the Meta (formerly Facebook) ecosystem and purchase its products, i.e., cross-selling. In this case, Meta (formerly Facebook) would make profits directly from business customers switching to Kustomer, not solely from services provided by Kustomer but also other services provided by Meta (formerly Facebook) within its ecosystem (e.g., Facebook Marketplace; Facebook Shops, Workplace; advertising services). Meta (formerly Facebook) therefore has an incentive to steer businesses to Kustomer, and thereby into the Meta (formerly Facebook) ecosystem. This applies equivalently to steering businesses to Kustomer through input foreclosure of competing CRM software providers. Further, Meta (formerly Facebook) would have an incentive to both bring new business customers into the Meta (formerly Facebook) ecosystem through Kustomer, as well as bring existing business customers further into the Meta (formerly Facebook) ecosystem through Kustomer, in order to encourage additional use of its ecosystem and in particular of its ecommerce products by those existing business customers.
- (377) Meta (formerly Facebook) offers two key ecommerce products in the EEA, Facebook Marketplace and Shops. Marketplace allows users to browse and search for items, and users can post listings for items they want to sell. Shops is a virtual storefront in which businesses can showcase their inventory, create collections to attract customers and operate a shared storefront across Facebook and Instagram. Meta (formerly Facebook) has indicated that the Transaction is part of a wider strategy (intended to create better experiences for users as they interact with businesses) that also includes innovations and initiatives with Shops.<sup>569</sup>
- (378) Meta (formerly Facebook)’s internal documents indicate that [Business Plans]<sup>570</sup> [Business Plans].
- (379) Similarly, it appears that a foreclosure strategy, steering business customers into Meta (formerly Facebook)’s ecosystem, would be consistent with Meta (formerly Facebook)’s public statements around its future business decisions. Indeed, Meta (formerly Facebook) makes links across its range of products when talking about “*the trajectory of the company over the long term*”, for example, Mark Zuckerberg, CEO of Meta (formerly Facebook), states that “*this modern commerce system is*

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<sup>568</sup> Parties’ reply to RFI 10, question 10.

<sup>569</sup> Parties’ reply to RFI 20, question 7.

<sup>570</sup> See, for example Meta (formerly Facebook)’s internal document, Attachment E0548 – [...]; Meta (formerly Facebook)’s internal document, Attachment E0419 – [...]; Meta (formerly Facebook)’s internal document, Attachment E0409 – [...]; Meta (formerly Facebook)’s internal document, Attachment E0936 – [...].



*going to bring together a number of areas where we either already have strong offerings – like in ads, community tools, and messaging -- with areas like Shops, business messaging, and payments that we're focused on ramping up now”.*<sup>571</sup>

- (380) In this regard, and in the context of Meta (formerly Facebook)’s ability and incentive to grow Kustomer, Zendesk (a close competitor of Kustomer) draws together and mentions the various business activities of Meta (formerly Facebook): *“the [T]ransaction will have a big impact on ecommerce in general and the open web. It will result in a company that has an overview over every step of the buying process/customer journey, which is a big value proposition to companies seeking to advertise on Facebook. There is a real prospect for Facebook to use its ads business to subsidize its CRM offering. Possibly this will result in a substantially below market rate, and Kustomer being positioned as part of their advertising solution. This could especially be destructive in B2C ecommerce.”*<sup>572</sup>
- (381) The Commission notes that the merged entity may have additional longer-term gains from steering business customers to Kustomer. In particular, there may be longer-term benefits from increasing Meta (formerly Facebook)’s ability to defend its position in the highly valuable B2C messaging market in the future (if the foreclosure strategy enables Meta (formerly Facebook) to achieve a significant market power on the downstream market). However, these longer-term benefits are difficult to quantify, and have therefore been omitted from the Commission’s analysis (since they are not necessary to reach the Commission’s conclusions).
- (382) In light of the above, the Commission considers that steering businesses into the Meta (formerly Facebook) ecosystem, to then cross-sell them Meta (formerly Facebook)’s other products, constitutes a significant benefit in the long-term from foreclosure. The Commission notes that this gain is not quantifiable, and is therefore (conservatively) not included in the Commission’s quantitative analysis.
- (b.ii) Meta (formerly Facebook) can limit losses from foreclosure
- (383) The Commission considers that Meta (formerly Facebook) has the ability to limit its losses from an input foreclosure strategy. As outlined in Section 7.3.2.2.(a.iii) above, Meta (formerly Facebook) exercises a high level of control over the API access to its channels. And, as outlined in Section 7.3.2.2.(a.i) above, Meta (formerly Facebook)’s channels are an important input for not only CRM software providers but also their business customers.<sup>573</sup> As such, the Commission considers that Meta (formerly Facebook) will have the ability to limit its losses from foreclosure by targeting foreclosure to Kustomer’s close competitors (including potential entrants who would become close competitors). Doing so would maximize the number of business customers switching to Kustomer (downstream) whilst minimizing the number of business customers switching away from Meta (formerly Facebook) (upstream). Sub-section A proceeds by first outlining the potential losses to the merged entity following foreclosure. Sub-section B then proceed by demonstrating that the available evidence suggests a significant proportion of the business customers of

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<sup>571</sup> Transcript of Meta (formerly Facebook)’s First Quarter 2021 Results Conference Call, April 28th, 2021; available at: [https://s21.q4cdn.com/399680738/files/doc\\_financials/2021/Q1/FB-Q1-2021-Earnings-Call-Transcript.pdf](https://s21.q4cdn.com/399680738/files/doc_financials/2021/Q1/FB-Q1-2021-Earnings-Call-Transcript.pdf), last accessed on 15 December 2021 (ID: 2815).

<sup>572</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 12 (ID: 2085).

<sup>573</sup> Zendesk notes that *“Facebook’s messaging channels are becoming increasingly important, in particular, for consumer brands”* and *“a significant portion of the market strongly values access to Facebook’s B2C messaging channels”* (Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 6 (ID: 2085)).

Kustomer's close competitors would switch to Kustomer, whilst the business customers of less close rivals would remain unaffected.<sup>574</sup> Second, the Commission considers that there are potentially further aggravating factors that would allow Meta (formerly Facebook) to further encourage switching to Kustomer and thereby increase the incentive for Meta (formerly Facebook) to foreclose. These factors are discussed in the Sub-section C below.

#### A. Losses from foreclosure

- (384) By engaging in a foreclosure strategy, Meta (formerly Facebook) would potentially lose (i) revenues from providing API access to its messaging channels or from usage of the API (for those APIs that Meta (formerly Facebook) offers against payment today or in the future); and (ii) messaging-related revenues (i.e., CTM ads and paid messaging services associated with businesses who stop using Meta (formerly Facebook)'s messaging channels as a result of the foreclosure).
- (385) As stated by the Parties, there may also be damage to Meta (formerly Facebook)'s reputation following a foreclosure strategy, which may in turn lead also to losses in messaging-related revenues (and is therefore accounted for in the Commission's assessment of messaging-related losses below).<sup>575</sup> However, regarding wider-reaching reputational damage outside of losses in messaging-related revenues, evidence submitted by third parties indicates that any further losses outside messaging-related revenues would likely be borne by third parties and not Meta (formerly Facebook), because the reputational harm is more likely to fall on the foreclosed CRM software provider and business customers than on Meta (formerly Facebook) further upstream. Salesforce notes that “[input foreclosure] could, in principle, have a negative impact on both business users and third-party CRM providers. First, [input foreclosure] could have a reputational impact on business users since end customers might blame them for a bad customer experience, not knowing it was because Facebook had altered API features. Second, it could have a reputational impact on third-party CRM providers. [...]. Were such a strategy to be pursued, it could in principle result in Salesforce's customers switching away to Kustomer.”<sup>576</sup>
- (386) Regarding losses of revenues from providing API access to its messaging channels, Meta (formerly Facebook) [Revenue Information], specifically it received USD [Revenue Information] in revenue in 2020 from WABAPI, which accounts for less than [Revenue Information] of Meta (formerly Facebook)'s revenue worldwide. Meta (formerly Facebook) has stated that its forecast WABAPI revenues will reach USD [Revenue Information] by 2022 and that its gross margin on WABAPI is [Business Plans], which implies a maximum loss of USD [Business Plans].<sup>577</sup> However, Meta (formerly Facebook) earns this profit from many businesses, around [Customer Information]. And so, the average loss per business customer switching

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<sup>574</sup> Business customers who may switch to these less close rivals from Kustomer's close competitors would also have their access to Meta (formerly Facebook)'s B2C messaging unaffected, and so would (all else being equal) not alter their use of Meta (formerly Facebook)'s B2C messaging channels.

<sup>575</sup> As such, for a total foreclosure strategy, any losses associated with a damaged reputation will be covered by the losses in messaging-related revenues. This is in line with the Parties' approach taken in their economic submission, which does not include any incremental loss associated with a damaged reputation (beyond any losses in messaging-related revenues).

<sup>576</sup> Agreed minutes of the call of 28 September 2021 with Salesforce, paragraph 4 (ID: 2151).

<sup>577</sup> Parties' reply to RFI 9, Annex 9.002.

away from Meta (formerly Facebook) would only amount to USD [Revenue Information].<sup>578</sup>

- (387) Regarding losses of messaging-related revenues, Meta (formerly Facebook) indicated that it earned USD [Revenue Information] in revenue globally from CTM ads in 2020,<sup>579</sup> but clarified that [Revenue Information] of this was generated from “tail” businesses [...], i.e., which typically do not need, and would not pay for a CRM tool (and would therefore likely not be the targets of foreclosure).<sup>580</sup> Therefore, the remaining [Revenue Information] or USD [Revenue Information] in 2020 CTM ad revenues were earned through non-“tail” businesses (i.e., which could be potential target customers of Kustomer). The remaining analysis conservatively assumes that all non-“tail” business customers generate CTM ad revenues via a CRM software provider,<sup>581</sup> and therefore that all CTM ad revenue associated with these business customers could potentially be lost as a result of foreclosure. However, the Commission notes that the actual losses are therefore likely below those estimated in the following analysis. By 2022, Meta (formerly Facebook) forecasts generating USD [Revenue Information] globally from CTM ads.<sup>582</sup> Assuming the proportion of “tail” businesses will stay roughly the same between 2022 and 2020, USD [Revenue Information] of these CTM ad revenues will be generated by business customers that would use CRM software. Meta (formerly Facebook)’s internal documents indicate the gross margin on its ads services is [Business Plans], which implies a maximum loss of USD [Revenue Information].<sup>583</sup> Meta (formerly Facebook) has indicated it earns this profit from over [Customer Information] businesses,<sup>584</sup> and so the average loss per business customer switching away from Meta (formerly Facebook) would only amount to USD [Revenue Information].<sup>585</sup> The Commission notes that the

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<sup>578</sup> Parties’ reply to RFI 9, Annex 9.002.

<sup>579</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, Figure 2.2.

<sup>580</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, paragraphs 1.18 and 2.18. The Commission notes that a further [...] % was generated from “head” and “hair” businesses [Business Plans], for which Kustomer’s “*torso-focussed [i.e., SMB and mid-sized business focused] product is not suitable*”. The following figures and calculations conservatively include these business customers.

<sup>581</sup> As explained in paragraph 391 below, [Confidential Meta information on CTM ad spending with Meta by businesses using CRM software].

<sup>582</sup> Parties’ reply to RFI 22, question 2. When asked to provide detail on the basis for these forecasts, Meta (formerly Facebook) conceded that they “*there is significant uncertainty around the forecasts themselves.*”

<sup>583</sup> Parties’ reply to RFI 9, Annex 9.002.

<sup>584</sup> Parties’ reply to RFI 23, question 2. These calculations are based on the best and most granular data that Meta (formerly Facebook) was able to provide. While the average upstream loss was calculated across a larger sample of businesses than the corresponding calculation of average downstream gains, there is no indication that the estimates would be biased in any direction as a result. In particular, the Commission has seen no evidence to suggest that the average CTM ad spend of the approximately [Smaller Target Customer Group] business customers most addressable by Kustomer (which were the sample size used to calculate downstream losses) is significantly higher than the average CTM ad spend of the approximately [Larger Target Customer Group] business customers identified as “Torso advertisers” (which was the sample size used to calculate upstream losses, and which most likely includes the [Smaller Target Customer Group] business customers most addressable by Kustomer).

<sup>585</sup> Parties’ reply to RFI 9, Annex 9.002. The Commission notes that these calculations imply a significantly higher downstream gain from *incremental* CTM ad spend compared to the downstream loss of *baseline* CTM ad spend. However, first, the Commission notes that these figures were calculated using the Parties’ own data. Second, whilst the figures imply a [...] increase in CTM ad spend (post-switching to Kustomer), in absolute terms the increase in CTM ad spend is only approximately USD [...] (i.e., less than the amount the same business would typically spend on CRM software, i.e., approximately USD [...]). Third, the Parties’ own calculations imply a roughly [...] increase in CTM ad spend (post-switching to Kustomer). See Parties’ reply to RFI 9, Annex 9.002, Q26, Scenario 1 (also

Parties' analysis attributes all the revenues earned from these [Customer Information] businesses to the [Customer Information] business customers most addressable by Kustomer, which thereby drastically overstates the average loss per business customer switching away from Meta (formerly Facebook).<sup>586</sup> This single extreme assumption drives in large part the Parties' conclusion that foreclosure would not be profitable for the merged entity.

- (388) As outlined in the Parties' economic submission<sup>587</sup>, Meta (formerly Facebook)'s losses from foreclosure are limited to those business customers that switch away from Meta (formerly Facebook) (or use its channels less, and including switching away to potential entrants), i.e., those business customers that do not switch away from the foreclosed CRM software competitors to Kustomer (or CRM software rivals that are not foreclosed).
- (389) In this context, the Commission notes that it would not require a high degree of switching for losses from foreclosure to be outweighed by the gains, i.e., for foreclosure to be profitable. Even conservatively accounting for only the quantifiable gains and losses (which excludes some of the significant gains), the merged entity gains substantially more per business customer switching to Kustomer than it would lose per business customer switching away from Meta (formerly Facebook)'s B2C channels, USD [Revenue Information] and USD [Revenue Information] respectively.<sup>588589</sup> This implies that, for foreclosure to be unprofitable (i.e., the losses to outweigh the gains), for each business customer switching to Kustomer there would need to be more than [40-50] business customers switching away from Meta (formerly Facebook)'s B2C channels, i.e., a [40-50]:1 critical switching ratio. In other words, if more than [0-5] of business customers of foreclosed CRM software providers switch to Kustomer, foreclosure would be profitable. This figure (i.e., the critical switching percentage for foreclosure to be profitable) would be even lower if

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assuming that incremental ads revenue will be split between additional data and CTM ad revenues consistently over time).

<sup>586</sup> The Parties assume the entire CTM ad revenue from [Business Plans] businesses come from [...] business (which are most likely to consider Kustomer), but provide no evidence as to why the revenue is distributed in such an extreme way. See Form CO, Annex 13.17, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects, footnote 72. LoF Response, paragraph 3.7, argues (with no sources or additional evidence) that the [...] businesses include smaller businesses that may have a smaller CTM ad spend, which would skew the estimate for the average CTM ad spend for the [...] businesses (which are most likely to consider Kustomer) downwards. However, the Parties' analysis takes this to the extreme by assuming that less than [0-5]% of businesses included in this figure earn [90-100]% of the revenue, i.e., that [90-100]% of these "Torso" businesses have no CTM ad spend. In contrast, the same data indicates that the average CTM ad spend of "tail" businesses (who would have a smaller CTM ad spend than the smaller businesses included in the "Torso" segment) is USD [...].

<sup>587</sup> Form CO, Annex 13.7, Acquisition by Facebook, Inc. of Kustomer, Inc. Analysis of Vertical Effects, pages 21-24.

<sup>588</sup> Parties' reply to RFI 9, question 26. This also includes USD [...] profit which Meta (formerly Facebook) estimates it would on average earn from incremental WABAPI revenues from each business customer that switches to Kustomer.

<sup>589</sup> The Notifying Party implicitly argues in the SO Response, paragraph 4.8(B)(ii)(d), that the CTM ad gain for every new business customer of Kustomer should be roughly equal to the CTM ad loss for every business customer lost by Meta (formerly Facebook) that was using a third party CRM software provider. However, this is misleading. The Commission notes that the CTM ad losses are incurred from business customers *not* using Kustomer but a third party CRM software provider; whereas the CTM ad gains are from business customers using Kustomer. This is consistent with the Transaction rationale that business customers using Kustomer (will) spend more on CTM ads than Meta (formerly Facebook)'s average business customer or a business customer using a third party CRM software provider. As such, one would not expect the CTM ad gain to be roughly similar to the CTM ad loss.

one were to include the unquantifiable gains from foreclosure. In this regard, the Commission considers that the evidence on switching in relation to foreclosure outlined in the following sub-Section is sufficient to demonstrate that losses from foreclosure would be limited relative to the gains.

- (390) The Commission received further evidence from the Parties that corroborates the magnitude of the critical switching ratio. In particular, in the reply to RFI 23, the Parties provided the CTM ad spend that can be linked to business customers using a CRM to connect to Meta (formerly Facebook)’s channels. These data seek to more directly estimate the CTM ad revenues attributed to the approximately [Customer Information] business customers most addressable by Kustomer. And, using these alternate figures results in a critical switching ratio of [30-40]:1, which broadly corroborates in terms of magnitude the critical switching ratio calculated in paragraphs 387-389 above. These data indicate [Revenue Information], which suggests that these revenues would not be lost as a result of foreclosure.
- (391) In the reply to RFI 23, the Parties indicated that the “*CTM revenues in 2020 that can be linked to businesses using a CRM to connect to the Messenger API*” was only USD [Revenue Information].<sup>590</sup> The Parties also conceded that Meta (formerly Facebook)’s Messenger channel accounted for [Revenue Information] of its total CTM ad revenues.<sup>591</sup> Therefore, assuming that the proportion of CTM ads linked to a CRM is the same for Instagram and WhatsApp as it is for Messenger, the CTM revenues in 2020 that can be linked to businesses using a CRM to connect to Meta (formerly Facebook)’s APIs across all of its channels would be approximately USD [Revenue Information]. The Commission then assumes (conservatively) that all of these CTM revenues were generated from the [Customer Information] businesses most addressable by Kustomer,<sup>592</sup> which implies that CTM revenues in 2020 per business that may consider Kustomer an appropriate CRM is USD [Revenue Information]. Assuming (conservatively) that these CTM revenues per business in 2020 will scale in line with Meta (formerly Facebook)’s forecast for its total CTM revenues in 2022, CTM revenues in 2022 per business that may consider Kustomer an appropriate CRM is USD [Revenue Information].<sup>593</sup> As such, following the calculations made in paragraph 389 above, the merged entity still gains substantially more per business customer switching to Kustomer than it would lose per business customer using a third party CRM and switching away from Meta (formerly Facebook)’s B2C channels, USD [Revenue Information] and USD [Revenue Information] respectively.<sup>594</sup> This is mainly driven by [Revenue Information].<sup>595</sup> This implies that, for foreclosure to be unprofitable, for each business customer

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<sup>590</sup> Parties’ reply to RFI 23, question 1, Table 1.

<sup>591</sup> Parties’ reply to RFI 22, question 1c, Table 2.

<sup>592</sup> This is a conservative assumption because the Parties indicate these revenues were earned from over [...] businesses. In this regard, it is not necessarily unconservative to use this figure to calculate the average CTM ad loss *per business*, even if the figure does not include all of Meta’s CTM revenues linked to a CRM. It would only be unconservative to use this figure if the more than [...] businesses captured by this figure on average had a smaller (by a factor of [...]) CTM ad spend than those [...] businesses most addressable by Kustomer. See LoF Response, paragraph 3.7(D).

<sup>593</sup> Parties’ reply to RFI 9, Annex RFI 9.002. The Parties state that Meta (formerly Facebook)’s revenues from CTM ads was USD [Revenue Information] in 2020 and will be USD [Revenue Information] in 2022.

<sup>594</sup> Note that the loss per business customer includes the USD [Revenue Information] and USD [Revenue Information] losses per business with respect to messaging-related revenues and API access/usage revenues respectively.

<sup>595</sup> See paragraphs 366, and 387-389 above.

switching to Kustomer there would need to be more than [30-40] business customers switching away from Meta (formerly Facebook)'s B2C channels, i.e., a critical switching ratio of [30-40]:1. This figure calculated with alternative data is largely in line in terms of magnitude with the critical switching ratio calculated in paragraphs 387-389 above.

- (392) Further, Meta (formerly Facebook)'s internal documents similarly indicate that [Description of expected uptake of and spending on CTM ads].<sup>596</sup> A Meta (formerly Facebook) internal document estimates that [Description of expected uptake of and spending on CTM ads].<sup>597</sup> A further Meta (formerly Facebook) internal document considers [Description of expected uptake of and spending on CTM ads].<sup>598</sup> Another Meta (formerly Facebook) internal document suggests that [Description of expected uptake of and spending on CTM ads].<sup>599</sup> The following Meta (formerly Facebook) internal document suggests [Description of expected uptake of and spending on CTM ads].<sup>600</sup> [Description of expected uptake of and spending on CTM ads].<sup>601</sup> The following Meta (formerly Facebook) internal document also shows that internally Meta (formerly Facebook) [Description of expected uptake of and spending on CTM ads]<sup>602</sup> [Description of expected uptake of and spending on CTM ads].

B. Switching is likely to be sufficiently significant to limit losses

- (393) In general, business customers are unlikely to switch away from using Meta (formerly Facebook)'s channels for the following reasons. As laid out in Section 7.3.2.2.(a.ii), Meta (formerly Facebook) holds market power on the upstream market, access to its channels is an important input for the downstream market, and CRM software providers and their customers do not view other B2C communication channels as substitutable for Meta (formerly Facebook)'s channels. Indeed, Meta (formerly Facebook)'s channels are often seen as a requirement, because of the omnichannel approach to B2C communications and the high penetration rate of Meta (formerly Facebook)'s channels among end-consumers.<sup>603</sup> Further, the trend of increased use of B2C messaging will only aggravate these factors. Zendesk notes that “a significant portion of the market strongly values access to Facebook’s B2C messaging channels.” and that “Facebook’s messaging channels are becoming increasingly important, in particular, for consumer brands.”<sup>604</sup>
- (394) In response to the Commission’s market investigation, a majority of CRM software providers, a strong majority of CPaaS providers and just under half of business customers that had a view indicated that business customers would likely or very likely switch to another CRM software or CPaaS provider that had access (or better access) to Meta (formerly Facebook)'s messaging channels, if (API) access to those

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<sup>596</sup> By contrast, Meta (formerly Facebook) expects business customers of Kustomer to increase their CTM ad spend post-Transaction. See paragraphs 387-389 above.

<sup>597</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>598</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>599</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>600</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>601</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>602</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>603</sup> Parties’ reply to RFI 6, question 22.

<sup>604</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 6 (ID: 2085).

channels were restricted or degraded from their current CRM software or CPaaS provider.<sup>605</sup>

- (395) Similarly, all CRM software providers and half of business customers that had a view indicated that business customers are likely or very likely to consider switching to Kustomer, if Kustomer’s integrations with Meta (formerly Facebook)’s messaging channels were significantly superior (e.g., in terms of functionality) to the integrations available to rival customer service and support CRM tools.<sup>606</sup>
- (396) The Notifying Party argues that businesses switch CRM provider infrequently as it involves significant time and costs.<sup>607</sup> Even if this may be more so the case for large ‘enterprise’ businesses that may require a high degree of customisation in their CRM tool, this is not necessarily as true of SMBs (and even to an even lesser extent for businesses not currently using a CRM tool). In response to the Commission’s market investigation, those businesses that indicated that they tend to switch customer service and support provider infrequently were all large businesses with more than [Regulatory Submission] employees, while those that indicated they switch relatively often were predominantly SMBs ([Regulatory Submission] employees), in addition to certain companies with more than [Regulatory Submission] employees.<sup>608</sup> That switching CRM provider is not unduly costly or time consuming for SMBs was also confirmed by Crisp, a customer service and support CRM software provider and close competitor of Kustomer, which stated that “*switching would be straightforward since most CRM software tools offered to SMBs and mid-sized businesses are off-the-shelf/‘plug-and-play’ (e.g. the solutions offered by Hubspot, Crisp, etc.), and require very little customisation*”.<sup>609</sup> Twilio, a major CPaaS provider indicated that “*it considers that Kustomer’s product is more an “off the shelf product” [i.e., one that did not involve significant customisation]*.”<sup>610</sup> which suggests Kustomer’s tool is one that businesses, in particular SMBs and businesses not currently using a CRM tool, could switch to with relative ease. This point was implicitly confirmed by the Notifying Party in that it accepts that “[Regulatory Submission]”.<sup>611</sup>
- (397) Indeed, an internal document from Meta (formerly Facebook) states (in the context of the Transaction) that “[Business Plans]”.<sup>612</sup>
- (398) Further evidence of ease of switching can be found in an email sent by [...], to a potential customer of Kustomer: “[Business Plans].”<sup>613</sup> Ease of switching is also evidenced by the various testimonials from small businesses (i.e., with a turnover of less than \$50 million) on Gartner's website<sup>614</sup>, which often mention a deployment period of less than 3 months.<sup>615</sup> Further evidence of ease of switching can be found

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<sup>605</sup> Replies to questionnaire 1 to CRM software providers, question 54; replies to questionnaire 2 to CPaaS providers, question 42; replies to questionnaire 4 to business customers, question 63.

<sup>606</sup> Replies to questionnaire 5 to business customers, question 14; replies to questionnaire 7 to CRM software providers, question 43.

<sup>607</sup> SO Response, paragraph 4.14.

<sup>608</sup> Replies to questionnaire 5 to business customers, questions 1.1 and 10.

<sup>609</sup> Agreed minutes of the call of 15 September 2021 with Crisp, paragraph 8 (ID: 2132).

<sup>610</sup> Agreed minutes of the call of 14 June 2021 with Twilio, paragraph 13 (ID: 2029).

<sup>611</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, paragraphs 1.18 and 2.18.

<sup>612</sup> Meta (formerly Facebook)’s internal document, [...].

<sup>613</sup> Kustomer’s internal document, [...].

<sup>614</sup> See: <https://www.gartner.com/reviews/market/crm-customer-engagement-center>, last accessed on 29 November 2021.

<sup>615</sup> For example: <https://www.gartner.com/reviews/market/crm-customer-engagementcenter/vendor/zendesk/product/zendesk-suite/review/view/1348935>, last accessed on 29

in the case of prior multihoming between two CRM providers, for example in the situation where one offers a freemium tier. For instance, one start-up commented on Gartner's website that it had switched from Zendesk to Zoho after multihoming by using the Zoho free/freemium tier prior to ceasing its use of Zendesk (i.e., which would allow for training of agents on using the Zoho CRM tool and integrating Zoho with the companies own IT infrastructure while the Zendesk CRM tool was still in place), after which the business upgraded to the Zoho paid version: “*Our company has been using Zendesk for the last three years ... Three years in though we kept bumping up against the limitations of Zendesk put in place for our subscription (Teams) but could not justify the high price (almost double the cost) to upgrade. We had already started using CRM (migrated from Salesforce) and Sign (migrated from Docusign) by Zoho... and found we could purchase the top plan for Zoho Desk for less than we were paying Zendesk*”.<sup>616</sup>

- (399) In its SO Response, the Notifying Party argues that businesses would be constrained from switching away from a chosen CRM provider due to the integrations and features other than OTT B2C messaging channels.<sup>617</sup> However, the statistic that “[Regulatory Submission]”<sup>618</sup> rather suggests that having such a wide variety of integrations (excluding OTT B2C messaging channels and other B2C communication channels, which by definition are needed for communications between customer service agents and end customers) are likely to not constitute a particularly important factor for a business customer’s choice of customer service and support CRM software provider in view [Regulatory Submission].<sup>619</sup> Moreover, as made clear by Kustomer during the technical sessions in the week of 20 September 2021, Kustomer (and competing CRM software providers) [Regulatory Submission], which against suggests that provided such an integration can be done upon request, e.g., via a publicly accessible API, not having a particular integration will not necessarily deter or prevent a business from switching.
- (400) Therefore (and with specific reference to the market questionnaire evidence in paragraphs 394, 395 and 396 above), it appears that in general a significant proportion of business customers, and in particular SMBs (as well as businesses not currently using a CRM tool), are likely to switch to Kustomer following foreclosure, and therefore unlikely to switch away from Meta (formerly Facebook) following foreclosure. Losses would therefore be limited.

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November 2021 (ID: 2458); <https://www.gartner.com/reviews/market/crm-customer-engagementcenter/vendor/zendesk/product/zendesk-suite/review/view/1309433>, last accessed on 29 November 2021 (ID: 2456); <https://www.gartner.com/reviews/market/crm-customer-engagementcenter/vendor/zendesk/product/zendesk-suite/review/view/1299728>, last accessed on 29 November 2021 (ID: 2457); <https://www.gartner.com/reviews/market/crm-customer-engagementcenter/vendor/freshworks/product/freshdesk-omnichannel/review/view/1279519>, last accessed on 29 November 2021 (ID: 2464).

<sup>616</sup> <https://www.gartner.com/reviews/market/crm-customer-engagement-center/vendor/zoho/product/zohodesk/review/view/3710576>, last accessed on 29 November 2021 (ID: 2459).

<sup>617</sup> SO Response, paragraph 16.

<sup>618</sup> SO Response, paragraph 4.21. In SO Response, Annex 3 paragraph 2.99 states that “*Zendesk has 1,314 integrations compared to only 61 for Kustomer. This makes Zendesk businesses particularly unlikely to switch away from Zendesk, as a substantial proportion of Zendesk’s business customers are likely to have integration needs which are unmet by many of the potential alternative CSCRM providers (and in particular, which are unmet by Kustomer)*.”

<sup>619</sup> See, e.g., Form CO, paragraph 6.67 Table 6.13. Separately, at Form CO, paragraph 9.16, the Notifying Party indicated that following the Transaction [Facebook internal strategy in relation to growth of Kustomer’s customer base].



- (401) Moreover, Meta (formerly Facebook) would have the ability to further limit its losses from foreclosure by targeting foreclosure at Kustomer’s close competitors, who themselves are more focussed on SMBs. As outlined in Section 7.3.2.2.(a) above, Meta (formerly Facebook) exercises a significant degree of control over the API access to its channels, which in turn would provide Meta (formerly Facebook) with the ability to target foreclosure at not only specific API access-seekers but also specific business customers of them. Meta (formerly Facebook)’s control over its API access would also allow it to act with precision with regard to the avenues through which it could restrict or degrade access. Meta (formerly Facebook) would therefore have the incentive to target foreclosure at Kustomer’s close competitors (and potential entrants who would become close competitors). This would, by definition, increase the likelihood that business customers would switch towards Kustomer (downstream), and decrease the likelihood that business customers would switch away from Meta (formerly Facebook) (upstream). Meta (formerly Facebook) would thereby limit its losses from foreclosure.
- (402) For example, as outlined in Section 7.3.2.2.(a), Meta (formerly Facebook) has the ability to target foreclosure at specific businesses of its strategic partners, e.g., business customers of Kustomer’s close competitor, Zendesk. Therefore, at the extreme, Meta (formerly Facebook) could target foreclosure at specific business customers that were most likely to switch to Kustomer. In such a case, Meta (formerly Facebook) would make very little losses.
- (403) Kustomer is a relatively small customer service and support CRM software provider targeting mainly SMBs (as stated by the Parties themselves<sup>620</sup>). The following evidence suggests that Kustomer’s close competitors are similarly sized customer service and support CRM software providers also focussing on the same types of businesses, SMBs. These include but are not limited to Zendesk, Intercom, Freshworks, Gorgias, Gladly and Crisp.
- (404) First, while the question whether there is a separate market for the supply of customer service and support CRM software or whether it is part of the overall market for the supply of CRM software is left open, Section 6.1.1.3 indicates that customer service and support CRM software providers are closer competitors than CRM software providers offering other functionalities. Similarly, while the question whether the market for the supply of customer service and support CRM software (or the broader market for CRM software overall) should be further segmented based on business customer size is left open, Section 6.1.1.3 indicates that CRM software providers targeting similar business customer sizes are closer competitors than those targeting different business sizes.
- (405) Second, this view of Kustomer’s close competitors is shared by the smaller customer service CRM software providers that tend to target SMBs. Zendesk (a smaller customer service CRM provider) considers that Kustomer is a “*direct and significant competitor of Zendesk. Both Kustomer and Zendesk target broadly the same customers, with Zendesk serving a wider range of customers and Kustomer focusing more on the larger customers within that range. Zendesk has lost customers to Kustomer over the years*”.<sup>621</sup> Crisp (a very small customer service CRM provider)

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<sup>620</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, paragraphs 1.18 and 2.18.  
<sup>621</sup> Agreed minutes of the call of 18 May 2021 with Zendesk, paragraph 5 (ID: 2090).

states that “it expects Facebook will compete, via Kustomer, with both the Crisp freemium and paid solutions”.<sup>622</sup>

- (406) Third, this view of Kustomer’s close competitors is shared by the larger CRM software providers such as SAP, Salesforce, Microsoft and Oracle. SAP states that “SAP does not consider Kustomer as a close competitor, as they are only competitors in the sense that they are both active in the customer service segment of CRM software, but their respective offerings are rather differentiated, and have very different customer bases.”<sup>623</sup> SAP also confirmed that “we don’t see Kustomer as a competitor” in their response to the Phase I market questionnaire.<sup>624</sup> Salesforce considers that it “serves all size of companies” while “Kustomer generally serves only smaller businesses”.<sup>625</sup> In addition, Salesforce notes that “as businesses grow they will tend to look for more sophisticated CRM tools”.<sup>626</sup> Similarly, Microsoft indicated that while it has customers of different sizes it “primarily targets larger business customers”<sup>627</sup> and it appears from public sources that the same is true of Oracle’s CRM offering.<sup>628</sup>
- (407) Fourth, in the absence of diversion ratios from competitors, the Commission has analysed Kustomer’s win/loss data, specifically the share of wins from competitors.<sup>629</sup> Kustomer’s win/loss data indicates that in absolute terms the majority of Kustomer’s wins from competitors came from the close competitors of Kustomer listed above (i.e., Zendesk, Intercom, Freshworks, Gorgias, Gladly), over [Win-Loss Data].<sup>630</sup> [Win-Loss Data].
- (408) For example, [Win-Loss Data].<sup>631</sup> This example demonstrates that the switching rates of business customers of Kustomer’s close competitors are magnitudes higher than those of other CRM software providers. Indeed, similar observations could be made for the competitors that account for Kustomer’s third, fourth, and sixth most wins, [Win-Loss Data]; all of which are closer competitors to Kustomer than Salesforce. Similar conclusions can be drawn from Kustomer’s loss data (i.e., the share of losses to competitors); although the Commission notes that, in the context of foreclosure, Kustomer’s win data is more relevant since one is looking at switching from competitors to Kustomer.
- (409) In light of the above, the Commission considers that the close competitors of Kustomer are similarly sized customer service and support CRM software providers also focussing on the same types of businesses, SMBs. In particular, the example in the paragraph above (as well as the evidence on closeness of competition) demonstrates that business customers of Kustomer’s close competitors are more likely to switch to Kustomer than business customers of Salesforce, i.e., switching

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<sup>622</sup> Agreed minutes of the call of 15 September 2021 with Crisp, paragraph 6 (ID: 2132).

<sup>623</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 7 (ID: 2008).

<sup>624</sup> Reply to questionnaire 1 to CRM software providers, question 43.1 (ID: 800).

<sup>625</sup> Agreed minutes of the call of 19 May 2021 with Salesforce, paragraphs 3 and 4 (ID: 2005).

<sup>626</sup> Agreed minutes of the call of 19 May 2021 with Salesforce, paragraph 9 (ID: 2005).

<sup>627</sup> Reply to questionnaire 1 to CRM software providers, question 7.1 (ID: 726).

<sup>628</sup> See <https://enlyft.com/tech/products/oracle-crm>, last accessed on 15 December 2021 (ID: 2800).

<sup>629</sup> Parties’ reply to RFI 21, Annex 3 and Form CO, paragraph 6.67 Table 6.13.

<sup>630</sup> This figure and the rest of the analysis in this paragraph excludes [...] % of wins from “home grown” or “greenfield” projects.

<sup>631</sup> See Salesforce. #1 in Sales, available at: <https://www.salesforce.com/campaign/worlds-number-one-SALES/>, last accessed on 15 December 2021 (ID: 2803). See Meet Gorgias, the #1 rated helpdesk for ecommerce merchants, available at: <https://www.gorgias.com/about-us>, last accessed on 15 December 2021 (ID: 2805).

rates to Kustomer of business customers of Kustomer's close competitors are magnitudes higher than those of other CRM software providers. In this regard, the Commission considers that a foreclosure strategy targeted at Kustomer's close competitors would maximise the switching from the foreclosed CRM software providers to Kustomer.

- (410) In this regard, Zendesk (a close competitor of Kustomer) notes that “*large businesses typically need heavy customisation solutions, which creates a sort of lock-in or disincentive to switching. Below that level, for mid-market and SMB business customers, the CRM product is less customizable, and therefore for these segments Kustomer has a real ability to influence switching. So for SMB and mid-market (i.e. around 100-1000 employees – above 1000 there would be the need for more customisation), Kustomer could scale rapidly and influence switching (without being overwhelmed itself) as solutions targeted at these segments of the market are more out of the box and need much less customization*”.<sup>632</sup> Similarly, Crisp (a close competitor of Kustomer) states that “*businesses wishing to use CRM software solutions, in particular small businesses, may have the incentive to switch to Kustomer if Facebook provides a better integration of these channels with Kustomer compared to third party CRM solutions*”.<sup>633</sup>
- (411) Therefore, in light of the above conclusion that in general a significant proportion of business customers, and in particular SMBs, are likely to switch to Kustomer following non-targeted foreclosure, the Commission considers that a targeted foreclosure strategy would encourage an even higher level of switching. As such, the Commission expects that a sufficient proportion of business customers are likely to switch to Kustomer so that losses from foreclosure would be limited (relative to the gains). As noted in paragraph 389 and 391 above, it would require only a limited proportion of the foreclosed business customers to switch to Kustomer for foreclosure to be profitable.
- (412) The Commission notes that this does not imply that a significant proportion or even the majority of all business customers would not switch to non-foreclosed CRM software providers other than Kustomer (e.g., SAP or Oracle) as a result of a targeted foreclosure strategy. However, notwithstanding the conclusion of the previous paragraph, the evidence on closeness of competition above suggests that the foreclosed business customers of Kustomer's close competitors would on balance be more likely to switch to Kustomer than other CRM software competitors, such as SAP or Oracle, precisely because (almost by definition) Kustomer's offering is a closer competitor/substitute for the offerings of these close competitors of Kustomer. Moreover, even though such larger CRM players may have offerings for SMBs, given their primary focus on larger and less price-sensitive enterprise clients with highly complex needs (and which likely account for a material portion of their revenues), it is far from certain that they would react in a timely manner to a foreclosure strategy of the merged entity targeted at close competitors of Kustomer, including start-ups and smaller customer service and support CRM players focused on SMBs.
- (413) In any case, Meta (formerly Facebook) would not lose any significant revenues if, as a result of targeted foreclosure, business customers were to switch to CRM software competitors that are not foreclosed. Therefore, to the extent that business customers

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<sup>632</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 14 (ID: 2085).

<sup>633</sup> Agreed minutes of the call of 15 September 2021 with Crisp, paragraph 7 (ID: 2132).

were to switch to other non-foreclosed CRM software competitors, Meta (formerly Facebook) would not experience any significant losses but would not get any gain from the foreclosure either. Similarly, Meta (formerly Facebook) would not lose any revenues if, as a result of targeted foreclosure, business customers were to choose to multi-home with Kustomer and their foreclosed CRM software provider.

- (414) Therefore, losses to Meta (formerly Facebook), as a result of a targeted foreclosure strategy, would be limited to business customers that (i) decide to stay with the foreclosed CRM software provider (which are close competitors with Kustomer), and (ii) that also decide to limit their use of Meta (formerly Facebook)'s channels as a result of the degradation to their CRM software provider's API access.
- (415) In its SO Response<sup>634</sup> and the paper submitted on 10 October 2021,<sup>635</sup> the Notifying Party argues that Meta (formerly Facebook) would not have the incentive to execute a targeted foreclosure strategy with respect to Kustomer's close competitors. This is essentially because, in this scenario: (i) the gains from foreclosing these close competitors would still be minimal, because business customers would not switch sufficiently to Kustomer, and (ii) the cost of foreclosing these close competitors would still be substantial, again because business customers would not switch sufficiently to Kustomer.
- (416) This submission does not alter the Commission's conclusions stated throughout Section 7.3.2.2.(b) Contrary to what the Notifying Party argues, the Commission considers that, by targeting the close competitors of Kustomer, the level of switching to Kustomer will be sufficient to ensure that gains from foreclosure will be significant and losses limited. The Commission arrives at this conclusion on the basis of both the evidence outlined in Section 7.3.2.2.(b) and the evidence put forward by the Parties. Indeed, the Notifying Party concludes business customers would not switch sufficiently to Kustomer based on *historical* win/loss data. The Commission considers that these data are not informative in this respect because there has not been an example in the past where the owner of a leading B2C channel owns a CRM (i.e., the pre-Transaction scenario is significantly different to the post-Transaction scenario). As such, historical switching rates would not be indicative of switching following a foreclosure strategy, i.e., in response to a deterioration of Meta (formerly Facebook) access for some of Kustomer's competitors but not for Kustomer. Indeed, a foreclosure strategy in this case would inherently change the product of foreclosed CRM software providers. As such, these historical switching rates can at best provide a lower bound for the switching rates to Kustomer in response to such a deterioration, with no indication that the actual switching rates would be close to that lower bound. It is for this reason that, whilst in general historical switching rates are helpful for assessing total market wide foreclosure strategies, there are shortcomings for using them to assess partial or targeted foreclosure strategies.
- (417) In addition, there are further shortcomings of these data. The diversion ratios are based on Kustomer's historical win data in 2020, which covers a sample of [Win-Loss Data] wins. Although, Kustomer is a small player it has been growing significantly over the past 3 years, which is when the win/loss data is from. This would imply these historical data should be sufficiently discounted to account for the fact that Kustomer's business is rapidly growing through mainly brownfield opportunities (i.e., business customers switching from competitors to Kustomer).

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<sup>634</sup> SO Response, Section 4.

<sup>635</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021.

This data does not include [Win-Loss Data]. In addition (and as noted by the Parties themselves), these diversion ratios are not a good estimate for switching as a result of targeted foreclosure (“if a foreclosure strategy targeted multiple CSCRM providers at the same time, the resulting diversion ratios to Kustomer could be higher than historic diversion ratios.”).<sup>636</sup> A targeted foreclosure strategy will include multiple competitors of Kustomer. Historic switching rates would need to be adjusted to disregard switching to other foreclosed CRM providers (as the Parties themselves note<sup>637</sup>). This is likely to be significant because the Commission assesses a targeted foreclosure strategy at Kustomer’s close competitors, who almost by definition will have a significant amount of switching to each other.

- (418) In this regard, the Commission considers that the evidence collected from business customers directly on their willingness to switch following a foreclosure strategy, as well as views from CRM software competitors, is more relevant for assessing the level of switching following foreclosure (and therefore for assessing the incentives for the merged entity to undertake a targeted foreclosure strategy).
- (419) Notwithstanding the above, the Commission notes that, by accounting for some of the shortcomings of the historical switching data provided by the Parties, the data in fact indicates that switching to Kustomer will be sufficient to ensure that gains from foreclosure will be significant and losses limited (despite these data constituting a lower bound). In particular, accounting for the main shortcoming, namely that historical switching data do not account for the fact that a business that switches away from a foreclosed CRM provider in order to gain (superior) access to Meta (formerly Facebook)’s B2C messaging channels would not switch to another competitor of Kustomer if that player is also foreclosed), increases the diversion ratio to the point where foreclosure would be profitable: an [10-20]:1 switching ratio (which is less than the “critical switching ratio” of [40-50]:1 or [30-40]:1 estimated by the Commission in paragraphs 389 and 391 above). The Commission notes that even once correcting for these shortcomings, this historical switching data is still unlikely to be a good indicator for switching post-foreclosure, mainly because it includes switching for all kinds of reasons and not just switching to gain better access to Meta (formerly Facebook)’s channels.
- (420) First, the estimated diversion ratio to Kustomer from competitors increases significantly when accounting for Kustomer’s growth as well as using a correct sample (i.e., business customers who are likely targets of foreclosure). According to Kustomer’s win data, Kustomer made [...] wins from competitors in the first half of 2021, which would imply [...] in total in 2021.<sup>638</sup> Assuming the same growth rate between the number of wins in 2022 and 2021, Kustomer is expected to make [...] wins from competitors in 2022.<sup>639</sup> As stated by the Parties, Kustomer may be considered an appropriate CRM by [...] business customers.<sup>640</sup> This constitutes a representative sample for the businesses that may be the targets of foreclosure. The Parties assume an annual churn rate of [...], which implies [...] of these business

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<sup>636</sup> SO Response, Annex 3, paragraph 2.94.c.ii.

<sup>637</sup> SO Response, Annex 3, paragraphs. 2.44 and 2.45.

<sup>638</sup> Parties’ submission on Foreclosure Issues, dated 12 October 2021, Sheet “Win Data”. Note that contrary to the Parties’ analysis, this includes wins from unknown competitors.

<sup>639</sup> Idem. This is conservative as the growth rate is increasing over time ([...], [...], and [...] in 2019, 2020 and 2021 respectively).

<sup>640</sup> SO Response, paragraph 4.9(B)(ii)(b). These [...] businesses therefore constitute the universe of business customers that would consider switching to Kustomer, and for this reason constitutes the appropriate denominator.

customers that might consider Kustomer would have likely switched CRM software provider.<sup>641</sup> Given that Kustomer is expected to make [...] wins from competitors in 2022, [...] or [...] of business customers that might consider Kustomer are expected to switch to Kustomer from competitors in 2022. This is already above the critical switching ratio of [40-50]:1 or [30-40]:1 calculated by the Commission.

- (421) Second, the estimated diversion ratio to Kustomer from competitors increases significantly when accounting for the fact that business customers are unlikely to switch to another foreclosed CRM provider if they are leaving their current CRM software provider due to foreclosure. Proceeding from the calculations in the paragraph above, [...] of business customers are expected to switch to Kustomer (based on first preferences), which means [...] of business customers are expected to switch to another CRM provider. However, “*taking Kustomer’s data on which CSCRM providers it lost new opportunities to (which is broadly indicative of, but not the same as, diversion ratios): [...] of opportunities were lost to [Kustomer’s 6 close competitors]: Zendesk, Intercom, Freshworks, Gorgias, Gladly and Crisp*”<sup>642</sup> (emphasis added). As stated in paragraphs 403-409 above and in paragraph 308 of the SO, these six close competitors are likely to be the targets of foreclosure; although this list is non-exhaustive. This figure implies that [...] of these [...] business customers not switching to Kustomer would prefer to switch to another foreclosed CRM competitor, i.e., [...].<sup>643</sup> Conversely, [...] of these [...] business customers not switching to Kustomer would prefer to switch to a non-foreclosed CRM competitor, i.e., [...]. Without further evidence, the Commission assumes that the businesses wanting to switch to another foreclosed CRM provider would switch to Kustomer and non-foreclosed CRM competitors in the same proportion as the other businesses.<sup>644</sup> This results in an estimated diversion ratio to Kustomer from close competitors of [Win-loss Data] or [Win-loss Data].<sup>645</sup> This is significantly above the critical switching ratio of [40-50]:1 or [30-40]:1 calculated by the Commission in paragraphs 389 and 391 above.
- (422) In light of the evidence outlined above, the Commission considers it unlikely that business customers would decide to stay with the foreclosed CRM software providers that are close competitors of Kustomer (or switch to a foreclosed potential entrant into the market who would be a close competitor of Kustomer). In this regard, Meta (formerly Facebook) has the ability to limit its losses from foreclosure by targeting at Kustomer’s close competitors.

### C. Aggravating factors

- (423) The Commission notes that there are potentially further aggravating factors that would allow Meta (formerly Facebook) to further encourage switching to Kustomer and thereby limit to a greater extent the losses from foreclosure (increasing the incentive for Meta (formerly Facebook) to foreclose). It is worth noting that the Commission does not view these aggravating strategies as inherently anti-

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<sup>641</sup> SO Response, Annex 3 Figure 1.

<sup>642</sup> SO Response, Annex 3, paragraph 2.106.

<sup>643</sup> In the absence of any further evidence, the Commission assumes that diversion ratios are symmetric between Kustomer and its close competitors.

<sup>644</sup> This is conservative given that Kustomer is a close competitor of the targets of foreclosure, and therefore switching to Kustomer is more likely from these CRM competitors than other non-foreclosed CRM competitors.

<sup>645</sup> In other words, disregarding the [...] who switch to other foreclosed CRMs, [...] business customers out of the [...] business customers not switching to a foreclosed CRM will go to Kustomer, i.e., [...].

competitive *per se*, but that in parallel with a foreclosure strategy they would exacerbate the incentive to foreclose, by reducing the associated losses. The Commission considers that Meta (formerly Facebook) could do so in two main ways: (i) offering Kustomer for free or below market price, and (ii) bundling Kustomer with Meta (formerly Facebook)'s ecosystem of products (see Section 7.3.2.2.(b.i)D above regarding Meta (formerly Facebook)'s ecosystem of products).

- (424) First, Meta (formerly Facebook) may offer Kustomer for free or below market price, in order to encourage switching to Kustomer. Meta (formerly Facebook) has a history of offering its products and services for free, and monetising them through online advertising. In addition, [Business Plans].<sup>646</sup> Indeed, Zendesk (a close competitor of Kustomer) notes that “*price of the software is an important factor, if not one of the most important factors, for business customers in the lower end of the market, more so than the features offered by the CRM tool. For many businesses, customer support is not a revenue centre, but more a cost centre. If it is possible to reduce customer support costs, many businesses, especially SMBs and mid-sized businesses, would be inclined to use a cheaper or even a free CRM*”.<sup>647</sup> And, in the context of switching by business customers between CRM software providers, Crisp states that “[*business customers*] may switch to Kustomer if Facebook offers Kustomer for free or based on a freemium model (e.g. by monetising it through advertising)”.<sup>648</sup>
- (425) In parallel to a foreclosure strategy, a strategy of offering Kustomer for free or below market price would further encourage switching to Kustomer from foreclosed CRM providers (relative to the situation without such an aggravating strategy). This would therefore reduce the number of business customers that decide to stay with the foreclosed CRM software provider (which are close competitors of Kustomer), and thereby limit further the losses from foreclosure. In particular, offering Kustomer for free may encourage business customers to multi-home in the short-term with both Kustomer and their foreclosed CRM software provider, which as outlined above would not result in any significant losses for Meta (formerly Facebook).
- (426) Second, Meta (formerly Facebook) may offer Kustomer as part of a bundle with its other products, also to encourage switching to Kustomer (see Section 7.3.2.2.(b.i)D above regarding Meta (formerly Facebook)'s ecosystem of products). Market participants raised concerns that Meta (formerly Facebook) could leverage its position in, for example, ecommerce in order to encourage business customers to switch to Kustomer.<sup>649</sup> Strategies to bundle or leverage Meta (formerly Facebook)'s position to encourage switching may even be more subtle. An example put forward by Zendesk suggests that “*Facebook would be able to identify businesses using the Kustomer product and directly or indirectly promote their experiences as being differentiated from others. For example, this could be done by adding a “checkmark” or other icon to the business profile page on WhatsApp/Messenger/Instagram that would appear only when using the full suite of Facebook CX products.*”.<sup>650</sup>

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<sup>646</sup> Meta (formerly Facebook)'s internal document, Attachment E029 – [...].

<sup>647</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 7 (ID: 2085).

<sup>648</sup> Agreed minutes of the call of 15 September 2021 with Crisp, paragraph 7 (ID: 2132).

<sup>649</sup> See, for example, the agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 12 (ID: 2085).

<sup>650</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 3 (ID: 2085).

- (427) In parallel to a foreclosure strategy, a strategy of bundling Kustomer with other Meta (formerly Facebook) products would further encourage switching to Kustomer from foreclosed CRM providers (relative to the situation without such an aggravating strategy). Similarly to offering Kustomer for free, this would therefore reduce the number of business customers that decide to stay with the foreclosed CRM software provider (which are close competitors of Kustomer), and thereby limit further the losses from foreclosure.
- (428) Finally, it is worth noting that, whilst this Section has focussed on Meta (formerly Facebook) limiting its losses by maximizing the switching to Kustomer, such a foreclosure strategy (or any parallel aggravating strategies) would also increase the gains to Meta (formerly Facebook). As discussed in Section 7.3.2.2.(b.i), Meta (formerly Facebook) is able to make numerous, diverse and significant gains from business customers that switch to Kustomer, as a result of foreclosure.
- (b.iii) Conclusion
- (429) On the basis of the assessment in Section 7.3.2.2.(b) above, the Commission concludes that Meta (formerly Facebook) would have the incentive to engage in a targeted input foreclosure of restricting or degrading API access of customer service and support CRM software providers, both in the EEA and worldwide, to a large and important part of the EEA-wide, if not worldwide, OTT B2C messaging market. This conclusion also holds for the broader EEA-wide, if not worldwide, upstream market for B2C communication services overall, given the importance of Meta (formerly Facebook)'s channels for CRM software providers and their business customers, as well as the complementarity of different channels in such a wider market, as well as the broader EEA-wide, if not worldwide, downstream market for CRM software overall, given the importance of customer service and support CRM software within an overall CRM software market. As outlined in Section 7.3.2.2.(a.i) above, the Commission's conclusion would not change on the basis of the potential segments of the customer service and support CRM software market, or the overall CRM software market, based on (i) business customer size, (ii) mode of deployment or (iii) the industry sector of the business customer because OTT B2C messaging channels would remain an equally important input irrespective of such further segmentation. This conclusion remains the same irrespective of whether the relevant upstream and downstream markets, and potential segments thereof, are defined as EEA-wide or worldwide in geographic scope.
- (c) Impact on effective competition
- (430) The Commission has reached the conclusion that it is likely, and there is even a strong probability, that a targeted input foreclosure strategy would have significant effects on competition by reducing the sales prospects of Kustomer's close competitors and deterring potential entrants.
- (431) The effects of an input foreclosure strategy would, as a result of the restricted or degraded API access and in light of the importance of Meta (formerly Facebook)'s channels as an input into CRM software (see Section 7.3.2.2.(a)), reduce competition in the CRM software market, and/or the customer service and support CRM software market and possible segments thereof. This reduction in competition may result in higher prices, lower quality and less innovation for business customers (in particular SMBs), which may in turn be passed on to consumers. In addition, business



customers may be deprived of choice and no longer have the possibility to choose a CRM provider without an ecosystem such as Meta (formerly Facebook).<sup>651</sup>

- (432) The Commission notes that even a partial targeted foreclosure strategy targeted at small CRM providers would make it more difficult for these to compete, as Meta (formerly Facebook)'s channels are considered an important input into CRM software and foreclosed rivals would not be able to compete on an equal footing with Kustomer which, combined with a potential loss of customers, could hinder foreclosed rivals to innovate and effectively compete.
- (433) The impact on effective competition would be immediate, in particular as regards deterrence to new entrants in the CRM software market. As detailed in section 7.3.2.2.(a.iii): (i) Meta (formerly Facebook) has the (technical and contractual) ability to restrict or degrade access to its API without much delay; and (ii) [Business Plans].<sup>652</sup>
- (434) The impact may be particularly acute as (i) potentially foreclosed firms play a sufficiently important role in the competitive process (Section 7.3.2.2.(c.i)); (ii) the mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants (Section 7.3.2.2.(c.ii)); there is currently no CRM software provider which is vertically integrated (Section 7.3.2.2.(c.iii)); countervailing factors would not be sufficient to maintain effective competition (Section 7.3.2.2.(c.iv)); and (v) claimed efficiencies have not been substantiated (Section 7.3.2.2.(c.v)).

(c.i) Potentially foreclosed firms play a sufficiently important role in the competitive process

- (435) According to the Non-Horizontal Guidelines, significant harm to effective competition normally requires that the foreclosed firms play a sufficiently important role in the competitive process on the downstream market. The higher the proportion of rivals which would be foreclosed on the downstream market, the more likely the merger can be expected to result in a significant price increase in the downstream market and, therefore, to significantly impede effective competition therein. Despite a relatively small market share compared to other players, a specific firm may play a significant competitive role compared to other players, for instance because it is a close competitor of the vertically integrated firm or because it is a particularly aggressive competitor.<sup>653</sup>
- (436) The Commission considers that new-entrants, start-ups and small CRM providers with a focus on SMB customers are most likely the targets of a total or partial foreclosure strategy by Meta (formerly Facebook) and these play a sufficiently important role in the competitive process on the CRM market, as they are particular drivers of innovation.

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<sup>651</sup> As set out in Section 7.3.2.2.(b.i.)D, Meta (formerly Facebook) may steer businesses into its ecosystem of products with a view to cross-selling different products (e.g., Facebook Marketplace, Facebook Shops and Workplace).

<sup>652</sup> Parties' reply to RFI 21, question 5(i).

<sup>653</sup> See Non-Horizontal Guidelines, paragraph 48.

A. Small CRM providers focus on SMB customers (while large CRM providers focus on large enterprises)

- (437) The market investigation provided evidence to support that, by and large, smaller CRM providers target SMB customers whereas many of the large CRM providers focus on enterprise customers.
- (438) First, this finding is supported by evidence from CRM providers' responses to the market investigation, which generally confirmed the focus on enterprise customers by large CRM providers.<sup>654</sup> To this regard, SAP indicated it estimates 85% of its clients are large business customers and confirmed that SMBs are "*not a relevant market for SAP*".<sup>655</sup> Moreover, Microsoft confirmed that it "*primarily targets larger business customers for D365 sales*" (product viewed as targeting large enterprises, as explained below).<sup>656</sup> By contrast, Crisp, a small CRM player, indicated around 60% of its customers to be small business customers, 40% medium-sized business customers and 1% large business customers.<sup>657</sup>
- (439) Second, the replies of large CRM players to the Commission's RFIs provide information that corroborates such distinction (between large and small CRM players focusing on large enterprises and SMB customers respectively). Indeed, Oracle explained in response to an RFI dated 16 November 2021 that it focuses on enterprise customers and that this is reflected in its development efforts: "*Oracle focuses on enterprise size customers so development efforts is focused towards those segments.*"<sup>658</sup>
- (440) In fact, large CRM providers would need to change their business strategy to further focus on SMB customers. In this regard, in response to RFIs dated 16 November 2021, large CRM providers stated the following:
- "*If Microsoft were to adopt a strategy of more proactively targeting SMBs, it would primarily increase focus in its marketing and sales channels to target that specific segment. It might also create offerings with less customizability and extensibility. As a general matter, enterprise-sized customers have complex and varying needs, and may use a multitude of IT solutions that either target CRM use cases or are adjacent to them. It is therefore important to enterprises to have CRM solutions that can work with as many other different IT offerings as possibility. Customizability and extensibility are therefore key – hence the modularity, openness, and extensibility of D365. Smaller companies with less complex IT systems may not require meaningful customizability and extensibility. They may also not have the time or resources available to implement complex customizations and extensions. They may therefore merely require a simpler end-to-end solution that works out of the box without requiring meaningful effort to set up and customize.*"<sup>659</sup>

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<sup>654</sup> Replies to questionnaire 7 to CRM providers, question 6.

<sup>655</sup> Reply to questionnaire 7 to CRM providers, question 6.1 and 6.3 (ID: 1646).

<sup>656</sup> Reply to questionnaire 7 to CRM providers, question 6.1 (ID: 1661).

<sup>657</sup> Reply to questionnaire 7 to CRM providers, questions 6.1.-6.3 (ID: 2125).

<sup>658</sup> Oracle's reply to RFI dated 16 November 2021 (ID: 2315).

<sup>659</sup> Microsoft's reply to RFI dated 16 November 2021 (ID: 2301).

- *“Oracle’s main customers are large business enterprises so we cannot comment on specific needs of SMBs. In our experience, interests completely depend on the customer’s use case as opposed to the customer size”.*<sup>660</sup>
- *“To further target SMB customers, Salesforce must continue to innovate and drive demand for its products. While the interests of SMB customers are largely the same as enterprise customers, some SMB customers are more price sensitive and do not demand the same breadth of features as enterprise customers”.*<sup>661</sup>
- *“A key aspect would be pricing and sizing - it is known that SMB customers are quite price sensitive. [sic.] In essence, SAP would need to do three things: 1) create suitable price models that are attractive to SMB customers with smaller infrastructure needs, 2) align features and functions with the requirements of SMB customers, usually less complex than enterprise customers and 3) resolve issues of processes and integration/implementation that are/may be unique to the SMB market”.*<sup>662</sup>

(441) Third, the information submitted by the Notifying Party also confirms this distinction: [Information about focus of CRMs].<sup>663</sup>

(442) Finally, this distinction (between large and small CRM players focusing on large enterprises and SMB customers respectively) is generally confirmed by the results of the annual CRM awards by CRM Magazine. As regards large CRM providers, both the 2020<sup>664</sup> and the 2021<sup>665</sup> CRM awards for best enterprise CRMs mention Microsoft, Oracle, Salesforce and SAP in the top five best enterprise CRMs. The CRM awards for best CRM for SMB customers mention however smaller CRM providers alongside larger providers in 2020<sup>666</sup> (Creatio, HubSpot, Microsoft, Salesforce and Zoho) and 2021<sup>667</sup> (Freshworks, HubSpot, Salesforce, SugarCRM and Zoho).

(443) In light of the above, the Commission concludes that small CRM providers target SMB customers whereas large CRM providers focus on enterprise customers.<sup>668</sup>

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<sup>660</sup> Oracle’s reply to RFI dated 16 November 2021 (ID: 2315).

<sup>661</sup> Salesforce’s reply to RFI dated 16 November 2021 (ID: 2304).

<sup>662</sup> SAP’s reply to RFI dated 16 November 2021 (ID: 2310).

<sup>663</sup> Notifying Party Submission on Foreclosure Issues dated 10 October 2021, page 28.

<sup>664</sup> CRM Magazine, The best enterprise CRM software and solutions: the 2020 CRM industry leader awards, 31 august 2021, available at: <https://www.destinationcrm.com/Articles/Editorial/Magazine-Features/The-Best-Enterprise-CRM-Software-and-Solutions-The-2020-CRM-Industry-Leader-Awards-142561.aspx>, last accessed on 29 November 2021 (ID: 2461).

<sup>665</sup> CRM Magazine, The best enterprise CRM software and solutions: the 2021 CRM industry leader awards, 26 August 2021, available at: <https://www.destinationcrm.com/Articles/Editorial/Magazine-Features/The-Best-Enterprise-CRM-Software-and-Solutions-The-2021-CRM-Industry-Leader-Awards-148586.aspx>, last accessed on 29 November 2021 (ID: 2453).

<sup>666</sup> CRM Magazine, The best CRM for Midsize and Small Businesses: the 2020 CRM industry leader awards, 31 August 2021, available at: <https://www.destinationcrm.com/Articles/Editorial/Magazine-Features/The-Best-CRM-for-Midsize-and-Small-Businesses-The-2020-CRM-Industry-Leader-Awards-142562.aspx>, last accessed on 29 November 2021 (ID: 2452).

<sup>667</sup> CRM Magazine, The best CRM for Midsize and Small Businesses: the 2021 CRM industry leader awards, 26 August 2021, available at: <https://www.destinationcrm.com/Articles/Editorial/Magazine-Features/The-Best-CRM-for-Midsize-and-Small-Businesses-The-2021-CRM-Industry-Leader-Awards-148587.aspx>, last accessed on 29 November 2021 (ID: 2463).

<sup>668</sup> The Notifying Party argues that larger CRM players also serve SMB customers, which the Commission does not dispute or ignore in its assessment. However, given all the evidence presented in this Section,

Despite the Notifying Party's views that, in a scenario of targeted foreclosure of small CRM providers, large CRM providers would remain non-foreclosed and exert competitive pressure on Kustomer<sup>669</sup>, all the aforementioned elements indicate that this would not be the case as large CRM players do not focus on SMB customers (and would therefore not innovate for SMB customers, unlike small CRM players as it will be demonstrated below).

B. Small CRM players that target SMB customers play a disproportionately important role in the competitive process (as these are particular drivers of innovation)

- (444) The CRM market is highly dynamic and is constantly evolving as a result of ongoing innovation.
- (445) In this regard, both the information submitted by the Notifying Party and the market investigation support that innovation is an important parameter of competition in the CRM market. The Notifying Party submits that CRM players “are actively innovating” when arguing the CRM market is highly competitive<sup>670</sup>, and that “companies continue to focus on the next level of innovation and the first to identify the next “big thing” in Customer Service CRM, which is often quickly emulated”.<sup>671</sup> Moreover, a large portion of business customers that expressed a view considered the benefit from the current level of competition in the CRM market was “High innovation (e.g. more new features, further AI capabilities)” – more than for any other response like “low prices” or “high quality” (in a multiple choice question).<sup>672</sup> One participant stated that the availability of innovative functionalities is one of the most important considerations in its choice of CRM (even more than price): “Price is an important aspect to consider when choosing a support CRM provider, but e.g. innovative functionality and the seamless integration into the existing IT structures are more important.”<sup>673</sup>
- (446) [Information about innovation], which was highlighted by Kustomer in one of the site visit meetings.<sup>674</sup> Indeed this has been acknowledged by Meta (formerly Facebook) employees assessing the Transaction in internal documents, where they discuss the reaction to the Transaction by, amongst others, [Information about innovation].<sup>675</sup>
- (447) The innovative role of small CRM players with a focus on SMB customers has also been observed by industry reports, such as Gartner's “Magic Quadrant”, which stated that “Startups and new entrants from adjacent markets are typically found in the Visionaries quadrant ... Visionaries are ahead of many competitors in terms of delivering innovative products and delivery models”<sup>676</sup> (emphasis added). Gartner

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the Commission concludes larger CRM players focus on large enterprise customers and small CRM players target SMB customers.

<sup>669</sup> SO Response, paragraph 5.28.

<sup>670</sup> Form CO, paragraph 6.70.

<sup>671</sup> PowerPoint presentation session 2 “Facebook's proposed acquisition of Kustomer - Kustomer and the CRM Market” of the site visit held on 22 September 2021, slide 17.

<sup>672</sup> Replies to questionnaire 5 to business customers, question 17.

<sup>673</sup> Reply to questionnaire 5 to business customers, question 15.1 (ID: 1366).

<sup>674</sup> This was explained by [Kustomer executive], during the site visit held on 22 September 2021 (session 2, “Kustomer and the CRM market”): [Kustomer executive opinion on innovation within the CRM software market]– notes taken by the case team.

<sup>675</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>676</sup> Gartner's “Magic Quadrant”, <https://www.gartner.com/doc/reprints?id=1-1Z70UGZF&ct=200608&st=sb>, last accessed on 29 November 2021 (ID: 2516); see also Form CO, footnote 88.

considered ServiceNow and Freshworks as Visionaries in 2019 and 2020 respectively.<sup>677</sup> Moreover, Gartner publishes a yearly list of “cool vendors” in CRM customer service and support. Companies are selected for the “cool vendors” list because Gartner considers them to be particularly innovative, impactful and intriguing companies. The Gartner “cool vendors” list has previously included Gladly and Helpshift (both small CRM providers), as well as several technologies that have since been acquired by CRM providers.<sup>678</sup> As highlighted by one market participant: *“disruptive technological approaches are typically adopted by newcomers to the industry whose approach and agility are difficult to replicate by incumbents. A classic example here is Salesforce’s approach of delivering cloud-based software as a service at a time [i.e., when it first entered the market in 1999<sup>679</sup>] when on-premise[s] software was the norm. Industry reports do not tend to highlight the innovative nature of smaller players in the CRM market because it is accepted that smaller companies must innovate in order to stay competitive in a market historically dominated by large businesses. Gartner Research collects a list of vendors they consider “cool” due to their “innovative ways of supporting better customer service and operational outcomes” who are all smaller vendors, many of whom focus on SMB customers”*<sup>680</sup><sup>681</sup> (emphasis added).

- (448) Based on the market investigation and the assessment of the merged entities’ incentives set out in Section 7.3.2.2.(b), there is a particular concern that an input foreclosure strategy would most likely target close competitors to Kustomer or new entrants which are particularly innovative.
- (449) One market participant stated that *“there would likely be a negative impact on start-ups, maverick players and new entrants at the lower end of the CRM market that are pushing the envelope at present. There is a lot of innovation at this end of the market.”*<sup>682</sup> (emphasis added). This directly contradicts the Notifying Party’s argument that the market investigation indicates that the CRM market is expected to remain highly competitive post-Transaction.<sup>683</sup>

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<sup>677</sup> Gartner’s “Magic Quadrant”, <https://www.gartner.com/doc/reprints?id=1-1Z70UGZF&ct=200608&st=sb>, last accessed on 29 November 2021 (ID: 2516); see also Form CO, footnote 88

<sup>678</sup> An overview of cool vendors identified from 2012-2019 is included in Gartner, The Gartner Customer Service Technology Vendor Guide, 2019, available at: <https://productionkeywords.s3-us-west-2.amazonaws.com/uploads/tokdm6bu/Gartner%20Customer%20Support.pdf>, last accessed on 29 November 2021 (ID: 2460)

<sup>679</sup> See <https://freshservice.com/general/history-saas-blog/>, last accessed on 15 December 2021 (ID: 2812).  
<sup>680</sup> Zendesk’s reply to RFI dated 12 October 2021 (ID: 2143); “The Cool Vendors 2021: Building Trust With Digital Innovation, Competence and Ethics report” is generated for subscribers, but can be generally found here: <https://www.gartner.com/en/doc/749379-cool-vendors-must-build-trust-with-digital-innovation>, last accessed on 15 December 2021.

<sup>681</sup> It should be noted that the Notifying Party argues that even though they are key innovators, larger CRM players are necessarily excluded from Gartner’s “Cool Vendors” list which requires the vendor to be a “small company” and from the “Visionary” category in Gartner’s “Magic Quadrant” report, which requires the company to be one whose products and market presence are not yet complete or established. The Commission considers the fact that these only concern smaller CRM players or new entrants demonstrates that the innovation by these is very important and is particularly valued in the market.

<sup>682</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 15 (ID: 2085).

<sup>683</sup> Moreover, the Commission considers the Notifying Party at times misrepresents the results of the market investigation. For example, when drawing conclusions from the replies to questionnaire 7, question 63.2 (about the impact on competitors if Kustomer was offered with superior integration), the Notifying Party counts respondents that abstained from answering the cited question (Microsoft,

- (450) As explained in Section 7.2.1. above, the CRM software market is highly fragmented and split between a long tail of smaller competitors. Small players (like Zendesk, Freshdesk or Gladly) represent up to 50% of the CRM software market (or the customer service and support CRM market).<sup>684</sup>
- (451) The Commission notes that the Notifying Party relies on *Microsoft/LinkedIn* to suggest that a foreclosure of less than 30% of the CRM software market was considered by the Commission not to “*affect a sufficiently important proportion of Microsoft’s competitors to result in a price increase or a reduction of market incentives to innovate.*”<sup>685</sup> However, *Microsoft/LinkedIn* related to the potential foreclosure of LinkedIn data for rivals of Microsoft. Such data would only, if at all, be relevant for two sub-segments (CRM B2B marketing and B2B sales) that together accounted for less than 30% of the entire CRM software market.<sup>686</sup> In the present case, foreclosure could harm the entire market for customer service and support CRM software (which accounts for 36% of the overall CRM market in 2020) due to the disproportionately important role of small CRM providers in driving innovation on the market. Moreover, in the referred decision, the Commission noted there were many other possible sources of data<sup>687</sup> and considered that “*there is uncertainty as to whether in the near future LinkedIn full data would effectively become an important input*”.<sup>688</sup> In the present case however, the Commission concludes that Meta (formerly Facebook)’s B2C messaging channels are an important input for the market for customer service and support CRM software and that other B2C messaging channels are largely complementary. Therefore, the Commission considers the Notifying Party is misrepresenting the conclusions of such decision, which are clearly not applicable to the present case.
- (452) In addition, these small players have a disproportionate impact on competition (greater than may be expected on the basis alone of their combined market share).
- (453) Indeed, the long tail of smaller competitors is illustrated on the website Beststartup.eu that published 2021 lists of CRM start-ups and companies in several EEA countries which stand out because of their innovative character:
- 101 top CRM startups and companies in France (2021)<sup>689</sup>;
  - 67 top CRM startups and companies in Ireland (2021)<sup>690</sup>;
  - 29 top CRM startups and companies in Austria (2021)<sup>691</sup>;

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Pegasystems, Salesforce, Cisco) as replying that the Transaction would have minimal or no impact on competitors. Moreover, none of the respondents that mentioned the alleged efficiencies resulting from the Transaction (cited by the Notifying Party) are CRM players except for Salesforce which is a large CRM provider and therefore unlikely to be targeted by the foreclosure strategy.

<sup>684</sup> The Notifying Party submits Zendesk, Intercom, Freshworks, Gorgias, Gladly and Crisp represent only 6% of the market. However, as expressly stated above in Section 7.3.2.2.(b), those are examples of close competitors and not an exhaustive list (as evidenced by Section 7.2.1.).

<sup>685</sup> The Notifying Party cites Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraph 275.

<sup>686</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraphs 275 and 261.

<sup>687</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraph 262-263.

<sup>688</sup> Commission decision of 6 December 2016 in case M.8124 – *Microsoft/LinkedIn*, paragraph 250.

<sup>689</sup> Available at: <https://beststartup.eu/101-top-crm-startups-and-companies-in-france-2021/>, last accessed on 29 November 2021 (ID: 2467).

<sup>690</sup> Available at: <https://beststartup.eu/67-top-crm-startups-and-companies-in-ireland-2021/>, last accessed on 29 November 2021 (ID: 2466).

- 53 top CRM startups and companies in Sweden (2021)<sup>692</sup>;
- 14 top CRM startups and companies in Estonia (2021)<sup>693</sup>;
- 51 top CRM startups and companies in Denmark (2021)<sup>694</sup>;
- 42 top CRM startups and companies in Finland (2021)<sup>695</sup>;
- 55 top CRM startups and companies in Belgium (2021)<sup>696</sup>;
- 65 top CRM startups and companies in Spain (2021)<sup>697</sup>;
- 101 top CRM startups and companies in the Netherlands (2021)<sup>698</sup>
- 37 top CRM startups and companies in Portugal (2021)<sup>699</sup>;
- 57 top CRM startups and companies in Italy (2021)<sup>700</sup>;
- 10 top CRM startups and companies in Croatia (2021)<sup>701</sup>.

(454) Even if the Notifying Party submits that less than 20% of the mentioned companies are CRM providers (and the rest no longer exist or are not a CRM - they are either unrelated businesses or out-of-market actors that may integrate with a CRM)<sup>702</sup>, the Commission considers these lists are still a significant indicator of the innovative character of the many companies (132 companies) that are indeed small CRM players.

(455) The disproportionate impact of small CRM providers on the market for customer service and support CRM software is also supported by the growing importance of the SMB segment in this market, which is confirmed by CRM Magazine: *“Though enterprise-scale companies still make up the bulk of CRM system users, demand is growing fast from small and midsize businesses, analyst firms have noticed. In fact, the SMB sector accounted for about 44 percent of the total worldwide CRM market, which has been valued at \$47.6 billion this year by Grand View Research. Industry estimates also suggest that around 91 percent of all organizations with more than 10 employees currently use at least some very basic CRM systems, creating a huge*

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<sup>691</sup> Available at: <https://beststartup.eu/29-top-crm-startups-and-companies-in-austria-2021/>, last accessed on 29 November 2021 (ID: 2472).

<sup>692</sup> Available at: <https://beststartup.eu/53-top-crm-startups-and-companies-in-sweden-2021/>, last accessed on 29 November 2021 (ID: 2449)

<sup>693</sup> Available at: <https://beststartup.eu/14-top-crm-startups-and-companies-in-estonia-2021/>, last accessed on 29 November 2021 (ID: 2448).

<sup>694</sup> Available at: <https://beststartup.eu/51-top-crm-startups-and-companies-in-denmark-2021/>, last accessed on 29 November 2021 (ID: 2469).

<sup>695</sup> Available at: <https://beststartup.eu/42-top-crm-startups-and-companies-in-finland-2021/>, last accessed on 29 November 2021 (ID: 2471).

<sup>696</sup> Available at: <https://beststartup.eu/55-top-crm-startups-and-companies-in-belgium-2021/>, last accessed on 29 November 2021 (ID: 2470).

<sup>697</sup> Available at: <https://beststartup.eu/65-top-crm-startups-and-companies-in-spain-2021/>, last accessed on 29 November 2021 (ID: 2450).

<sup>698</sup> Available at: <https://beststartup.eu/101-top-crm-startups-and-companies-in-the-netherlands-2021/>, last accessed on 29 November 2021 (ID: 2465).

<sup>699</sup> Available at: <https://beststartup.eu/37-top-crm-startups-and-companies-in-portugal-2021/>, last accessed on 29 November 2021 (ID: 2473).

<sup>700</sup> Available at: <https://beststartup.eu/57-top-crm-startups-and-companies-in-italy-2021/>, last accessed on 29 November 2021 (ID: 2468).

<sup>701</sup> Available at: <https://beststartup.eu/10-top-crm-startups-and-companies-in-croatia-2021/>, last accessed on 29 November 2021 (ID: 2447).

<sup>702</sup> LoF Response, paragraph 4.5(D)(ii).

*opportunity for industry expansion.*”<sup>703</sup> In this regard, the Notifying Party submits that the growth of the SMB segment (in the CRM software market) has no bearing on the impact of smaller CRM players on innovation. Nevertheless, the Commission considers that if the demand from SMB customers is rising and small CRM players are the ones focusing on serving and innovating for SMB customers, this constitutes one further element to support that small CRM players have a growing importance in the CRM software market. In particular, the foreclosure of these small CRM players would mean the growing number of SMB customers looking for a CRM provider would not benefit from the innovation that small CRM players create which is focused on that segment of the market.

- (456) Indeed, these small CRM providers are able to develop new innovative features that the larger players cannot with their legacy systems and products. One market participant explained that “*bigger companies such as Salesforce could technically innovate, but they have constraints given their size, such as a huge number of legacy customers who are used to how their product works, etc*”.<sup>704</sup> Moreover, these innovations may have an important impact on competition in the (highly innovative and growing<sup>705</sup>) CRM software market both today and in the future.
- (457) A variety of internal documents from Kustomer [Information about innovation].<sup>706</sup> For instance, a Recommendations Report of Kustomer from April 2020 states, [Information about innovation]<sup>707</sup> (emphasis added). The Report further reinforces this by noting, [Information about innovation]<sup>708</sup> (emphasis added) and [Information about innovation]<sup>709</sup> (emphasis added).
- (458) In addition, Kustomer refers to this distinction in a document named [Information about innovation]<sup>710</sup>. In a document named [Information about innovation],

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<sup>703</sup> CRM Magazine, The best CRM for Midsize and Small Businesses: the 2021 CRM industry leader awards, 26 August 2021, available at: <https://www.destinationcrm.com/Articles/Editorial/Magazine-Features/The-Best-CRM-for-Midsize-and-Small-Businesses-The-2021-CRM-Industry-Leader-Awards-148587.aspx>, last accessed on 29 November 2021 (ID: 2463).

<sup>704</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 15 (ID: 2085).

<sup>705</sup> PowerPoint presentation session 2 [...].

<sup>706</sup> In its LoF Response, the Notifying Party adds that the internal documents cited by the Commission which describe larger CRM software providers as “older legacy players” and not innovative are, with the exception of one e-mail, all sales and marketing related documents which are by definition designed to portray Kustomer in a positive light compared to other customer service and support CRM providers. The Commission notes that these documents do not merely describe [Information from internal documents]. Moreover, even if these are [Information from internal documents], Kustomer could be described and promoted therein in a positive manner by highlighting other advantageous aspects other than its innovative character by contrast with legacy CRM players. The fact that Kustomer chooses to distinguish itself focusing primarily on the innovation aspect (as a key differentiator) is indicative that innovation is one of the most important features that distinguishes Kustomer from larger CRM players (as is further supported by all the other evidenced referred in Section 7.3.2.2.(c.i)). In fact, these internal documents further demonstrate that, in order to grow in the CRM market, a small player such as Kustomer must innovate (hence the reason why [Information from internal documents]). The Commission therefore considers these internal documents are important evidence to indicate that there is a distinction between new innovative smaller players and larger companies in the CRM market.

<sup>707</sup> Kustomer’s internal document, [...].

<sup>708</sup> Kustomer’s internal document, [...].

<sup>709</sup> Kustomer’s internal document, [...].

<sup>710</sup> Kustomer’s internal document, [...].



- Kustomer states: [Information about innovation]<sup>711</sup>. Finally, in a presentation named [Information about innovation], Kustomer states: [Information about innovation]<sup>712</sup>.
- (459) Moreover, Kustomer refers [Information about innovation]<sup>713</sup><sup>714</sup>.<sup>715</sup>
- (460) In fact, the very reason why Kustomer was founded was due to [Information about innovation]<sup>716</sup>. For example, [Information about innovation]<sup>717</sup>, or in an email to a potential customer, Kustomer states [Information about innovation]<sup>718</sup> (emphasis added).
- (461) Other CRM providers such as Zendesk confirm the distinction between new innovative players and legacy players. For example, a marketing text promoting its CRM platform “Zendesk Sunshine” states “*To make matters worse, legacy CRM platforms force us into their proprietary technology. ... It’s time break free from CRM systems that lock businesses into an outdated view of customers. We need a CRM platform that supports a new reality*”.<sup>719</sup> In a document named “Zendesk VS. Freshservice (example of how Zendesk may position against Freshdesk)”, Zendesk is described as an “*innovative leader in areas like Machine Learning*”.<sup>720</sup> Gartner Reports confirm that Zendesk can be seen as a particularly innovative player. For example, in the 2020 “Gartner’s Magic Quadrant for the CRM Engagement Center Report”, it describes Zendesk as a CRM with innovation as one of its strengths, and notes, [Gartner’s estimates on the size and growth of CRM market segments].<sup>721</sup> Zendesk’s CEO has talked publicly about “Zendesk Sunshine” as disruptive, “*truly a next-generation headless CRM, that can have the potential to change the landscape again*”.<sup>722</sup>
- (462) Finally, there are several concrete examples of innovations introduced in recent years by customer service support CRM software market providers with a focus on SMB customers, as well as examples of material innovations anticipated in the coming years by such players in the market.
- (463) Kustomer itself is one CRM provider which is highly innovative (notably for creating a ticketless solution) with mostly SMB customers (in particular, medium-sized business customers).<sup>723</sup> SAP highlighted: “*the technology behind Kustomer is exceptional. Kustomer changed the CRM business model by creating a model based on reaching a resolution over chatbots or over the phone without documenting it (i.e., it is a more efficient solution). That is what the customer wants whereas the*

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711 Kustomer’s internal document, [...].

712 Kustomer’s internal document, [...].

713 Kustomer’s internal document, [...].

714 Kustomer’s internal document, [...].

715 Kustomer’s internal document, [...].

716 Kustomer’s internal document, [...].

717 Kustomer’s internal document, [...].

718 Kustomer’s internal document, [...].

719 Kustomer’s internal document, [...].

720 Kustomer’s internal document, [...].

721 Kustomer’s internal document, [...].

722 <https://diginomica.com/zendesk-ceo-disruptive-player-crm>, last accessed on 29 November 2021 (ID: 2455).

723 Form CO, paragraphs 2.2.9 and 3.25; PowerPoint presentation session 2 “Facebook’s proposed acquisition of Kustomer - Kustomer and the CRM Market” of the site visit held on 22 September 2021, slide 4; agreed minutes of the call with Salesforce on 19 May 2021, paragraph 4 (ID: 2005); agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 8 (ID: 2085).

*traditional approach, and what businesses wanted, involved a preference for documenting the resolution of problems via tickets”.*<sup>724</sup>

- (464) The Notifying Party submitted numerous examples of key innovations in the customer service support CRM software market which were introduced in the customer service and support CRM software market by small CRM players with a focus on SMB, such as Zendesk and Freshworks:<sup>725</sup>
- Zendesk Chatbots (in the area of Self-Service);
  - Freshworks Chatbots (in the area of Self-Service);
  - Kustomer KIQ Conversational Assistant (in the area of Self-Service);
  - Helpshift Chatbot (in the area of Self-Service);
  - Kustomer KIQ Language Detection (in the area of Routing & Workflows);
  - Freshworks Freddy AI Actions (in the area of Agent Assistance);
  - Helpshift Agent Desktop (in the area of Agent Assistance); and
  - Freshworks Freddy Insights (in the area of “Business Intelligence”).
- (465) In addition, Zendesk, a customer service and support CRM software provider with a focus on SMB customers provided concrete evidence of an innovation introduced in recent years to its customer service and support CRM software offering, i.e., “*early innovation in AI for customer service. Answer Bot - AI powered responses to customer questions which suggest relevant help center articles that are likely to answer the customer’s question*”.<sup>726</sup>
- (466) The Notifying Party argues this innovation was introduced by large CRM players first. However, the market investigation supports that there was indeed an innovative aspect to “*answer bot*”.
- (467) According to Zendesk, “*Answer Bot product offerings have been innovative in that businesses have not had to “train” a machine learning model to accurately predict appropriate responses or resolutions to customer inquiries. Leading solutions that predate Answer Bot (and frankly still most leading solutions today) require extensive AI model development and training on a customer-by-customer basis, limiting these solutions’ addressability to businesses with sufficient time, resources, and training data. Additionally, Answer Bot introduced the concept of “zero configuration” bots. When a customer enables Answer Bot on their account, it immediately starts providing answers automatically in response to customer inquiries by using content that already exists within the knowledge base of the business. With Answer Bot capabilities, Zendesk’s products will offer predictions for customers without any customization or training data required*”.<sup>727</sup> Although the Notifying Party submits “it

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<sup>724</sup> Agreed minutes of the call of 18 May 2021 with SAP, paragraph 16 (ID: 2008).

<sup>725</sup> PowerPoint presentation session 2 “Facebook’s proposed acquisition of Kustomer - Kustomer and the CRM Market” of the site visit held on 22 September 2021, slide 17. It should be noted that this presentation was submitted to the Commission prior to the SO where the Commission presented its arguments regarding an input foreclosure targeted at Kustomer’s close competitors. In its LoF Response, Annex 2, the Notifying Party then submitted that neither of these examples (which it had pointed out itself as “key innovations” in the CRM market) were: (i) innovations; or (ii) by the small CRM players it had previously named.

<sup>726</sup> Zendesk’s reply to RFI dated 12 October 2021 (ID: 2143).

<sup>727</sup> Zendesk’s reply to RFI dated 16 November 2021 (ID: 2311).

*is debatable*” whether Zendesk’s chatbot was “*the first that was easier to set up*”<sup>728</sup> in the terms just described, it should be noted that Zendesk was nominated for an AI award in the category of “Best Intelligent Assistant Innovation” in the year it introduced “answer bot” in the CRM market (2017).<sup>729</sup>

- (468) Zendesk anticipates innovating in the coming years, in the areas of “*business messaging experiences*” (focused on the end-customer and in “*building tools and technologies that allow businesses using [our CRM tool] to deliver rich experiences to their customers directly within the conversation*”<sup>730</sup>) and “*multi-party messaging*” (focused on bringing conversations happening outside of a CRM tool, into the CRM tool).<sup>731</sup> Zendesk explained why it considers it is innovating in such areas: “*Zendesk’s business messaging is unique in the CRM market as it’s built on a powerful CPaaS platform (Sunshine Conversations) that allows businesses open access to all of the conversational data in real time. This enabled a number of innovative features, many of which have gone on to inspire the competition: 1. Channel Transfers - People interacting with a business can start a conversation on a public messaging channel, such as Facebook Messenger, WeChat, or LINE and be redirected to a secure and private messaging channel such as one found on the company’s mobile app or website. When the redirection happens, all context about the user and conversation is maintained and the user does not have to reauthenticate or repeat previous parts of the conversation. The inverse is also possible: a conversation that starts on a website can be transferred over to a public messaging app (...). 2. Zendesk was granted two patents for allowing systems from multiple vendors to share and participate in conversations with end users. These unique mechanisms allow businesses using Zendesk to integrate any number of third party systems through a documented standard, ensuring that a business has complete freedom of choice over its technology partners. Zendesk’s own products integrate with one another for the purposes of sharing conversational data using these same technologies. (...) 3. Zendesk’s multi-party messaging allows businesses to connect various participants in their business (ie, customers, employees, suppliers, contractors) together in a single conversation, even if they aren’t all using Zendesk software. For example, a food delivery company could connect customer support agents using Zendesk, food delivery contractors using a mobile app and a customer using any consumer messaging channel together in a conversation. Because they are powered by the underlying CPaaS, these conversations can be archived and stored within Zendesk, monitored for compliance and trust and safety issues, and used as context when the customer requires further assistance. To our knowledge no other vendor in the CRM space is able to provide this multi-party flexibility in terms of conversation channels or level of integration.*”<sup>732</sup> In its SO Response, the Notifying Party confirmed “*there will undoubtedly be further innovation in these areas*”.<sup>733</sup>
- (469) Zendesk also anticipates future material innovations by other small CRM players that also focus in particular on SMB customers, in the area of “*automation and chatbots*

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<sup>728</sup> LoF response, Annex 2.

<sup>729</sup> Available at [https://aibusiness.com/document.asp?doc\\_id=760435](https://aibusiness.com/document.asp?doc_id=760435), last accessed on 29 November 2021 (ID: 2451).

<sup>730</sup> The CRM software provider explained: “*for example, an airline using [our CRM tool] could deliver a visual seat selection tool to their customer during a flight booking, on any communication channel, so that their customer can stay in the conversation and does not need to switch contexts*” (ID: 2143).

<sup>731</sup> Zendesk’s reply to RFI dated 12 October 2021 (ID: 2143).

<sup>732</sup> Zendesk’s reply to RFI dated 16 November 2021 (ID: 2313).

<sup>733</sup> SO Response, Annex 1, line 15.

for customer service” (leveraging machine learning to automatically deploy conversational automation for a business using the history of past interactions).<sup>734</sup>

- (470) Another small customer service and support CRM software provider which focuses in particular on SMB customers, Crisp,<sup>735</sup> also provided concrete evidence of innovations introduced in recent years to its customer service and support CRM software offering, which include “*automated/realtime chat translations*”, “*co-browsing*”, “*embedded audio/video calls*”, and “*integrations*” with different software applications (“*Slack, Messenger, Whatsapp, Twitter, etc*”) and with other CRMs<sup>736</sup> (e.g., with “*Hubspot, Zendesk, Salesforce*”), “*status page*” (which allows for monitoring a company’s infrastructure and lets users know when something is not working without having to contact customer service).<sup>737</sup>
- (471) The Notifying Party argues all these innovations were introduced by large CRM players first.<sup>738</sup> Nevertheless, the market investigation supports that there was an innovative aspect to each of these examples.
- (472) In what concerns “*embedded audio/video calls*”, Crisp clarified that it is an innovation as “*we are one if [sic.] the first companies providing embedded video calls in a customer support chat widget, without any external third party plugin. The main advantage is companies don’t need to install Zoom/Skype/Google Meets. The video call solution works as is, in the browser, without requiring any third-party software. A such feature already existed before as a niche market: Some customer support players were offering chat widgets only focused on video/audio. Crisp was the first company releasing audio-video calls as a core feature on a SMB/generalistic customer support software*”.<sup>739</sup>
- (473) As for “*automated chat translation*”, Crisp clarified it was the first CRM player to make it available for SMB customers: “*the goal of such feature is to let customers write using their native language (for instance the customer says “bonjour” in French). The customer support agent sees “hello” on his end. Then the customer agent replies “how can I help?”. The software submits the message and auto-translates the message to the end customer “comment je peux aider?”. Crisp was the first company introducing this on a SMB solution, with a fair price (it is included in our 95 euros / month plan). Some other companies started doing then same after us, like Zendesk, Gosquared, Freshdesk.*”<sup>740</sup>
- (474) In what regards “*co-browsing*” Crisp explained “*the main innovation is it doesn’t requires a third-party plugin. The end-customers doesn’t require to install anything on their browser. For instance, Oracle Co-Browse solution require the user to install*

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<sup>734</sup> Zendesk’s reply to RFI dated 12 October 2021 (ID: 2143).

<sup>735</sup> Agreed minutes of the call of 15 September 2021 with Crisp, paragraph 2 (ID: 2132) “*Crisp started almost five years ago in France as a chat software for smaller companies to get in touch with their customers. Most users are SMBs and start-ups, but bigger companies are starting to become interested*”.

<sup>736</sup> According to the same market participant, “*integrations for CRM are just like the App-Store for iPhone. It expends functionalities. You are not forced to use the default browser, mail app provided by your OS. So it is with CRM as well. You can use a different E-Mailing software, also connect with other CRM*”. Business customers use different software for different purposes (e.g., one software for e-mailing and another for tasks) and “*integrations*” allow business customers to connect these different software using their CRM software.

<sup>737</sup> Crisp’s reply to RFI dated 12 October 2021 (ID: 2034).

<sup>738</sup> SO Response, paragraph 5.17(A)(i).

<sup>739</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

<sup>740</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

*a software on the computer. Crisp works in the browser directly. This way, when a customer reports a problem, or requires help, you can directly see the problem, in a few seconds.”*<sup>741</sup>

- (475) Crisp further clarified that while “*integrations*” with different software applications and with other CRMs “*is not something specific to Crisp and as most of companies on the market are doing this*”, Crisp created an innovative feature within this area: “*we also have integrations with Team messaging software such as Slack and Microsoft Teams. The main innovation is it lets company reply directly from Slack/Microsoft Teams, so they do need to use the Crisp interface.*”<sup>742</sup>
- (476) As for “*status page*”, Crisp explained it was the first company to introduce such solution in customer service and support: “*this feature allows companies to monitor all their servers (a such system already existed before). This way, once a server goes down, the companies is notified. Crisp is the first company doing this with in the customer support level. In situations where an online service is affected, at the same time, thousands of clients can reach the customer service, creating a crisis situation for customer service agents, having to explain the situation to many different clients. With the Crisp Status Page system, if something goes down, customers are notified automatically in the chat widget, so they don’t have to reach the customer service to know what is going on.*”<sup>743</sup>
- (477) Crisp also provided further examples of innovations by other small CRM players focused on SMB customers, stating it “*took some good ideas from competitors, like Campaigns Systems (Intercom), Ticketing Center in 2021 (Zendesk / Salesforce)*”.<sup>744</sup> Crisp explained that “*Campaigns systems*” is a solution that “*allows companies to send emails to all their customers. For instance, send a newsletter when a new product is released. The main innovation is it lets customers, using only one product (Crisp), with a fair price. They had to use multiple expensive products previously to achieve the same tasks.*”<sup>745</sup> As for “*Ticketing center*”, it “*allows companies to create a ticker [sic.] center. It’s basically a website page they can embed on their dashboard, allowing end users to create tickets.*” Zendesk confirmed many of its innovations are somehow related to its core workflow functionality, which is based on a ticket (set of interactions between an organization and end-user customers): “*this is the primary workflow enabled by Zendesk customer service products and has been a source of significant innovation around our ability to manage interactions across channels, apply business rules and automation, and report on activity. A substantial majority of the product development that Zendesk has been engaged in since its founding in some way or another is related to the management of tickets as our core data object.*”<sup>746</sup>
- (478) Crisp predicted that “*innovation in the future*” would focus, amongst other things, on “*integrations*” (e.g., with B2C messaging channels), as well as “*AI and Bots.*”<sup>747</sup> In its SO Response, the Notifying Party confirmed “*there will undoubtedly be further innovation in these areas*”.<sup>748</sup>

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<sup>741</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

<sup>742</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

<sup>743</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

<sup>744</sup> Crisp’s reply to RFI dated 12 October 2021 (ID: 2034).

<sup>745</sup> Crisp’s reply to RFI dated 16 November 2021 (ID: 2446).

<sup>746</sup> Zendesk’s reply to RFI dated 16 November 2021 (ID: 2311).

<sup>747</sup> Crisp’s reply to RFI dated 12 October 2021 (ID: 2034).

<sup>748</sup> SO Response, Annex 1, line 16.

- (479) It should also be noted that Zendesk explained that its “*answer bot*” innovation has been adopted by “*all of the major support CRM providers*”.<sup>749</sup> Crisp likewise echoed the view that innovations in the past have frequently been copied or taken up by CRM competitors. Just as Crisp took some good ideas from Intercom, Zendesk/Salesforce (as mentioned above in relation to “*Campaign Systems*” and “*Ticketing Center*”), many of Crisp’s innovations, including “*Automated / realtime chat translations*”, “*co-browsing*” and integrations with different kinds of software applications were copied by larger “*competitors like Freshworks*”. The same was true of innovations introduced by many other SMB-focused players. For example, “*Drift offer is a messaging system ... It was then copied by Hubspot*”, “*Intercom came with an all-in-one approach ...[and]... released some features in past years like Embedded chat widgets (2018/2019), Onboarding system (2018). ... Most of their features are then copied Drift, Freshworks and other players.*”<sup>750</sup>
- (480) In light of the above, it is reasonable to conclude that future innovations introduced by such smaller CRM software providers focused in particular on SMB customers ([Business Plans]<sup>751</sup>) would to a large extent be copied or taken up by other players in the market, including larger CRM software providers. As such, a targeted foreclosure of new-entrants, start-ups and close competitors of Kustomer, i.e., smaller customer service and support CRM software providers that focus in particular on SMB customers, would reduce competition in the customer service and support market to an even greater extent than may be expected on the basis alone of combined market share of the targets of foreclosure.
- (481) The Commission therefore considers that the firms that could potentially be the target of total or partial foreclosure strategies play a sufficiently important role in the competitive process.
- (482) The Notifying Party argues that large CRM players develop innovations for both large and SMB customers<sup>752</sup>. In this regard, the Commission does not dispute that larger CRM players also innovate in the market.
- (483) Nevertheless, contrary to what the Notifying Party argues, the Commission considers that smaller CRM providers play a specific innovative role in the market, in particular for SMB customers, as evidenced by all the arguments put forward in the present Section and in particular the several examples of innovations specifically directed at SMB customers referenced above<sup>753</sup>, which can be differentiated from the innovations by major CRM providers that are not specific for SMB customers.
- (484) In addition, contrary to what the Notifying Party argues<sup>754</sup>, the Commission considers that if these small players were foreclosed from the CRM market, larger CRM players would not react by reinforcing their innovation efforts. Not only are those larger CRM players less adaptable (and therefore do not have the same incentive to bring innovation to this segment in the market), but they would also have

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<sup>749</sup> Zendesk’s reply to RFI dated 12 October 2021 (ID: 2143).

<sup>750</sup> Crisp’s reply to RFI dated 12 October 2021 (ID: 2034).

<sup>751</sup> Meta (formerly Facebook)’s internal document, [...].

<sup>752</sup> SO Response, paragraph 5.33.

<sup>753</sup> The Notifying Party argues the Commission solely relies on the responses of two small CRM players. In fact, in its market investigation, the Commission reached out to several other small CRM players (which were not responsive to the Commission’s RFIs), as well as large CRM players, and it also took into consideration in its assessment all the elements mentioned above including industry reports, internal documents and public sources.

<sup>754</sup> SO Response, paragraph 1.10.

less competitive pressure to do so once smaller (innovative) rivals have been foreclosed and, therefore, the impact would be a significant lessening of innovation in the CRM market (where innovation is a key characteristic).

(c.ii) The mere likelihood that the merged entity would carry out a foreclosure strategy will likely already have anticompetitive effects

(485) According to the Non-Horizontal Guidelines, the mere likelihood that the merged entity would carry out a foreclosure strategy post-merger may already create a strong deterrent effect on potential entrants.<sup>755</sup>

(486) There has been a large number of entrants in the CRM software market, and/or the customer service and support CRM software market over the past years.

(487) However, potential new entrants in the market may be deterred if they consider it likely that Meta (formerly Facebook) will restrict or degrade API access to its channels since these are an important input into CRM software and such foreclosure would have a direct impact on the quality of their product offerings and ability to compete in the market. Even if these potential new entrants would try to innovate through creating new additional features to differentiate their offerings (and compete without having the full range of communication channels), they would be at a disadvantage in relation to CRM software providers with access to Meta (formerly Facebook)'s messaging channels (including Kustomer) and, given the importance of this input (see Section 7.3.2.2.(a.i)), they would not be able to overcome this obstacle and compete on the merits.

(488) The Commission therefore considers that the mere likelihood that the merged entity would carry out foreclosure strategies would likely already create a strong deterrent effect on potential entrants.

(c.iii) Competition from vertically integrated downstream competitors or alternative input providers would not constrain the merged entity

(489) The Non-Horizontal Guidelines set out that if there remain sufficient credible downstream competitors whose costs are not likely to be raised, for example because they are themselves vertically integrated or they are capable of switching to adequate alternative inputs, competition from those firms may constitute a sufficient constraint on the merged entity and therefore prevent output prices from rising above pre-merger levels.<sup>756</sup>

(490) In this regard, it should be noted there is currently no CRM software provider which is vertically integrated.

(491) As for the possibility of CRM software providers switching to adequate alternatives, the Commission considers this would be unlikely.

(492) First, according to the information provided in market calls held by the Commission, several communication channels are complementary (for instance email, phone and SMS) and business customers in particular consider it important for CRM providers to have an omnichannel offering.<sup>757</sup>

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<sup>755</sup> See Non-Horizontal Guidelines, paragraph 49.

<sup>756</sup> See Non-Horizontal Guidelines, paragraph 50.

<sup>757</sup> Agreed minutes of the call of 19 May 2021 with Salesforce, paragraph 7 (ID: 2005) and agreed minutes of the call of 18 May 2021 with SAP, paragraph 15 (ID: 2008).

(493) Second, as demonstrated in Section 7.3.2.2.(a.ii) above, there are no other channels with high penetration rates similar to Meta (formerly Facebook)'s messaging channels.

(494) The Commission therefore considers there would be no competition from vertically integrated downstream competitors and CRM providers would not be capable of switching to adequate alternative input providers so as to sufficiently constrain the merged entity.

(c.iv) Countervailing factors would not be sufficient to maintain effective competition

(495) As set out in the Non-Horizontal Guidelines, the effect on competition on the downstream market must also be assessed in light of countervailing factors such as the presence of buyer power or the likelihood that entry upstream would maintain effective competition.<sup>758</sup>

(496) As regards countervailing buyer power, as mentioned above, a targeted foreclosure strategy aimed at Kustomer's close competitors and new entrants would impact small niche innovative players in the customer service and support CRM software.

(497) Such players do not have the size, resources or bargaining strength to exert competitive pressure on Meta (formerly Facebook), nor the ability to switch to other B2C messaging channels within a reasonable timeframe as a reaction to Meta (formerly Facebook)'s foreclosure strategy. For the same reasons, it is also unlikely they could sponsor upstream entry for instance by persuading a potential entrant to enter by committing to execute a substantial agreement with this company.

(498) As regards the likelihood that entry upstream would maintain effective competition, it should be noted that Google RCS is only in an early stage of development of its offering in the B2C messaging market and, according to Meta (formerly Facebook)'s internal documents, [Business Plans]. On 3 February 2019, [Name] (part of the team that "*evaluated the Kustomer transaction from a business or strategic perspective*"<sup>759</sup>) sent an e-mail on the state of the B2P market indicating that: [Business Plans]<sup>760</sup> The uncertainty regarding the future growth of alternative channels upstream is corroborated by Google itself (regarding Google RCS) and by Apple (regarding Apple Business Chat) as detailed in Section 7.3.2.2.(a.i).

(499) In addition, based on the information provided in market calls, although having a large user base in P2P messaging can indeed facilitate entry in B2C messaging<sup>761</sup>, achieving high P2P penetration in a short timeframe is unlikely.

(500) The Commission therefore considers that eventual countervailing factors would not be sufficient to maintain effective competition.

(c.v) Claimed efficiencies have not been substantiated

(501) According to the Non-Horizontal Guidelines, the effects on competition need to be assessed in light of efficiencies substantiated by the merging parties.<sup>762</sup>

(502) The Notifying Party submits the Transaction will create the following efficiencies and customer benefits: (i) increase take-up of messaging for B2C communications,

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<sup>758</sup> See Non-Horizontal Guidelines, paragraph 51.

<sup>759</sup> Parties' reply to RFI 7, question 3.

<sup>760</sup> Meta (formerly Facebook)'s internal document, [...].

<sup>761</sup> Agreed minutes of the call of 20 September 2021 with Google, paragraph 6 (ID: 2127).

<sup>762</sup> See Non-Horizontal Guidelines, paragraph 52.



(ii) drive innovation and competition in the B2C messaging space; (iii) drive innovation and competition in the CRM market, and (iv) facilitate access to higher quality ads services for businesses.<sup>763</sup>

(503) In assessing any claims regarding efficiencies, the Commission applies the Horizontal Merger Guidelines which establish a cumulative set of requirements to take efficiencies into consideration.<sup>764</sup>

(504) First, the "relevant benchmark" in the assessment of efficiency claims is that consumers should be no worse off as a result of the merger. For that purpose, efficiencies have to be substantial and timely, and should, in principle, benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur.<sup>765</sup>

(505) Any efficiency should be passed on to consumers. The scope for pass-on is often related to the existence of competitive pressure from the remaining firms in the market and from potential entry. The greater the possible negative effects on competition, the more the Commission has to be sure that the claimed efficiencies are substantial, likely to be realized, and to be passed on, to a sufficient degree, to the consumer.<sup>766</sup>

(506) Second, efficiencies should be merger specific and it should not be possible for them to be achieved to a similar extent by less anticompetitive alternatives.<sup>767</sup>

(507) Finally, the efficiencies should be verifiable so that the Commission can be reasonably certain that the efficiencies are likely to materialize, and be substantial enough to counteract a merger's potential harm to consumers.<sup>768</sup>

(508) In the Form CO, the Notifying Parties have submitted very brief and generalised claims regarding cost savings (for businesses that service consumers through messaging) and how the Transaction will drive innovation and competition in the relevant markets.<sup>769</sup>

(509) It is incumbent upon the Notifying Party to provide the Commission in due time with all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised and that the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and that the claimed efficiencies therefore benefit consumers.<sup>770</sup>

(510) The Commission therefore considers the Notifying Party has not shown that any efficiencies are verifiable, merger specific and would be passed on to consumers.

(c.vi) Conclusion

(511) On the basis of the assessment in Section 7.3.2.2.(c) above, the Commission concludes that, were the merged entity to pursue a targeted input foreclosure strategy of restricting or degrading API access, it is likely, and there is even a strong probability that the Transaction would have significant negative effects on

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<sup>763</sup> Form CO, paragraph 9.1.

<sup>764</sup> See Non-Horizontal Guidelines, paragraph 53; Horizontal Merger Guidelines, paragraph 78.

<sup>765</sup> See Horizontal Merger Guidelines, paragraph 79.

<sup>766</sup> See Horizontal Merger Guidelines, paragraph 84.

<sup>767</sup> See Horizontal Merger Guidelines, paragraph 85.

<sup>768</sup> See Horizontal Merger Guidelines, paragraph 86.

<sup>769</sup> Form CO, Section 9.

<sup>770</sup> See Horizontal Merger Guidelines, paragraph 87.

competition in the EEA-wide, if not worldwide, market for customer service and support CRM software. This conclusion also holds for the broader downstream market for CRM software, given the importance of customer service and support CRM software within an overall market for CRM software. As outlined in Section 7.3.2.2.(a.i) above, the Commission's conclusion would not change if the customer service and support CRM software market, or the overall CRM software market, were to be segmented based on (i) business customer size, (ii) mode of deployment or (iii) the industry sector of the business customer, because OTT B2C messaging channels would remain an equally important input irrespective of such further segmentation.

#### 7.3.2.3. Conclusion

- (512) Based on the assessment in Section 7.3.2.2, and in light of the results of the market investigation and of all the evidence available to it, the Commission has reached the conclusion that it is likely, and there is even a strong probability, that the Transaction would significantly impede effective competition as a result of vertical non-coordinated effects arising from vertical links between the EEA-wide, if not worldwide, upstream market for OTT B2C messaging services and the EEA-wide, if not worldwide, downstream market for customer service and support CRM software. This conclusion also holds for the potential broader upstream market for B2C communication services overall, given the importance of Meta (formerly Facebook)'s channels for CRM software providers and their business customers, as well as the complementarity of different channels in such a potential wider market, as well as the broader potential downstream market for CRM software overall, given the importance of customer service and support CRM software within a potential overall CRM software market. As outlined in Section 7.3.2.2.(a.i) above, the Commission's conclusion would not change on the basis of the potential segments of the customer service and support CRM software market, or the overall CRM software market, based on (i) business customer size, (ii) mode of deployment or (iii) the industry sector of the business customer because OTT B2C messaging channels would remain an equally important input irrespective of such further segmentation.
- (513) In view of the above considerations and in light of the results of the market investigation and the evidence and information available to it, the Commission concludes that post-Transaction, Meta (formerly Facebook) would have the ability and the incentive to target foreclose (partially or totally) at certain third-party access to Meta (formerly Facebook)'s B2C messaging channels. The Commission concludes that such targeted foreclosure (be it partial or total) would significantly impede effective competition on the market for customer service and support CRM software, as well as the broader market for CRM software overall or any potential segments thereof.

#### 7.4. Assessment of horizontal effects

- (514) In Section 7.3.2.2.(b), the Commission took into account the potential accumulation of data by Meta (formerly Facebook) through the ownership of Kustomer as an incentive to engage in an input foreclosure strategy on the market for customer service and support CRM software. The Commission has also separately considered whether the accumulation of data might lead to raised barriers to entry and expansion on the market for online display advertising or any segment thereof.
- (515) Although the Transaction does not give rise to any horizontally affected markets in a traditional sense, the Commission considers that, after the Transaction, the

availability to Meta (formerly Facebook) of commercially exploitable data, which can be obtained from Kustomer's activities, would be augmented.

- (516) In particular, the Transaction may result in an increase of Meta (formerly Facebook)'s data collection capabilities through the acquisition of Kustomer if Meta (formerly Facebook) incentivises Kustomer's customers to give access to their data. Meta (formerly Facebook)'s databases are not made available today to third parties and Kustomer, as a processor under the GDPR, cannot on its own take a decision to give access to a database of its business customers without agreement from the business customer. [Business Plans in relation to Data Sharing].<sup>771</sup>
- (517) The Horizontal Merger Guidelines set out a number of factors which may influence whether significant non-coordinated effects are likely to result from a merger. According to paragraph 36 of the Horizontal Merger Guidelines, a merger can significantly impede effective competition if the merged entity gains such a degree of control over an asset that expansion or entry by rival firms may be more difficult.
- (518) In the present case, the Transaction would allow Meta (formerly Facebook) to combine its already very prominent datasets with data it could potentially obtain through the acquisition of Kustomer by incentivising Kustomer's customers to share data, thus strengthening the Parties' ability to further target their supply in the online display advertising market, and any sub-segment thereof, and creating or reinforcing barriers to entry and expansion in such market. Such a concern would arise to the extent the merged entity has the ability to combine Meta (formerly Facebook)'s datasets with data it could obtain through the acquisition of Kustomer and is therefore merger specific.
- (519) The Commission notes in this respect that there are certain regulatory limitations to prevent the illegal combination of datasets, as previously set out in *Apple/Shazam*<sup>772</sup> and *Google/Fitbit*<sup>773</sup>.
- (520) First, the Commission recalls that the processing of personal data is subject to the applicable EU rules dealing with personal data protection, and most notably to Regulation (EU) 2016/679 of the European Parliament and of the Council<sup>774</sup> (the "GDPR"). Such rules apply to personal data, that is "any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person"<sup>775</sup>.
- (521) Pursuant to Article 4 GDPR, a controller is the natural or legal person which determines the purposes and means of the processing of personal data, while a processor is a natural or legal person which processes personal data on behalf of the

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<sup>771</sup> Form CO, paragraph 3.2.12.

<sup>772</sup> Commission decision of 6 September 2018 in case M.8788 – *Apple/Shazam*, paragraphs 225-235.

<sup>773</sup> Commission decision of 17 December 2020 in case M.9660 – *Google/Fitbit*, paragraphs 403-413.

<sup>774</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, page 1. In this Decision, the Commission discusses the rules under that Regulation only for the purposes of the assessment the Transaction under the Merger Regulation. The analysis in this Section is therefore entirely without prejudice to the relevant administrative or legal procedures where the Parties' compliance with those rules may be assessed.

<sup>775</sup> GDPR, Article 4(1).

controller.<sup>776</sup> A processor may not process data except on instructions from the controller, unless required to do so by EU or Member State law.<sup>777</sup>

- (522) Pursuant to Article 5(1)(b) GDPR, personal data which has been collected for specified, explicit and legitimate purposes may not be further processed in a manner that is incompatible with those purposes. Data which qualifies as personal data under the GDPR can be transmitted to and processed by a third party only to the extent that there exists a legal basis for the transmission to the third party and a legal basis for the processing by that third party. Further, the GDPR requires that individuals concerned by the processing must be informed in a transparent manner on all relevant circumstances of the processing, including on the identity of each controller and the purposes of the processing.<sup>778</sup>
- (523) Second, the Commission also recalls that Union rules dealing with privacy and the protection of the confidentiality of communications, notably Directive 2002/58/EC of the European Parliament and of the Council<sup>779</sup> (the “e-Privacy Directive”) may also pose some limitations to data combinations.
- (524) Article 5(3) of the e-Privacy Directive requires that Member States ensure that the storing of information or gaining access to information already stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her agreement, having been provided with clear and comprehensive information, in accordance with the GDPR, inter alia, about the purposes of the processing. This does not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary for the provider of an information society service explicitly requested by the subscriber or user to provide the service.
- (525) Meta (formerly Facebook) and Kustomer are obliged to implement appropriate technical and organizational measures to ensure and to demonstrate that processing is performed in accordance with the GDPR and the e-Privacy Directive, as transposed in Member States’ laws. In particular, they must ensure the lawfulness of their data collection from the users’ devices and of the processing of personal data they collect and have to comply with the principles relating to the processing of personal data, including the principles of purpose limitation, fairness, legality (in particular having chosen appropriate legal basis) and transparency.
- (526) Without prejudice to the assessment of the matter by the competent data protection authorities, the assessment of the effects of the Transaction under the Merger Regulation in this Decision is predicated on the assumption that Meta (formerly Facebook) could gain access to additional datasets through the acquisition of Kustomer. Even if any possible future access to additional datasets would not be in compliance with the GDPR or the e-Privacy Directive, as transposed in Member

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<sup>776</sup> GDPR, Articles 4(7) and 4(8).

<sup>777</sup> GDPR, Article 29.

<sup>778</sup> GDPR, Articles 5, 13 and 14.

<sup>779</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (“Directive on privacy and electronic communications” or “e-Privacy Directive”), OJ L 201, 31.7.2002, pages 37-47. In this Decision, the Commission discusses these rules only for the purposes of the assessment of the Transaction under the Merger Regulation. The analysis in this Section is therefore without any prejudice to the relevant administrative or legal procedures where the Parties’ compliance with those rules may be assessed.

States' laws, the assessment of the effects of the Transaction under the Merger Regulation would be the same, unless the consequences of a breach would effectively prevent the Parties from getting access to additional datasets.

- (527) While there are EU rules dealing with data protection, privacy, and the protection of the confidentiality of communications that have the aim to prevent the illegal combination of datasets, these regulations do not eliminate the risk that the Parties' ability to get access to such data by incentivizing Kustomer's customers to give access to their data could render the expansion or entry by rival firms more difficult if not impossible.
- (528) Therefore, the Commission examines whether the combination of Kustomer's data, or data that could be collected from customers of Kustomer, and Meta (formerly Facebook)'s data and data collection capabilities could give rise to anticompetitive horizontal non-coordinated effects by strengthening Meta (formerly Facebook)'s market position in the supply of online display advertising services or any sub-segment thereof, thereby significantly impeding effective competition in this market.

#### 7.4.1. *Legal Framework*

- (529) The Horizontal Merger Guidelines describe two main ways in which horizontal mergers may significantly impede effective competition, in particular by creating or strengthening a dominant position: (i) by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects); and (ii) by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are significantly more likely to coordinate and raise prices or otherwise harm effective competition (coordinated effects) as a result of the proposed concentration.<sup>780</sup> For the purpose of this Decision, only the potential non-coordinated effects are assessed.
- (530) A merger giving rise to horizontal non-coordinated effects might significantly impede effective competition by creating or strengthening the dominant position of a single firm, one which, typically, would have an appreciably larger market share than the next competitor post-merger. Moreover, also mergers that do not lead to the creation of or the strengthening of a single firm's dominant position may create competition concerns under the substantive test set out in Article 2(2) and Article 2(3) of the Merger Regulation. Regarding mergers in oligopolistic markets, the Merger Regulation clarifies that "*under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition*".<sup>781</sup>
- (531) The Horizontal Merger Guidelines list a number of factors which may influence whether or not significant horizontal non-coordinated effects are likely to result from a merger<sup>782</sup>, such as the large market shares of the merging firms or the fact that the merged entity would be able to hinder the expansion of competitors. Not all those

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<sup>780</sup> Horizontal Merger Guidelines, paragraph 22.

<sup>781</sup> Merger Regulation, recital 25. Similar wording is also found in Horizontal Merger Guidelines, paragraph 25.

<sup>782</sup> Horizontal Merger Guidelines, paragraphs 26 and further.

factors need to be present to make significant non-coordinated effects likely and it is not an exhaustive list. Further, the Horizontal Merger Guidelines state that, “according to well-established case law” very large market shares of 50% or more may in themselves be evidence of the existence of a dominant market position.<sup>783</sup>

- (532) Specifically as regards the merged entity’s ability to hinder expansion by competitors, the Horizontal Merger Guidelines state that some proposed mergers would significantly impede effective competition by leaving the merged firm in a position where it would have the ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete. This could be the case, for example, where the merged entity exercises control over certain types of inputs, or intellectual property making the expansion or entry of rival firms more costly.<sup>784</sup>

#### 7.4.2. *Data held by Kustomer*

- (533) CRM providers, including Kustomer, generally do not own / control the data that is stored on their systems. Indeed, all CRM providers expressing an opinion indicated during the market investigation that their business customers own the data they store.<sup>785</sup> Any CRM provider would therefore need to obtain agreement / instruction from its business customers before it could use any of its data.
- (534) In paragraphs 330-337 above, the Commission set out the types of data that Kustomer stores on their systems and that Meta (formerly Facebook) might therefore get access to following the Transaction, were it to obtain agreement from business customers to access and use the data. Meta (formerly Facebook) makes a distinction in this regard between on the one hand Customer Transaction Data and on the other hand Other Event Data.
- (535) “Customer Transaction Data” (or conversions data) relates to data on completed transactions that businesses may share with Kustomer. More specifically, this data could include, for example, data such as customer contact information, their gender or date of birth, as well as their order and purchase history, payment information, return data and customer interaction data.
- (536) “Other Event Data” relates to other data on customer actions falling short of purchases (sometimes referred to as “mid-funnel” events). This includes website views, adds to cart, adds to wish-list, store visits, app downloads, or other “custom events” that a business may decide to record and share.
- (537) As regards these other “custom events” that a business may decide to share with Kustomer, the Notifying Party clarified that Kustomer’s CRM software allows businesses to upload data in relation to their end customers, including data in relation to incomplete transactions so that it appears in their Kustomer CRM software interface. This is achieved through incorporating a snippet of code on the business’ website.<sup>786</sup> The data will be integrated into the relevant business’ account as custom object data. Moreover, according to a training video demonstrating Kustomer’s CRM software, what makes Kustomer “unique” is that it is able to bring into its CRM software data from other systems, such as, for example, e-commerce platforms (such

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<sup>783</sup> Horizontal Merger Guidelines, paragraphs 17.

<sup>784</sup> Horizontal Merger Guidelines, paragraph 36.

<sup>785</sup> Replies to questionnaire 1 to CRM software providers, question 58.

<sup>786</sup> Form CO, footnote 226. According to the Notifying Party, currently only around [a small percentage] of customers of Kustomer actually made use of this function.

as Shopify), a business' back-end system, and through widgets that are included in for example e-commerce platforms.<sup>787</sup>

- (538) Finally, as set out previously, Kustomer's CRM software may also generate some of its own data. For example, Kustomer's CRM software calculates a "customer sentiment" score.

#### 7.4.3. *Raised barriers to entry and expansion as a result of data accumulation*

- (539) Some respondents to the market investigation raised concerns that the Transaction would have a negative impact on the market for online display advertising services if Meta (formerly Facebook) would obtain access to the data held by Kustomer, as this might raise the barriers to entry and expansion on the market.<sup>788</sup>

##### 7.4.3.1. Notifying Party's views<sup>789</sup>

- (540) In the Form CO and Article 6(1)(c) Response, the Notifying Party argues that, while the Transaction may provide Meta (formerly Facebook) with additional data "signal" by virtue of improved access to data collected and processed by Kustomer on behalf of its business customers, this is an efficiency that generates material benefits for business and end users.<sup>790</sup>

- (541) First, the Notifying Party submits that it would not be able to reduce ads service rivals' access to that data because: (i) any sharing of Event Data via Kustomer does not involve Meta (formerly Facebook) accessing any new types of data that it could not access before the Transaction; (ii) business customers control and store all of their Event Data and can share it with Meta (formerly Facebook) and third parties (including Meta (formerly Facebook)'s ads service rivals) independently of Kustomer<sup>791</sup>; and (iii) currently, any such data stored by Kustomer can only be used for ads purposes if the business specifically agrees and Meta (formerly Facebook) intends to continue this Kustomer's policy.<sup>792</sup>

- (542) Second, the Notifying Party considers that Meta (formerly Facebook) would not have access to significant incremental Event Data because Kustomer is currently a very small player in the CRM market (holding a fraction of Event Data held by competing providers) and any improved access to data would therefore not materially enhance Meta (formerly Facebook)'s position in ads services (or online ads services considered separately).<sup>793</sup>

- (543) Third, the Notifying Party considers that any foreclosure strategy would not have effects on competition in ads services given that Meta (formerly Facebook) faces

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<sup>787</sup> Kustomer live demo dated 24 April 2019, available at: <https://kustomer.wistia.com/medias/aj05oeeenj>, last accessed on 21 July 2021

<sup>788</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, questions 72 and 75; replies to questionnaire 4 to business customers, question 75; replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 33.

<sup>789</sup> In the Form CO, the Notifying Party submits its views on data concerns on ads services under the Section for conglomerate effects (Form CO, paragraphs 6.118–6.125).

<sup>790</sup> Form CO, paragraph 6.119; Article 6(1)(c) Response, paragraph 4.3.

<sup>791</sup> The Notifying Party further clarified that businesses usually do provide this data other than via CRM providers and even when these are used as a channel, nothing prevents ad providers from working with their advertising customers and CRMs to enable data to be sent via CRMs. (Meta (formerly Facebook) Comments on State of Play Meeting, paragraphs 3.2.-3.4.).

<sup>792</sup> Form CO, paragraph 6.122.

<sup>793</sup> Form CO, paragraph 6.123.

significant competition from ads service rivals (including ads services in the offline channel).<sup>794</sup>

- (544) In the Article 6(1)(c) Response, the Notifying Party reiterated that Kustomer is and will remain a tiny player in the CRM market, whose acquisition is not capable of resulting in merger-specific harm as a result of an increase of barriers to entry and expansion.<sup>795</sup>
- (545) To substantiate this point, the Notifying Party argues that in terms of advertising numbers, the projected number of businesses using Kustomer in 2025 that are expected to share data with Meta (formerly Facebook) equates to [Customer Information] % of the projected number of all businesses worldwide sharing such data with Meta (formerly Facebook) in 2025. In terms of revenue numbers, compared to the revenue Meta (formerly Facebook) is expected to make from online display advertising services on social networks in 2025, the revenue generated from the data that Meta (formerly Facebook) expects will be shared by Kustomer's customers in 2025 would amount to less than [Customer Information]%.<sup>796</sup>

#### 7.4.3.2. Commission's Assessment

- (a) Meta (formerly Facebook)'s market position in online display advertising
- (546) The Commission considers that Meta (formerly Facebook) holds significant market power in the market for online display advertising and in certain segments thereof. Moreover, Meta (formerly Facebook)'s current data collection capabilities present a significant advantage on the market for online display advertising services.
- (a.i) Meta (formerly Facebook) holds significant market power in online display advertising
- (547) As set out above, the Commission concluded that a separate market for online display advertising services exists. For the purpose of this Decision, it can however be left open whether the market for the supply of online display advertising services should be further segmented by (i) on-/off-social networks, (ii) video/non-video ads, and (iii) mobile/desktop.
- (548) In relation to **online display advertising** and sub-markets/segments thereof, for the purpose of this Decision, and in keeping with the Horizontal Merger Guidelines and case law, the Commission considers that Meta (formerly Facebook) holds significant market power in the following markets (where its market shares are above 50%, which according to well-established case law, may in themselves be evidence of the existence of a dominant position):<sup>797</sup>
- In the supply of online display advertising services in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>798</sup>
  - In the supply of online display advertising services on social networks in Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland,

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<sup>794</sup> Form CO, paragraphs 6.87 and 6.125.

<sup>795</sup> Article 6(1)(c) Response, paragraph 4.3.

<sup>796</sup> Article 6(1)(c) Response, paragraph 4.14.

<sup>797</sup> Horizontal Merger Guidelines, paragraph 17.

<sup>798</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Netherlands.



France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Malta, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>799</sup>

- In the supply of online display video advertising services in Austria, Belgium, Croatia, Czechia, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Spain, and Sweden;<sup>800</sup>
- In the supply of online display non-video advertising services in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Greece, Hungary, Iceland, Italy, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>801</sup>
- In the supply of online display advertising services on mobile in Austria, Belgium, Croatia, Czechia, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden;<sup>802</sup> and
- In the supply of online display advertising service on desktop in Slovenia.

(549) The Commission bases this conclusion on the market shares of Meta (formerly Facebook), as outlined in Section 7.2.3.<sup>803</sup>

(a.ii) Meta (formerly Facebook) has significant data collection capabilities

(550) In order to be successful on the market for online display advertising services, Meta (formerly Facebook) as well as other market participants rely on data access and collection of data in order to improve their ads services. In the Form CO, Meta (formerly Facebook) describes that it “collects data from its users to serve relevant ads on behalf of advertisers. It may also combine that with data that advertisers opt to share with Facebook, in order to maximise the effectiveness of those ads”.<sup>804</sup>

(551) The data Meta (formerly Facebook) collects could give it an advantage on the market for online display advertising services in three ways. First, data could be used to improve ad targeting, i.e., by using data to target an ads campaign to a specific audience. Second, data could be used to measure “conversions” (i.e., the effectiveness of particular ads campaigns in leading to more sales).<sup>805</sup> Third, Meta (formerly Facebook) also uses data shared by advertisers for general system improvement. This involves the improvement to predictions around which users are likely to take the actions that are important to the relevant advertiser. If an advertiser would, for example, choose to optimise its data use for Link Clicks, its ads will be shown to people who may be more likely to click on those links according to

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<sup>799</sup> Following linguistic borders within the EEA, this may also include Cyprus and Luxembourg.

<sup>800</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, and Netherlands.

<sup>801</sup> Following linguistic borders within the EEA, this may also include Cyprus, Liechtenstein, Luxembourg, Germany and Netherlands.

<sup>802</sup> Following linguistic borders within the EEA, this may also include Cyprus, Luxembourg and Liechtenstein.

<sup>803</sup> This is without prejudice to the possibility that Google could be found to be holding an equally significant degree of market power in the markets at stake, in particular in the overall national markets for the supply of online display advertising, as well as in the national markets for the supply of online display advertising off social networks.

<sup>804</sup> Form CO, paragraph 6.32.

<sup>805</sup> Form CO, paragraph 6.120.

predictions of Meta (formerly Facebook)'s machine learning models.<sup>806</sup> Meta (formerly Facebook)'s website identifies many other objectives that an advertiser might have to share its data for general system improvement.<sup>807</sup>

- (552) Meta (formerly Facebook) collects / receives two types of data: (i) on-site data; and (ii) off-site data. "On-site data" are gathered as a result of user behaviour on Meta (formerly Facebook)'s services and may include a range data including, e.g., users' connections, preferences and activities, interactions between a user and Meta (formerly Facebook)'s services, etc. "Off-site data" are data that Meta (formerly Facebook) collects or receives from third parties and relating to users' behaviour on those third parties' products and services. Off-site data can include for example information on the ways someone might interact with a third party's website/app (e.g., visits, purchases and ads seen/interacted with).<sup>808</sup>
- (553) Businesses can share off-site data with Meta (formerly Facebook) directly, or via Meta (formerly Facebook)'s partners, through Meta (formerly Facebook) Business Tools, which include Facebook Pixel, Conversions API, App Events via Facebook SDKs, App Events API and Offline Conversions API.<sup>809</sup>
- Facebook Pixel is a small piece of code that third parties can choose to add to their websites to enable them to measure, optimise and build audiences for advertising campaigns;
  - Conversions API enables third parties to share web events from the third party's server with Meta (formerly Facebook). This is similar to Facebook Pixel, but it does not rely on cookies;
  - Meta (formerly Facebook) SDKs are packages of code around one or more APIs. Third parties can choose to integrate these SDKs to their mobile apps or websites to enable Meta (formerly Facebook) to receive information about the actions of users on the apps/websites;
  - App Events API is a tool that allows advertisers to track actions that occur in their mobile apps or websites. This helps an advertiser to measure ad performance and build audiences for ad targeting; and
  - Offline Conversions API allows third parties to upload existing offline events such as in-store purchases, over-the-phone bookings etc. and to match this data to that third party's Meta (formerly Facebook) ads campaigns.
- (554) Because of its collection of on-site and off-site data, the Commission considers that Meta (formerly Facebook) has data collection capabilities that give it a significant advantage on the market for online display advertising services.
- (555) Meta (formerly Facebook) itself confirms its data collection capabilities in the Article 6(1)(c) Response where it states that Meta (formerly Facebook) currently receives similar ads data as the data that Kustomer stores from [Customer information] million businesses.<sup>810</sup> As set out above, this data is collected both through Meta (formerly Facebook)'s platforms Facebook and Instagram (on-site

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<sup>806</sup> Parties' reply to RFI 21, question 11a.

<sup>807</sup> See: <https://www.facebook.com/business/help/416997652473726>, last accessed on 7 December 2021 (ID: 2811).

<sup>808</sup> Parties' reply to RFI 17, question 13b.

<sup>809</sup> Parties' reply to RFI 16, question 12.

<sup>810</sup> Article 6(1)(c) Response, para. 4.14.

data) as well as through Meta (formerly Facebook) Business Tools (off-site data). The potential on-site data collection in itself is significant as Meta (formerly Facebook) announced in its most recent quarterly report that it has 2.91 billion monthly active users.<sup>811</sup> Moreover, given its significant market position in online display advertising, the Commission considers that Meta (formerly Facebook) also has a significant capability to attract off-site data. Similarly, the CMA concluded in its Market Study “Online platforms and digital advertising” of 1 July 2020 that the data capabilities of other platforms than Google and Meta (formerly Facebook) are relatively limited, indicating that Meta (formerly Facebook) has exclusive access to a large amount of data, giving it a significant competitive advantage over other market participants.<sup>812</sup>

- (556) Third parties confirm Meta (formerly Facebook)’s current position on the market for online display advertising services and its significant data advantage. One party notes that “*many SMBs use Facebook as their sole medium of communication as the platform offers them an entire service package that is not available elsewhere. This makes those SMBs very reliant on Facebook, which in turn controls how those businesses make contacts, how they acquire visibility, and how Facebook manages their data*”.<sup>813</sup> Another company confirms that Meta (formerly Facebook) can do much more with the data it owns: “*Facebook has strong algorithms, and can infer much more than anything Viber is capable of. Viber indicates that in the advertising world there are not many companies capable of offering advertising at the level of Facebook*”.<sup>814</sup>
- (557) A respondent to the market investigation that is itself active on the market for online display advertising services considers that “*There are likely to be existing barriers to entry and expansion for any provider who would like to offer online display advertising*”. As advertisers generally have limited advertising budgets, they may seek an online ads service provider “*who offers exposure to a large number of consumers, or the ability to target particular categories of consumers. This will often rely on a large and diverse data set, which comes both from economies of scale and from having a large network of users. These considerations will often favour a large incumbent*”. In this regard, the respondent considers that “*A more established player, or a player with access to particularly valuable forms of data, may therefore have an immediate advantage over new entrants*”.<sup>815</sup>
- (558) Specifically in relation to the Customer Transaction Data, or the type of data that is stored in CRM software, one respondent to the market information states that this type of data “*is the cornerstone of the economy of Facebook and Google – both optimise to generate sales for their clients based on the behaviour of people who have already purchased*”.<sup>816</sup> The same respondent indicates “*It has been Facebook’s*

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<sup>811</sup> Meta (formerly Facebook) quarterly report, Q3 2021, press release. Available at: <https://investor.fb.com/investor-news/press-release-details/2021/Facebook-Reports-Third-Quarter-2021-Results/default.aspx>, last accessed on 19 December 2021 (ID: 2802).

<sup>812</sup> CMA, Market Study “Online platforms and digital advertising” of 1 July 2020, Appendix F, paragraph 58.

<sup>813</sup> Agreed minutes of the call of 3 June 2021 with Snapchat, paragraph 26 (ID: 2104).

<sup>814</sup> Agreed minutes of the call of 16 September 2021 with Viber, paragraph 9 (ID: 2033).

<sup>815</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 72.1 (ID: 864).

<sup>816</sup> Reply to questionnaire 4 to business customers, question 66.1 (ID: 768).

*strategy to request companies to share as much information as possible with them – be it via the Pixel or Facebook connect”.*<sup>817</sup>

- (a.iii) Conclusion
- (559) Based on the evidence presented in Section 7.5.3.2.(a) above, the Commission considers that Meta (formerly Facebook) holds at least significant market power in the market for online display advertising services and that already prior to the Transaction Meta (formerly Facebook) has data collecting capabilities that provide a significant data advantage.
- (b) Potential data accumulation through the acquisition of Kustomer
- (560) Before assessing the potential data accumulation by Meta (formerly Facebook) as a result of the acquisition of Kustomer, it should be specified that the acquisition will not lead directly to an increased market share of Meta (formerly Facebook) on the market for online display advertising services or any segment thereof. Indeed, Kustomer itself is not active on this market or any of its segments.
- (561) In relation to the potential accumulation of data it is further important to note that Kustomer itself does not own / control any of the data that its business customers store on its systems. As a consequence, any data increment by Meta (formerly Facebook) depends on the agreement of the business customers of Kustomer as well as any required consent by the end customer.<sup>818</sup>
- (b.1) Meta (formerly Facebook) could encourage business customers to agree to the use of data
- (562) As set out above in paragraphs 346-348 above, the Commission considers that Meta (formerly Facebook) will have the ability to encourage business customers to agree to share data. Internal documents reveal that [Business Plans]<sup>819</sup>. In another document, Meta (formerly Facebook) discusses [Business Plans]. In this document, Meta (formerly Facebook) [Business Plans].<sup>820</sup> In practice, Meta (formerly Facebook) [Business Plans].<sup>821</sup>
- (563) Respondents to the market investigation confirm that, in their view, the need to obtain agreement would not hinder Meta (formerly Facebook) in its ability to obtain a significant volume of data. Indeed, all B2C communication channel providers and online ads service providers expressing an opinion indicate that Meta (formerly Facebook) could encourage businesses using Kustomer to share more data through its ownership of Kustomer.<sup>822</sup> A majority of the customers of Meta (formerly Facebook) and Kustomer responding to the market investigation state that, following the Transaction, they would be willing as a customer of CRM software to share data with Meta (formerly Facebook) for online display advertising purposes.<sup>823</sup>

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<sup>817</sup> Reply to questionnaire 4 to business customers, question 69.1 (ID: 768).

<sup>818</sup> Form CO, paragraph 6.122.

<sup>819</sup> Form CO, Attachment E2344, page 2.

<sup>820</sup> Form CO, Attachment E027, page 4.

<sup>821</sup> Form CO, paragraph 6.122.

<sup>822</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 70.

<sup>823</sup> Replies to questionnaire 4 to business customers, question 64.

- (b.ii) Data stored by Kustomer that is accessible to Meta (formerly Facebook) today
- (564) In paragraphs 338-362 above the Commission assessed the volume, value, variety and velocity of the data that Meta (formerly Facebook) could obtain following the Transaction. On the basis of these findings, the Commission considers that the data Meta (formerly Facebook) could obtain following the acquisition of Kustomer is highly relevant for improving Meta (formerly Facebook)'s targeting capabilities for the online display advertising services it provides. In addition to these findings, the Commission has further assessed to what extent data that is stored by Kustomer is accessible to Meta (formerly Facebook) today.
- (565) The Notifying Party submits that the Transaction will not give Meta (formerly Facebook) access to any types of data that it did not have access to before the Transaction.<sup>824</sup> In relation to the first category of data that is stored on Kustomer's systems (i.e., Customer Transaction Data), Meta (formerly Facebook) submits that, for example, customer lists are regularly shared through Meta (formerly Facebook)'s Custom Audiences or through Meta (formerly Facebook) Business Tools. Other Customer Transaction Data, such as actual transaction data or order history are regularly shared through for example Facebook Pixel, Web Events API, App Events API, SDKs, Conversions API and Offline Conversions API. Meta (formerly Facebook) receives this information either directly from an advertiser, or indirectly through one of its partners. As regards Other Event Data, the second category of information that is stored in Kustomer's systems, Meta (formerly Facebook) submits that this is also often shared as off-site data through Meta (formerly Facebook) Business Tools. Examples of this type of information include website visits or items placed in a shopping cart.<sup>825</sup>
- (566) The Commission assessed during the market investigation what types of data customers usually store in their CRM software. A majority of the responding CRM software providers indicated the following types of data as the main categories that are usually stored in their systems: customer identity, customer location, customer contact information, purchasing history/conversions data, the number of customer interactions and unstructured conversations data with customers.<sup>826</sup> While most of this data is available to Meta (formerly Facebook), it does not receive unstructured conversations data on channels other than its own B2C communications channels. This is confirmed by a competitor in online display advertising services, which states that "*at a minimum, Facebook would have direct visibility into interactions between a consumer and a business and correlate that consumer with profile information that Facebook already has about the consumer*".<sup>827</sup>
- (567) Internal documents suggest that [Business Plans].<sup>828</sup> Kustomer also [Business Plans]. In a presentation to Meta (formerly Facebook), it [Business Data].<sup>829</sup>
- (568) On the basis of the above, the Commission considers that, while Meta (formerly Facebook) might already have access to many if not most of the types of data that it might obtain through its acquisition of Kustomer, it might still get access to certain

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<sup>824</sup> Form CO, paragraph 6.122i.

<sup>825</sup> Parties' reply to RFI 21, question 12.

<sup>826</sup> Replies to questionnaire 1 to CRM software providers, question 60.

<sup>827</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 64 (ID: 855).

<sup>828</sup> Form CO, Attachment E14223, page 2.

<sup>829</sup> Form CO, Attachment E0010, slide 10.

new types of information. This could include in particular unstructured conversation data. While Meta (formerly Facebook) submits that unstructured data is [Regulatory Submission]<sup>830</sup>, the Commission cannot rule out that consumer interaction data from B2C communication channels other than those of Meta (formerly Facebook) could be potentially rich sources of information despite it being unstructured as is suggested in public sources.<sup>831</sup>

(569) The Commission finally took into account to what extent Meta (formerly Facebook) might have access to data that is held by Kustomer, even if it does not represent ‘new types’ of data. As regards the volume of new data that Meta (formerly Facebook) might receive, the Notifying Party presented an estimate of the number of Kustomer’s business customers that already share data with Meta (formerly Facebook) for advertising purposes through some of Meta (formerly Facebook) Business Tools (Facebook Pixel, SDKs and/or Conversions API). Of the [Customer Information] business customers of Kustomer (as of 31 December 2020), [Customer Information] customers have a positive ad spend with Meta (formerly Facebook) in 2020. This amounts to approximately [Customer Information]%.<sup>832</sup> Moreover, in its Valuation Model of Kustomer, Meta (formerly Facebook) estimated that [estimates in relation to ads data].<sup>833</sup>

(570) The Commission considers that while some business customers may already share similar data with Meta (formerly Facebook) through other means than Kustomer’s CRM software, it cannot exclude that business customers may be more willing to share such data following the Transaction. In this regard, a majority of respondents expressing an opinion indicated that they would be willing to share Customer Transaction Data with Meta (formerly Facebook) for online display advertising purposes following the Transaction.<sup>834</sup> Moreover, the Commission is not able to verify Meta (formerly Facebook)’s estimation that [estimates in relation to ads data].

(b.iii) Conclusion

(571) On the basis of the assessment in Section 7.4.3.2.(b) above, the Commission concludes that Meta (formerly Facebook) may be able to gain some additional data that could potentially be used to improve Meta (formerly Facebook)’s online display advertising services granting it a further data advantage on the market for online display advertising services or any segment thereof.

(c) Effects of data accumulation on the market for online display advertising services

(572) In order to assess the effects of the data accumulation on the market for the supply of online display advertising services or any sub-segment thereof, the Commission assessed to what extent competitors in the market would face a significant increase in

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<sup>830</sup> Article 6(1)(c) Response, paragraph 4.16.

<sup>831</sup> See for example: Hubspot, Unstructured Data Vs. Structured Data: A 2-Minute Rundown, 9 April 2020, available at: <https://blog.hubspot.com/marketing/unstructured-data>, last accessed on 20 December 2021 (ID: 2816); Forbes, What is unstructured data and why is it so important to businesses? An easy explanation for anyone, 16 October 2019, available at: <https://www.forbes.com/sites/bernardmarr/2019/10/16/what-is-unstructured-data-and-why-is-it-so-important-to-businesses-an-easy-explanation-for-anyone/?sh=3758697615f6>, last accessed on 20 December 2021 (ID: 2807); and Simpli.fy, Winning with unstructured data in programmatic, 13 September 2018, available at: <https://simpli.fi/winning-with-unstructured-data-in-programmatic/>, last accessed on 20 December 2021 (ID: 2806).

<sup>832</sup> Parties’ reply to RFI 17, question 10a.

<sup>833</sup> Parties’ reply to RFI 17, question 1a.

<sup>834</sup> Replies to questionnaire 4 to business customers, question 64.

the barriers to entry and expansion. Further, the Commission assessed whether similar datasets would be available to competitors and whether competitors have counterstrategies available to counter the potential data accumulation by Meta (formerly Facebook).

(c.i) Barriers to entry and expansion

(573) Above, the Commission considered that despite the fact that Kustomer itself does not own / control the data of its business customers and despite the fact that Meta (formerly Facebook) might already receive similar data through other means, the Transaction may lead to further data accumulation by Meta (formerly Facebook).

(574) The Notifying Party submits that any accumulation of data will not have a substantial impact on competition in the market for online display advertising services or any segment thereof. First, it argues that because of the tiny scale of Kustomer, the Transaction will not provide a sufficient competitive advantage to Meta (formerly Facebook) to substantially impact competition. In the success case where Meta (formerly Facebook) [estimates in relation to ads data]. Second, Meta (formerly Facebook) argues that also by revenue numbers, the impact of the data accumulation through the acquisition of Kustomer would be limited. Meta (formerly Facebook) forecasts that [estimates in relation to ads data].<sup>835</sup>

(575) Contrary to Meta (formerly Facebook)'s statements, a majority of B2C communication service providers and online ads service providers believe that Meta (formerly Facebook)'s access to data through the acquisition of Kustomer would increase barriers to entry and expansion on the market for the supply of online display advertising services.<sup>836</sup> Respondents state that:

- (1) *“Naturally, the more data FB has the more barrier it puts on its competition for targeting”*<sup>837</sup>;
- (2) *“As a general matter, any increase in scale, as well as access and control over user data, by market leaders increases the already high barriers to entry and expansion.”*<sup>838</sup>;
- (3) *“There are likely to be existing barriers to entry and expansion for any provider who would like to offer online display advertising. These barriers are often related to establishing a provider’s reach and audience, rather than pure technical barriers. In particular, advertisers generally have limited advertising budgets so may seek out a provider who offers exposure to a large number of consumers, or the ability to target particular categories of consumers. This will often rely on a large and diverse data set, which comes both from economies of scale and from having a large network of users. These considerations will often favour a large incumbent. Growing this network of users can also be a challenge for social networks in particular, as users are attracted to networks where they can find a significant number of friends/professional contacts/people with similar interests. A more established player, or a player*

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<sup>835</sup> Article 6(1)(c) Response, paragraph 4.14.

<sup>836</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 72.

<sup>837</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 72 (ID: 741).

<sup>838</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 72 (ID: 873).

*with access to particularly valuable forms of data, may therefore have an immediate advantage over new entrants in this respect.”*<sup>839</sup>

- (576) All B2C communication service providers and online ads service providers expressing an opinion indicate that the data Meta (formerly Facebook) could get access to would provide it with an increment of data that materially improves its ability to personalise its online display advertising services, in particular with regard to ad targeting.<sup>840</sup> Moreover, all those B2C communication service providers and online ads service providers expressing an opinion consider that Meta (formerly Facebook)’s ownership of Kustomer would allow it to attract a larger portion of an advertiser’s online ad spend.<sup>841</sup> One respondent states in this regard: *“the transaction clearly presents an opportunity to provide the advertiser with a greater understanding of the interactions between the consumer and business and how to correlate those interactions with advertising profiles and behaviour on Facebook’s platform.”*<sup>842</sup>
- (577) Finally, several respondents to the market investigation expect the Transaction to have a negative impact both on their company<sup>843</sup>, on the market for the supply of online display advertising services or sub-segments thereof<sup>844</sup> and on businesses purchasing online display advertising services<sup>845</sup>. Respondents state, among others:
- (1) *“With its acquisition of Kustomer, Facebook has the opportunity to create “super-profiles”, which could confer a competitive advantage to Kustomer and Facebook and may raise consumer data privacy concerns.”*<sup>846</sup>; and
  - (2) *“Depending on the data shared and added, Facebook which is already a dominant player, could become an even more dominant player. In our view, there are already markets where they are essentially the only effective channel for targeted ads, which makes it very easy for them to increase prices.”*<sup>847</sup>
- (578) The Commission considers it unlikely that the Transaction will lead to a significant increase in the barriers to entry and expansion on the market for online display advertising services or any segments thereof. While Meta (formerly Facebook) holds a significant position in the market for online display advertising services and has significant data collection capabilities prior to the Transaction, the size of Kustomer would make a significant data increase unlikely, even taking into account Meta (formerly Facebook)’s ambitious growth targets. Moreover, the Commission

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<sup>839</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 72 (ID: 864).

<sup>840</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 68.

<sup>841</sup> Replies to questionnaire 3 to B2C communication service providers and online ads service providers, question 69.

<sup>842</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 69.1 (ID: 855).

<sup>843</sup> Replies to questionnaire 3 to B2C communications services providers and online ads service providers, question 73; replies to questionnaire 4 to business customers, question 70.

<sup>844</sup> Replies to questionnaire 3 to B2C communications services providers and online ads service providers, question 75; replies to questionnaire 4 to business customers, question 76.

<sup>845</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 33.

<sup>846</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 75.1 (ID: 886).

<sup>847</sup> Reply to questionnaire 3 to B2C communication service providers and online ads service providers, question 75.1 (ID: 741).



considered already above that Kustomer itself does not own any data and that at present Meta (formerly Facebook) already has access to the same type of data and data from a significant percentage of Kustomer's customers. The Commission assesses below whether similar datasets are available to competitors of Meta (formerly Facebook) and whether its competitors have any potential counterstrategies.

- (c.ii) Availability of similar datasets and counterstrategies
- (579) The Notifying Party submits that datasets similar to the one that Meta (formerly Facebook) could obtain through its ownership of Kustomer would also be available to its competitors. First, businesses have the ability to share customer transaction data and other events data either directly or indirectly through other platforms rather than through their CRM software. Second, even if CRM software would be important for sharing this type of data, the Notifying Party argues that online ads service providers could obtain this data through other CRM providers. For example, Google would currently have integrations with software of Salesforce and Hubspot through which business may decide to share data with Google.<sup>848</sup>
- (580) The Commission observes that businesses can share data with online ads service providers in several ways depending on how they store data. A business can have a stack of software that it uses in the ordinary course of business to record sales and purchases, monitor inventory, for accounting and financial functions, customer service, marketing, shipping and logistics. All these types of data could for example be stored in CRM software, but also on e-commerce platforms and data management platforms, in business analytics software etc. As such, a business is not dependent on its CRM software to share data and business customers of Kustomer will not and cannot be prevented to share data with competing online ads service providers. This is also reflected in the results from the market investigation. Almost all respondents to the market investigation stated that they make use of online display advertising services of companies other than Meta (formerly Facebook).<sup>849</sup> In doing so, the vast majority indicates that share data for ads purposes.<sup>850</sup>
- (581) For the reasons above, the Commission considers that competitors of Meta (formerly Facebook) on the market for online display advertising services will still be able to get access to data from customers of Kustomer. The Commission further assessed whether competitors of Meta (formerly Facebook) are able to get access to data through CRM software.
- (582) The Commission notes first that Meta (formerly Facebook) has internally considered [Business Plans]. One internal document states in this regard that [Business Plans].<sup>851</sup>
- (583) The results from the market investigation indicate that similar datasets could be available. While all CRM providers and CPaaS providers expressing an opinion indicate that they do not sell data from their customers<sup>852</sup>, the majority of responding CRM providers allow their customers to share data directly with online ads service

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<sup>848</sup> Meta (formerly Facebook) comments on the State of Play Meeting, 22 July 2021, paragraphs 3.2 and 3.5; and Article 6(1)(c) Response, paragraph 4.22.

<sup>849</sup> Replies to questionnaire 4 to business customers, question 6.

<sup>850</sup> Replies to questionnaire 4 to business customers, question 6.2.

<sup>851</sup> Form CO, Attachment E14233, page 1.

<sup>852</sup> Replies to questionnaire 1 to CRM software providers, question 62; replies to questionnaire 2 to CPaaS providers, question 50.

providers.<sup>853</sup> Moreover, every CRM provider expressing an opinion indicates that business customers do make use of the ability to share data through their CRM software.<sup>854</sup> While only a minority of the responding customers indicate that they currently share data through their CRM software<sup>855</sup>, a majority of the responding online ads service providers confirm that businesses currently share data through their CRM software.<sup>856</sup>

(584) Finally, two responding online ads service providers indicate that they would have strategies available to counter the potential accumulation of data by Meta (formerly Facebook) as a result of the Transaction. One respondent states that “Counterstrategies include multiple partnerships with other CRM providers, and working with ecommerce, messaging channels outside of Facebook”.<sup>857</sup> Another respondent states that “rival online advertising companies would have a range of options available to them in order to gather similar data, including through partnerships with Kustomer itself and with other CRM tools”.<sup>858</sup>

(c.iii) Conclusion

(585) On the basis of all of the evidence set out in the above, the Commission considers that the potential data accumulation as a result of the Transaction will not give rise to a significant increase in the barriers to entry and expansion on the market for online display advertising services or any segment thereof. Moreover, the Commission concludes that competitors on this market would still have access to data from Kustomer’s business customers, or alternatively could get access to similar datasets through for example partnerships with other CRM software providers.

7.4.3.3. Conclusion

(586) In view of the above considerations and in light of the results of the market investigation and the evidence and information available to it, the Commission considers that the Transaction would not significantly impede effective competition in respect of the supply of online display advertising services, and or any sub-segment thereof.

## **7.5. Assessment of conglomerate effects**

### *7.5.1. Legal Framework*

(587) According to the Non-Horizontal Guidelines, in the majority of circumstances, conglomerate mergers will not lead to any competition problems.<sup>859</sup>

(588) However, foreclosure effects may arise when the combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another closely related market by means of tying or bundling or other exclusionary practices. While tying and bundling have often no anticompetitive consequences, in certain circumstances such practices may

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<sup>853</sup> Replies to questionnaire 7 to CRM software providers, question 51.

<sup>854</sup> Replies to questionnaire 7 to CRM software providers, question 52.

<sup>855</sup> Replies to questionnaire 5 to business customers, question 16.2.

<sup>856</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 18.

<sup>857</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 24 (ID: 1658).

<sup>858</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 24 (ID: 1667).

<sup>859</sup> Non-Horizontal Guidelines, paragraph 92.

lead to a reduction in actual or potential competitors' ability or incentive to compete. This may reduce the competitive pressure on the merged entity allowing it to increase prices.<sup>860</sup>

- (589) In assessing the likelihood of such a scenario, the Commission examines, first, whether the merged firm would have the ability to foreclose its rivals<sup>861</sup>, second, whether it would have the economic incentive to do so<sup>862</sup> and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers.<sup>863</sup> In practice, these factors are often examined together as they are closely intertwined.
- (590) In order to be able to foreclose competitors, the merged entity must have a significant degree of market power, which does not necessarily amount to dominance, in one of the markets concerned. The effects of bundling or tying can only be expected to be substantial when at least one of the merging parties' products is viewed by many customers as particularly important and there are few relevant alternatives for that product.<sup>864</sup> Further, for foreclosure to be a potential concern, it must be the case that there is a large common pool of customers, which is more likely to be the case when the products are complementary.<sup>865</sup> Finally, bundling is less likely to lead to foreclosure if rival firms are able to deploy effective and timely counter-strategies, such as single-product companies combining their offers.<sup>866</sup>
- (591) The incentive to foreclose rivals through bundling or tying depends on the degree to which this strategy is profitable.<sup>867</sup> Bundling and tying may entail losses or foregone revenues for the merged entity.<sup>868</sup> However, they may also allow the merged entity to increase profits by gaining market power in the tied goods market, protecting market power in the tying good market, or a combination of the two.<sup>869</sup>
- (592) It is only when a sufficiently large fraction of market output is affected by foreclosure resulting from the concentration that the concentration may significantly impede effective competition. If there remain effective single-product players in either market, competition is unlikely to deteriorate following a conglomerate concentration.<sup>870</sup> The effect on competition needs to be assessed in light of countervailing factors such as the presence of countervailing buyer power or the likelihood that entry would maintain effective competition in the upstream or downstream markets.<sup>871</sup>

#### 7.5.2. *Leveraging of Meta (formerly Facebook) 's position in the online display advertising market into the CRM market*

- (593) The Notifying Party considers that businesses that buy CRM software may also buy online advertising services, and in this sense these two markets are related.<sup>872</sup>

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<sup>860</sup> Non-Horizontal Guidelines, paragraphs 91 and 93.

<sup>861</sup> Non-Horizontal Merger Guidelines, paragraphs 95-104.

<sup>862</sup> Non-Horizontal Merger Guidelines, paragraphs 105-110.

<sup>863</sup> Non-Horizontal Merger Guidelines, paragraphs 111-118.

<sup>864</sup> Non-Horizontal Merger Guidelines, paragraph 99.

<sup>865</sup> Non-Horizontal Merger Guidelines, paragraph 100.

<sup>866</sup> Non-Horizontal Merger Guidelines, paragraph 103.

<sup>867</sup> Non-Horizontal Merger Guidelines, paragraph 105.

<sup>868</sup> Non-Horizontal Merger Guidelines, paragraph 106.

<sup>869</sup> Non-Horizontal Merger Guidelines, paragraph 108.

<sup>870</sup> Non-Horizontal Merger Guidelines, paragraph 113.

<sup>871</sup> Non-Horizontal Merger Guidelines, paragraph 114.

<sup>872</sup> Form CO, paragraph 6.8.

- (594) During the market investigation, the concern has been raised that the Transaction may allow Meta (formerly Facebook) to leverage its position in the market for online display advertising to strengthen Kustomer’s position in the CRM software market.<sup>873</sup>
- (595) Such practices could be related to Meta (formerly Facebook)’s potential bundling of online display advertising services and customer service and support CRM services.
- (596) Several respondents (including CRM and CPaaS providers, as well as business customers) also considered that Meta (formerly Facebook) would have incentives to offer Kustomer’s CRM software for free or at a discount following the Transaction.<sup>874</sup>
- (597) As regards the offering of Kustomer for free or at a discount, the Commission considers this would, in the short term, allow business customers to benefit from the lower or reduced price of its CRM software. In the longer term, this strategy (in parallel with an input foreclosure strategy) could result in a reduction of competition in the customer service and support CRM market.<sup>875</sup> The Commission addressed such a concern in Section 7.3.2.2.(b.ii)C where it concluded that offering Kustomer for free or below market price would not be an inherently anti-competitive strategy *per se* but would exacerbate Meta (formerly Facebook)’s incentive to pursue a targeted input foreclosure strategy of restricting or degrading API access, by reducing the associated losses (i.e., by further encouraging switching to Kustomer, thereby foreclosing CRM software providers and increasing revenues).
- (598) As for the potential bundling of online display advertising with CRM software, the Commission has further investigated whether post-Transaction Meta (formerly Facebook) would have the ability and incentive to engage in such strategy, as well as the potential resulting detrimental effect on competition.

#### 7.5.2.1. Notifying Party’s views

##### (a) Ability

- (599) The Notifying Party submits that Meta (formerly Facebook) would not have the ability to foreclose CRM rivals by engaging in a conglomerate strategy related to its ads services because it has an estimated market share in the market for online ads services of only [30-40%] in the EEA and [20-30%] globally and faces competition from many rivals (such as Google, Apple, YouTube or Amazon). The Notifying Party considers Meta (formerly Facebook) also faces competition from offline channels such as print, radio and TV, including Video On Demand.<sup>876</sup>

##### (b) Incentive

- (600) The Notifying Party also submits that Meta (formerly Facebook) would not have the incentive to foreclose CRM rivals by engaging in such strategy because it contradicts

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<sup>873</sup> Agreed minutes of the call of 9 September 2021 with Zendesk, paragraph 12 (ID: 2085).

<sup>874</sup> Replies to questionnaire 1 to CRM software providers, question 57; replies to questionnaire 2 to CPaaS providers, question 45; replies to questionnaire 4 to business customers, question 75.1.

<sup>875</sup> In order for the strategy of offering Kustomer for free to result in a reduction of competition, the ability of rival CRM software providers (either existing or new entrants) to compete would have to be significantly reduced so that the long-term impact on price, quality and innovation in the market more than offset the short-term benefits to customers from the lower price of Kustomer’s software.

<sup>876</sup> Form CO, paragraph 6.115.

Meta (formerly Facebook)'s strategy to increase the use of messaging for B2C communications.<sup>877</sup>

- (601) According to the Notifying Party, such strategy would also require Meta (formerly Facebook) to [Business Plans].<sup>878</sup>
- (602) Moreover, the Notifying Party submits it would not be able to recover those losses as such strategy would not lead to material gains in the CRM software market. That is because (i) Kustomer is a small player in the CRM market, (ii) in case of a price increase in the standalone price of Meta (formerly Facebook)'s ads services (relative to the bundle), customers of rival CRM providers are unlikely to switch to Kustomer due to its size, scale and limited product offering, (iii) many Meta (formerly Facebook) ads service customers do not use CRM software, (iv) switching CRM software providers is costly and complex, and (v) CRM services and ads services are not natural complements so there would be limited customer demand for a combined product.<sup>879</sup>
- (603) The Notifying Party also submits that the valuation model submitted by Meta (formerly Facebook) assumes that [Business Plans].<sup>880</sup>

(c) Effects

- (604) Finally, given the low level of probable switching to Kustomer due to the aforementioned reasons, the Notifying Party considers that rival CRM providers would not suffer material losses as a result of such foreclosure strategy which could not therefore have a significant detrimental effect on competition.<sup>881</sup>

7.5.2.2. Commission's Assessment

- (605) For the reasons set out below and based on the results of the market investigation, the Commission considers, for the purposes of the present Decision, that Meta (formerly Facebook) would not have the ability to bundle its online display advertising services with CRM software. Therefore, for the purposes of the present Decision, the Commission considers that the question whether Meta (formerly Facebook) would have the incentive to bundle its online display advertising services with CRM software and whether there would likely be a significant detrimental effect on competition in the CRM software market as a result, are not relevant and can be left open.

(a) Ability to foreclose

- (606) For the reasons set out below, the Commission considers that Meta (formerly Facebook) would not have the ability to engage in a bundling strategy of online display advertising services with CRM software.
- (607) As previously mentioned<sup>882</sup>, for the purposes of this Decision, the Commission considers Meta (formerly Facebook) has a significant degree of market power in online display advertising where its services are viewed by many customers as particularly important and there are few relevant alternatives for that product.

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<sup>877</sup> Form CO, paragraph 6.116.

<sup>878</sup> Form CO, paragraph 6.116.

<sup>879</sup> Form CO, paragraph 6.116.

<sup>880</sup> Article 6(1)(c) Response, paragraph 5.3.

<sup>881</sup> Form CO, paragraph 6.117.

<sup>882</sup> Sections 7.2.3. and 7.4.3.2.(a.i) above.

- (608) Moreover, in the Commission’s market investigation, the majority of market respondents that expressed a view considered that CRM software services and online display advertising are generally purchased by the same set of business customers<sup>883</sup> and are complementary products.<sup>884</sup>
- (609) In this regard, several providers of online advertising services explained that the data in CRM software services may be useful to track the effectiveness and improve the targeting of online advertising campaigns.<sup>885</sup> One market respondent highlighted that *“online display advertising services can be effective forms of customer acquisition and, at times, customer re-engagement. CRM software is best for organizing your existing customer information and enabling activities with that data. Many companies use both types of services to grow their business”*.<sup>886</sup> The same respondent explained why it is unclear whether CRM software services and online display advertising services are closely related markets while confirming the complementarity of the two products: *“a significant amount of business’s online display advertising spend is focused on building brand awareness and acquiring new customers that the business could not otherwise reach directly (e.g. such as via an email). CRM software is used to manage information, interactions, and workflows with customers that are definitionally “known” by the business. As stated above, this makes these services complementary -- customers are acquired via display advertising and from that point most engagement with these customers is mediated through a CRM. Some CRM providers offer product capabilities for using CRM data to inform the purchase of display advertising, and others offer products that also facilitate this purchase. However, especially at larger customers, these services are purchased and used by different teams, and the ecosystems and jobs to be done around both of these markets tend to be distinct. As such, it is difficult to determine just how closely related these markets are”*.<sup>887</sup>
- (610) Nevertheless, the majority of market respondents that expressed a view also indicated that CRM software services and online display advertising services tend to be purchased separately (i.e., at different points in time)<sup>888</sup>. One respondent explained *“this would be highly customer specific. We would expect that there are many companies that purchase both online display advertising services and CRM services, as well as many that only purchase one or the other. Even if a company were to purchase both services, we would expect most to source these services independently of each other.”*<sup>889</sup>
- (611) Although respondents were not entirely clear on whether such purchases are made at very different intervals (e.g., yearly purchase/renewal of a CRM software license and

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<sup>883</sup> Replies to questionnaire 7 to CRM software providers, question 54; replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 26.

<sup>884</sup> Replies to questionnaire 7 to CRM software providers, question 53; replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 25.

<sup>885</sup> Replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 25.1.

<sup>886</sup> Reply to questionnaire 7 to CRM software providers, question 53.1 (ID: 1713).

<sup>887</sup> Reply to questionnaire 7 to CRM software providers, question 56.1 (ID: 1713).

<sup>888</sup> Replies to questionnaire 7 to CRM software providers, question 55; replies to questionnaire 6 to B2C communication service and online ads service providers, question 27.

<sup>889</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 26.1 (ID: 1568).

a daily purchase of online display advertising services)<sup>890</sup>, the Commission considers that this is likely the case as many respondents pointed out their purchase involves separate and very different procedures that are usually handled by different departments in the same business customer (usually the purchase of CRM software is handled by the department in charge of sales whereas the marketing department is in charge of the purchase of advertising). In this regard, one respondent highlighted that *“these are two distinct teams in a business - CRM is usually governed by the Sales department, both for new sales, and for existing account managers to manage the ongoing commercial relationship, while advertising is done through the marketing department, which can either be an internal team to the business, or more usually, a 3rd party Agency dedicated in managing online advertising for their customers”*.<sup>891</sup> Another respondent explained that *“the purchase of enterprise software is a major procurement exercise (often involving RFPs, etc.) that involves complex integrations with other business systems. Advertising can be purchased and redirected on a much simpler basis (often through self-serve auction features)”*.<sup>892</sup>

- (612) The different purchasing patterns of online display advertising and CRM may also be related to a company’s longevity. Indeed, one respondent explained that *“although the same customers may purchase online display advertising services and CRM software services, the purchases may occur at different stages in the company’s lifecycle. When a company is first launched, the founders may purchase online display advertising to advertise the company. Once the company achieves some success, the company may then purchase CRM software.”*<sup>893</sup> Another respondent confirmed this, stating *“of course it depends on the business, but when you are growing, you need online advertising immediately while a CRM becomes beneficial only after a certain scale. Generally, learning about your customers first gives you more information to pick the right tool for the job”*.<sup>894</sup>
- (613) There was no clear consensus among CRM providers on whether they would be able to replicate Meta (formerly Facebook)’s combined offer of its online advertising services and Kustomer’s CRM software together as part of a bundle.<sup>895</sup> While one respondent considered such replication is *“near to impossible”*<sup>896</sup>, another highlighted it would need to *“partner with an online media company”*<sup>897</sup> whereas another indicated it has *“signup offers with multiple ad networks at any given time”*.<sup>898</sup> Given the results of the market investigation are mixed, it is unclear whether rival firms are likely unable to deploy effective and timely counter-strategies, such as single-product companies combining their offers.

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<sup>890</sup> Replies to questionnaire 7 to CRM software providers, question 55.2; replies to questionnaire 6 to B2C communication service providers and online ads service providers, question 27.

<sup>891</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 26.1 (ID: 1658).

<sup>892</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 27.1 (ID: 1568).

<sup>893</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 27.1 (ID: 1693).

<sup>894</sup> Reply to questionnaire 6 to B2C communication service providers and online ads service providers, question 27.1 (ID: 2552).

<sup>895</sup> Replies to questionnaire 7 to CRM software providers, question 58.

<sup>896</sup> Reply to questionnaire 7 to CRM software providers, question 58.1 (ID: 2125).

<sup>897</sup> Reply to questionnaire 7 to CRM software providers, question 58.1 (ID: 1655).

<sup>898</sup> Replies to questionnaire 7 to CRM software providers, question 58.1 (ID: 1707).

(614) In light of the above, taking into consideration the overall market results and, in particular, given the different purchasing patterns of online display advertising services and CRM software, for the purposes of the present Decision, the Commission considers Meta (formerly Facebook) would not have the ability to engage in a strategy of bundling its online display advertising services with Kustomer's CRM software.

(b) Incentive to foreclose

(615) Since the Commission has concluded above in Section 7.5.2.2.(a) that Meta (formerly Facebook) would not have the ability to bundle online display advertising with CRM software, the question whether Meta (formerly Facebook) would have the incentive to engage in such a bundling strategy (of online display advertising services with CRM software) can be left open for the purposes of the present Decision.

(c) Impact on effective competition

(616) Since the Commission has concluded above in Section 7.5.2.2.(a) that Meta (formerly Facebook) would not have the ability to bundle online display advertising with CRM software, the question whether such a bundling strategy (of online display advertising services with CRM software) would have a detrimental effect on competition can be left open for the purposes of the present Decision.

7.5.2.3. Conclusion

(617) In view of the above considerations and in light of the results of the market investigation and the evidence and information available to it, for the purposes of the present Decision, the Commission concludes the Transaction would not significantly impede effective competition as a result of bundling of online display advertising and CRM software, considering that Meta (formerly Facebook) would not have the ability to engage in such a strategy.

## **8. COMMITMENTS**

### **8.1. Introduction**

(618) In order to remove the competition concerns arising from the Transaction described in Section 7, the Notifying Party submitted commitments in Phase II.

(619) On 24 November 2021, the Notifying Party submitted commitments pursuant to Articles 8(2) and 10(2) of the Merger Regulation (the "Initial Commitments").

(620) The Commission launched a market test of the Initial Commitments on 26 November 2021 ("the market test"), seeking responses from the Parties' customers and competitors on the affected markets. The Commission informed the Notifying Party of the results of the market test on 10 December 2021.

(621) Based on the Commission's feedback, the Notifying Party submitted a revised final set of commitments on 20 December 2020 (the "Final Commitments").



## 8.2. Analytical Framework

- (622) Where the Commission considers that a concentration raises competition concerns parties may seek to modify the concentration in order to resolve such competition concerns and thereby gain clearance of their merger.<sup>899</sup>
- (623) Under the Merger Regulation, the Commission only has the power to accept commitments that are deemed capable of rendering the concentration compatible with the internal market. The commitments must eliminate the competition concerns entirely and must be comprehensive and effective from all points of view.<sup>900</sup> The commitments must also be proportionate to the competition concerns identified.<sup>901</sup> Furthermore, the commitments must be capable of being implemented effectively within a short period of time as the conditions of competition on the market will not be maintained until the commitments have been fulfilled.<sup>902</sup>
- (624) In assessing whether the proposed commitments will likely eliminate the competition concerns identified, the Commission considers all relevant factors including inter alia the type, scale and scope of the proposed commitments, assessed by reference to the structure and particular characteristics of the market in which the competition concerns arise, including the position of the parties and other participants on the market.<sup>903</sup>
- (625) When assessing the commitments proposed by the merging parties, the Commission has the legal duty to ensure that such commitments are effective. In order for the commitments to remove the competition concerns entirely and be comprehensive and effective, there has to be an effective implementation and ability to monitor the commitments. Whereas divestitures once implemented do not require any further monitoring measures, other types of commitments require effective monitoring mechanisms in order to ensure that their effect is not reduced or even eliminated by the parties. Otherwise such commitments would have to be considered as mere declarations of intentions by the parties and would not amount to any binding obligations as, due to the lack of effective monitoring mechanisms, any breach of them could not result in the revocation of the decision in accordance with the provisions of the Merger Regulation.<sup>904</sup>
- (626) Where the parties submit remedies proposals that are so extensive and complex that it is not possible for the Commission to determine with the requisite degree of certainty, at the time of its decision, that they will be fully implemented and that they are likely to maintain effective competition in the market, an authorisation decision cannot be granted. The Commission may reject such remedies in particular on the grounds that the implementation of the remedies cannot be effectively monitored and that the lack of effective monitoring diminishes, or even eliminates, the effect of the commitments proposed.<sup>905</sup>
- (627) However, while divestiture commitments may be the best means of resolving problems resulting from horizontal, vertical or conglomerate concerns, other

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<sup>899</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (the "Remedies Notice"), OJ 2008/C 267/01, paragraph 5.

<sup>900</sup> Remedies Notice, paragraph 9.

<sup>901</sup> Merger Regulation, recital 30.

<sup>902</sup> Remedies Notice, paragraph 9.

<sup>903</sup> Remedies Notice, paragraph 12.

<sup>904</sup> Remedies Notice, paragraph 13.

<sup>905</sup> Remedies Notice, paragraph 14.

structural commitments may be suitable to resolve all types of concerns if those remedies are equivalent to divestitures in their effects,<sup>906</sup> such as access remedies foreseeing the granting of access to key infrastructure, key technology, or essential inputs, and which are normally granted on a non-discriminatory and transparent basis.<sup>907</sup> Such access commitments may be submitted in order to ensure that competition is not significantly impeded as a result of foreclosure and/or in order to facilitate market entry by competitors.<sup>908</sup> Where applicable, it has to be further ensured that the terms and conditions, including the pricing, under which the access is granted (e.g., via a licence) do not impede the effective implementation of such a remedy. However, the Commission will only accept such access commitments if it can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated.<sup>909</sup>

- (628) Access commitments are often complex in nature and necessarily include general terms for determining the terms and conditions under which access is granted. In order to render them effective, those commitments have to contain the procedural requirements necessary for monitoring them, which normally has to be done by the market participants themselves, i.e., by those undertakings wishing to benefit from the commitments. Measures allowing third parties themselves to enforce the commitments may in particular involve access to a fast dispute resolution mechanism via arbitration proceedings (together with trustees). If the Commission can conclude that the mechanisms foreseen in the commitments will allow the market participants themselves to effectively enforce them in a timely manner, no permanent monitoring of the commitments by the Commission may be required. However, the Commission will only be able to accept such commitments where the complexity does not lead to a risk of their effectiveness from the outset and where the monitoring devices proposed ensure that those commitments will be effectively implemented and the enforcement mechanism will lead to timely results.<sup>910</sup>
- (629) It is against this background that the Commission reviews the proposed commitments in this case.

### **8.3. The Initial Commitments**

#### *8.3.1. Description of the Initial Commitments*

- (630) The Initial Commitments comprise two main elements: (A) a public API access commitment, and (B) a core API functionality-parity commitment.

##### 8.3.1.1. The public API access commitment

- (631) By the public API access commitment, Meta (formerly Facebook) commits to maintain access of Third Party CS CRM Providers (i.e., customer service and support software providers other than Kustomer) with sales in the EEA to Publicly Available B2C Messaging Channel APIs<sup>911</sup> (both existing and future ones) on a non-discriminatory basis, meaning without differentiating in terms of (i) eligibility criteria, (ii) API access pricing (to the extent any charge applies for access, which is

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<sup>906</sup> Remedies Notice, paragraph 17.

<sup>907</sup> Remedies Notice, paragraph 62.

<sup>908</sup> Remedies Notice, paragraphs 63-64.

<sup>909</sup> Remedies Notice, paragraphs 64-65.

<sup>910</sup> Remedies Notice, paragraphs 66.

<sup>911</sup> This covers the B2C Messaging Channel APIs that are publicly available on Meta (formerly Facebook)'s Developer Website as may be updated from time to time. Currently, this covers the Messenger API and the Instagram messaging API.

not currently the case), (iii) functionality or (iv) performance compared to other comparable users of those APIs.

- (632) This commitment covers B2C Messaging Channel APIs that are publicly available on Meta’s developer website as may be updated from time to time, which currently extends to the Messenger API and the Instagram messaging API. It does not cover the WhatsApp for Business API, as the latter is not currently publicly available on Meta (formerly Facebook)’s developer website.<sup>912</sup>

#### 8.3.1.2. The core API functionality-parity commitment

- (633) By the core API functionality-parity commitment, Meta (formerly Facebook) commits to ensure that all Core B2C Messaging Channel API Functionalities (and any future improvements on such functionalities) made available to the Kustomer Service<sup>913</sup> (including any successor businesses or entities, irrespective of branding) are also made available on an equivalent basis to Third Party CS CRM Providers.
- (634) This commitment, through the definition of Core B2C Messaging Channel API Functionalities, covers the following features of the Messenger, Instagram Messaging and the WhatsApp Business Platforms: sending/receiving (i) text-based messages, (ii) image attachments, and (iii) URL links.

#### 8.3.1.3. Anti-circumvention, carve-outs and other aspects

- (635) The Initial Commitments include anti-circumvention safeguards aimed at preventing Meta (formerly Facebook) from discriminating against Third Party CS CRM Providers through indirect means:
- (a) General release and decisions affecting the availability of certain APIs or functionalities: Meta (formerly Facebook) commits to not discriminate against Third Party CS CRM Providers in relation to denying or unreasonably delaying access to, changing, suspending, or deprecating Publicly Available B2C Messaging Channel APIs (vis-à-vis other comparable users<sup>914</sup>) or Core B2C Messaging Channel API Functionalities (vis-à-vis Kustomer); and
  - (b) The Initial Commitments extend to Third Party CS CRM Providers accessing Meta (formerly Facebook)’s B2C Messaging channels indirectly (e.g., through CPaaS providers) and to end business users: such users are provided access to the Publicly Available B2C Messaging Channel APIs on a non-discriminatory basis, and to Core B2C Messaging Channel API Functionalities on equivalent terms irrespective of whether they are business customers of a Third Party CS CRM Provider or business customers of Kustomer.

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<sup>912</sup> In its reply to RFI 24, Meta (formerly Facebook) indicated that it estimates that a cloud-hosted version of its WhatsApp for Business API will become publicly available in 2022. Once this occurs, the WhatsApp API would be captured by the non-discriminatory public API access commitment.

<sup>913</sup> This is defined as “any CS CRM product or service provided by Kustomer at any time during the term of the Commitments”.

<sup>914</sup> Form RM, footnote 3, indicates that “whether an access seeker is comparable to another user would be a factual question. As an illustrative example, business users of a Third Party CS CRM Provider that are news organisations could be compared to news organisations accessing the API independently. Comparable users to Third Party CS CRM Providers could include other business solution providers that access similar messaging functionalities via the Publicly Available B2C Messaging Channel APIs and have similar messaging needs (e.g. volumes).”

- (636) The Initial Commitments provide for carve-outs to ensure that Meta (formerly Facebook) will not be unduly restricted in its ability to undertake the following measures:
- (a) Develop and test new APIs or functionalities prior to the introduction of a feature at scale. If this process results in the successful development and release of new or improved versions of the B2C Messaging Channel APIs, these will be made available to Third Party CS CRM Providers and their customers as soon as Meta (formerly Facebook) makes them publicly available via public APIs. Similarly, if this process results in the successful development and release of improved Core Messaging Channel API Functionalities, these will be made available to Third Party CS CRM Providers and their customers in accordance with the Commitments as soon as they are made available to 50% or more of the business customers of Kustomer; and
  - (b) Develop the Kustomer Service through integration within the broader suite of Meta Services or partnerships with third parties, including features that complement (but do not in themselves constitute features of) the Publicly Available B2C Messaging Channel APIs and/or Core B2C Messaging Channel API Functionalities (to the extent, for the avoidance of doubt, that the functioning of and access to Publicly Available B2C Messaging Channel APIs and Core B2C Messaging Channel API Functionalities is not impeded for Third Party CS CRM Providers).
  - (c) The Initial Commitments permit Meta (formerly Facebook) to take necessary steps to, for example, comply with legal obligations, prevent fraud, promote user privacy and security, enforce relevant terms and policies, preserve the rights, safety, and integrity of the Meta Services users or Meta's property as required or permitted by law.
- (637) A Fast Track Dispute Resolution is included, and will apply in cases where a Third Party CS CRM Provider, showing a sufficient legitimate interest, claims that Meta is failing to comply with its obligations arising from the Commitments.
- (638) The Initial Commitments also provide that the Monitoring Trustee must be appointed before the Notifying Party can close the Transaction. The Monitoring Trustee may in turn appoint a technical expert (who may appoint other advisers) to assist in the performance of his or her duties and obligations.
- (639) The Initial Commitments would remain in effect for five years from the closing date of the Transaction.

### 8.3.2. *Results of Markets Tests of the Initial Commitments*

- (640) The Commission initiated a market test of the Initial Commitments on 26 November 2021 and received responses from competing CRM software providers, CPaaS providers, B2C messaging service providers, business customers that use CRM software and B2C messaging services, as well as from a Member State. The Commission also received a response from the Parties to an RFI on the Initial Commitments.<sup>915</sup>
- (641) The market test confirmed that several elements of the Initial Commitments were broadly sufficient, including the principle of the public API access commitment and

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<sup>915</sup> Parties' reply to RFI 24.

the fast-track dispute resolution mechanism. However, the market test also revealed that some significant improvements are necessary, as set out below.

- (642) **Duration.** A majority of respondents that expressed a view, including business customers, considered that a five-year duration is insufficient.<sup>916</sup> Several reasons were mentioned, including typical multi-year sales cycles in sourcing CRM software tools, and the fact that Meta (formerly Facebook)'s OTT B2C messaging channels are expected to remain important inputs in five years: *"The Facebook B2C communications channels are expected to continue to rule the market in 5 years and the competitors are unlikely to create an alternative"*.<sup>917</sup> One business customer indicated that if they invested in using Meta (formerly Facebook)'s channels for customer support, with the likely result that their end customers became accustomed to using them, that business may need to switch CRM provider after five years if those channels were no longer available, or not in the same way: *"If a Customer Service company builds its channel strategy around Meta B2C channels, it would be costly and difficult to change it (customers get used to it). If after 5 years the CS CRM can not offer these services, it will be a relevant reason to change CS CRM provider."*<sup>918</sup>
- (643) A range of alternative durations were proposed by market test respondents and a Member State, with a minimum of 10 years being proposed in several cases, including by competing CRM software providers: *"We suggest ... for example 10 years to address the EC's competitive concerns and the likelihood of Meta's continued market strength and prominence"*.<sup>919</sup>
- (644) **Pricing.** There was general consensus among respondents to the market test that expressed a view that the public API access commitment was acceptable, except as regards pricing. Currently there is no charge for API access (there is only a usage charge for WhatsApp) and several substantiated responses expressed strong concerns that Meta (formerly Facebook) could introduce a (so-called "non-discriminatory") price for all third parties but not for Kustomer, thereby favouring Kustomer. For example, a CRM software provider that responded to the market test indicated that *"For now, all Facebook APIs are free to us. It means they could start making those APIs paid for providers like us..."*<sup>920</sup> while another CRM software provider considered that *"the API access should to be free."*<sup>921</sup> A competing provider of B2C messaging services, despite not being a beneficiary of the commitments, echoed these views, observing that *"The pricing obligation is not to differentiate between third parties... but they will obviously have the internal fee free advantage"*<sup>922</sup>
- (645) While noting that it has [Business Plans], Meta (formerly Facebook) was equally not able to identify or provide a specific example of a clear category of third party API access seekers that could be used as a benchmark for monitoring of a commitment as to non-discriminatory pricing vis-a-vis third party CS CRM providers.<sup>923</sup>

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<sup>916</sup> Replies to questionnaire 8 (Commitments Market Test), question 19.

<sup>917</sup> Reply to questionnaire 8 (Commitments Market Test), question 19.1 (ID: 2608).

<sup>918</sup> Reply to questionnaire 8 (Commitments Market Test), question 19.1 (ID: 2436).

<sup>919</sup> Reply to questionnaire 8 (Commitments Market Test), question 19.1 (ID: 2634).

<sup>920</sup> Reply to questionnaire 8 (Commitments Market Test), question 20.1 (ID: 2415).

<sup>921</sup> Reply to questionnaire 8 (Commitments Market Test), question 20.1 (ID: 2634).

<sup>922</sup> Reply to questionnaire 8 (Commitments Market Test), question 6.1 (ID: 2608).

<sup>923</sup> Parties' reply to RFI 24, question 9(b): *"Comparable users to Third Party CS CRM Providers could include other business solution providers that access similar messaging functionalities via the Publicly Available B2C Messaging Channel APIs and have similar messaging needs (e.g. volumes)."*

- (646) **Core B2C Messaging Channel API Functionalities.** Several of the more substantiated responses expressed strong reservations about the narrow scope of the definition of “core” functionalities, in particular the fact that:
- (a) The definition is much narrower than the features currently covered by the relevant public APIs; and
  - (b) The definition does not allow for new functionalities to be covered in the future (only improvements to the existing “core” functionalities, which several respondent pointed out are basic features<sup>924</sup>, and one CRM software provider stated that they were “*not sure if any additional improvements, visible or otherwise, can be made against this basic feature set.*”<sup>925</sup>).
- (647) In parallel, Meta (formerly Facebook) indicated that overall there are currently [...] separate API features that make up (i) the public API for Messenger (40 APIs/features) (ii) the public API for Instagram Messaging (16 APIs/features) and (iii) the API for WhatsApp available through CPaaS providers ([...] APIs/features). Meta (formerly Facebook) further confirmed that, out of this list, no API/feature fell entirely within the definition of Core B2C Messaging Channel API Functionalities, and only a small subset (overall [...] APIs/features) are considered “partially” “core”: Messenger (4 out of 40), Instagram (2 out of 16) and WhatsApp ([...]out of [...]).<sup>926</sup>
- (648) In relation to the current definition, market participants, including many business customers, indicated that access to such features is considered necessary to be able to compete in the CS CRM market.<sup>927</sup> One such business customer expressed the view that “*all CS CRM systems should have the right to implement new features without limitation.*”<sup>928</sup> Another respondent to the market test indicated that they, i.e., business “*customers should be able to decide whether a function is relevant to the service they offer [which] also may give ideas of improvement [i.e., to Facebook].*”<sup>929</sup> By implication, this means that CRM software provider would need to be able to offer a full range of functionalities. Similarly, echoing these views, CPaaS providers, even though they are not a direct beneficiary of the commitments, indicated that “*all available existing and future message types should be available [sic] to [competing] CS CRM*”<sup>930</sup> software providers, including because the full range of functionalities would be available to competitors (i.e., Kustomer) and it is moreover not possible to anticipate all use cases of business customers: “*most likely because competitors offer such breadth of functionality and a provider cannot anticipate all customers’ use cases*”.<sup>931</sup> Finally, a close competitor of Kustomer indicated similarly that “*as the messaging channel functionalities increase in breadth, ... A CRM ... would need to be able to offer support for the entirety of the functionality*”<sup>932</sup> in order to effectively compete in the customer service and support CRM software market.
- (649) Further, respondents to the market test, including notably many business customers, also indicated that new functionalities or features of Meta (formerly Facebook)’s

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<sup>924</sup> Replies to questionnaire 8 (Commitments Market Test), question 11.1.

<sup>925</sup> Reply to questionnaire 8 (Commitments Market Test), question 11.1 (ID: 2543).

<sup>926</sup> Parties’ reply to RFI 24, Annex 1.

<sup>927</sup> Replies to questionnaire 8 (Commitments Market Test), question 9.

<sup>928</sup> Reply to questionnaire 8 (Commitments Market Test), question 9 (ID: 2540).

<sup>929</sup> Reply to questionnaire 8 (Commitments Market Test), question 9 (ID: 2540).

<sup>930</sup> Reply to questionnaire 8 (Commitments Market Test), question 9 (ID: 2615).

<sup>931</sup> Reply to questionnaire 8 (Commitments Market Test), question 9 (ID: 2593).

<sup>932</sup> Reply to questionnaire 8 (Commitments Market Test), question 9 (ID: 2577).

B2C messaging channels that may be introduced in the future are likely to become important for a customer service and support CRM software provider's ability to effectively compete, with several business customers indicating that they would likely consider switching to a CRM software provider that could offer such functionalities<sup>933</sup>: *"If new functionalities that become standard appear in the next coming 5 years and if they are not offered by our existing CS CRM provider, we would consider to switch to a provider offering such functionality..."*,<sup>934</sup> *"it is very likely that new functionalities or features of Meta' B2C messaging channels will become important to a CS CRM offering in the coming 5 years and that if a CS CRM provider is not able to offer such feature, its customers consider changing CS CRM provider"*,<sup>935</sup> and *"The most convenient feature will be preferred by the customer and develop to an expected functionality over time. It can be estimated that companies would consider switching to CS CRM provider that is able to offer these functionalities or features to avoid unsatisfied customers."*<sup>936</sup> A close competitor of Kustomer indicated that based on past trends, it is likely that new features and functionalities will become important in the future and noted that business customers evaluate the CRM offering not just based on availability of channels but also their completeness in terms of functionalities: *"There has been substantial new feature and functionality introduction in Meta's messaging channels over the past five years and we believe it is likely that this product innovation will continue. Today, businesses evaluate CS CRMs by not just the availability of the channels it offers but also the completeness of each channel in terms of the functionality that is supported."*<sup>937</sup>

- (650) **Beta testing.** A majority of market participants<sup>938</sup>, as well as a Member State that provided comments, indicated that the provisions around beta testing require improvement. The Parties provided confirmations that beta testing is normally done with a small sub-set of a CRM provider's customers<sup>939</sup> and the market test confirmed that the limitations on the number of business customers of Kustomer that can be involved in such testing was overly broad. In particular, the definition of "Broadly Available" as 50% of Kustomer's customers was considered to be too high, and that this could be used to circumvent the commitments, for example since Kustomer *"could hold some dormant/very small customers to which they will not provide access."*<sup>940</sup> Some respondents proposed instead using a small percentage, such as *"10%-15% of the total number of business customers"*<sup>941</sup> (or lower), while others considered it would be more appropriate to use a low absolute number, such as *"between 10 and 15 customers per CRM provider"*<sup>942</sup>. The Commission further notes that to date the highest number of Kustomer's business customers were involved in a beta test of a Meta (formerly Facebook) messaging channel was [Customer

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<sup>933</sup> Replies to questionnaire 8 (Commitments Market Test), question 10.1.

<sup>934</sup> Reply to questionnaire 8 (Commitments Market Test), question 10.1 (ID: 2615).

<sup>935</sup> Reply to questionnaire 8 (Commitments Market Test), question 10.1 (ID: 2565).

<sup>936</sup> Reply to questionnaire 8 (Commitments Market Test), question 10.1 (ID: 2622).

<sup>937</sup> Reply to questionnaire 8 (Commitments Market Test), question 10.1 (ID: 2577).

<sup>938</sup> Replies to questionnaire 8 (Commitments Market Test), questions 12, 13 and 14.

<sup>939</sup> See e.g., SO Response, Form RM and Parties' reply to RFI 24.

<sup>940</sup> Reply to questionnaire 8 (Commitments Market Test), question 11.1 (ID: 2608).

<sup>941</sup> Reply to questionnaire 8 (Commitments Market Test), question 14 (ID: 2543).

<sup>942</sup> Reply to questionnaire 8 (Commitments Market Test), question 14 (ID: 2540).

Information], which accounted for around [Customer Information] of Kustomer's [Customer Information] business customers at the time of notification.<sup>943</sup>

- (651) As regards reporting, one CRM software provider proposed that Kustomer should be required to *“report on all beta tests for each applicable APP”*<sup>944</sup>, rather than only where such testing exceeds 12 months as provided for in the Initial Commitments. Market test respondents moreover broadly confirmed that *“12 months is a very long period for testing”*<sup>945</sup> and, [Business Plans], that *“3-6 months is a generally accepted timeframe to beta-test a feature with selected customers before making it generally available.”*<sup>946</sup>
- (652) **Facebook and Instagram public comments.** The market test sought respondents' views the fact that Facebook and Instagram public comments are out of scope of the Initial Commitments, which are limited to Meta (formerly Facebook)'s “private” B2C messaging channels.
- (653) A majority of respondents that expressed a view considered that Facebook and Instagram public comments are OTT B2C messaging channels,<sup>947</sup> while the vast majority of those with a view considered such public comments to be important inputs to be able to compete in the customer service CRM software market.<sup>948</sup> This was in particular the case because end customers may see Meta (formerly Facebook)'s public and private messaging channels as an extension of one another, and could for example leave a public comment expecting a follow-up exchange over a private channel with customer service agents. As one major CRM provider indicated *“From a consumer standpoint, they may not see a difference between Facebook and Facebook Messenger (i.e. they see it as “Facebook”). If the consumer goes to the Facebook page of a business and leaves a comment that is later followed-up privately by customer service agents on a messaging channel, then it is reasonable to assume that the comments be an extension to OTT B2C messaging channels”*.<sup>949</sup> A business customer further indicated that it *“uses both [public comments and private messages] “such as on Facebook Messenger ... for customer relationship management as both are equally important and equally relevant for CRM.”*<sup>950</sup> Moreover, Facebook and Instagram public comments are integrated via public APIs into Kustomer's CRM software tool today.<sup>951</sup>
- (654) The results of the market test and responses provided by the Parties also revealed a number of other areas where improvements to the Initial Commitments were warranted.<sup>952</sup>

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<sup>943</sup> Parties' reply to RFI 24, Table 12.2.

<sup>944</sup> Reply to questionnaire 8 (Commitments Market Test), question 15.1 (ID: 2634).

<sup>945</sup> Reply to questionnaire 8 (Commitments Market Test), question 12.2 (ID: 2608).

<sup>946</sup> Reply to questionnaire 8 (Commitments Market Test), question 12.2 (ID: 2543).

<sup>947</sup> Replies to questionnaire 8 (Commitments Market Test), question 17.1.

<sup>948</sup> Replies to questionnaire 8 (Commitments Market Test), question 17.2.

<sup>949</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2543).

<sup>950</sup> Reply to questionnaire 8 (Commitments Market Test), question 17.1.1 (ID: 2565).

<sup>951</sup> Parties' reply to RFI 24, question 2(b).

<sup>952</sup> While a small number of respondents to the market test raised a concern that Meta (formerly Facebook) may use its Terms of Service or other eligibility criteria to obtain competitively sensitive information on third party CS CRM providers, a greater number of respondents that expressed a view considered that the information required was typically only technical information that was needed to be able to provide and maintain API access. One major CRM software provider indicated that *“by and large, [such information tends to be] technical information [which] is generally most relevant to ensuring properly functioning APIs.”* See reply to questionnaire 8 (Commitments Market Test), question 7.1 (ID: 2509).



- (655) First, new entrants, which the Commission identified as potential targets of foreclosure, are not covered by the Initial Commitments, in view of the requirement for Third Party CS CRM Provider to already have sales in the EEA.<sup>953</sup>
- (656) Second, while a majority of respondents that expressed a view considered that broadly speaking the other definitions in the Initial Commitments were appropriate<sup>954</sup>, market test respondents raised concerns in relation to certain specific definitions. In particular, concerns were raised in relation to the definition of CS CRM, which was defined in the Initial Commitments as “*a software application used by businesses for the primary purpose of collecting, storing, and organising customer data for use by customer service agents to manage and respond to 1:1 customer service communications.*” A major CRM software provider pointed out that a customer service CRM “*may not require a customer service agent*”<sup>955</sup> while another leading CRM software provider proposed “*deleting [...] “1:1” so that the definition does not inadvertently exclude customer service communications that reach more than one customer [and deleting] “primary” so that the definition does not inadvertently exclude customer service CRM software that may be multifunctional*”.<sup>956</sup>
- (657) Third, as access to Meta (formerly Facebook)’s B2C messaging channel APIs is subject to compliance with eligibility criteria and Terms of Service<sup>957</sup> and the Third Party and App Assessment Process<sup>958</sup>, a number of market test respondents, in particular competing customer service and support CRM software providers, expressed concerns that Meta (formerly Facebook) may have the ability or incentive to use such eligibility criteria or Terms of Service to place undue burdens on API access seekers.<sup>959</sup> For example, one close competitor of Kustomer stated that “*It is possible that Meta could change the standard terms of service and assessment processes such that it could inhibit or prohibit CS CRM providers from obtaining access to these services. When ToS change (ie, when they change data access rights, etc.) apps historically have needed to be re-reviewed and can lose access, and we do not have significant visibility into that process*”,<sup>960</sup> while a leading CRM software provider pointed out that “*Meta’s terms of use could hypothetically include (or could*

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This corroborates the Commission’s conclusion in Section 7.3.2.2.(a.iii)E above that Meta (formerly Facebook) is unlikely to have the ability to obtain data on CRM competitors to provide a competitive advantage to Kustomer.

<sup>953</sup> Parties’ reply to RFI 24, question 4. Meta (formerly Facebook) clarified however that there no minimum sales threshold, and that a competing customer service and support CRM software provider “*would be included in the definition of Third Party CS CRM Provider as soon as they generate a single sale in the EEA, agree to the applicable Terms of Service and meet the Third Party and App Assessment Process*” (emphasis added).

<sup>954</sup> Replies to questionnaire 8 (Commitments Market Test), question 18.

<sup>955</sup> Reply to questionnaire 8 (Commitments Market Test), question 5.1 (ID: 2543).

<sup>956</sup> Reply to questionnaire 8 (Commitments Market Test), question 7.2 (ID: 2577).

<sup>957</sup> Defined in the Commitments as “*the terms of service applicable to the use of the B2C Messaging Channel APIs as may be updated from time to time, for instance to comply with legal requirements or policy objectives as set out in paragraph 24 of these Commitments.*”

<sup>958</sup> Defined in the Commitments as “*the review process by which Meta verifies (including on an ongoing basis) that a third party’s use of its B2C Messaging channels complies with Meta’s applicable policies.*”

<sup>959</sup> Replies to questionnaire 8 (Commitments Market Test), question 7.

<sup>960</sup> Reply to questionnaire 8 (Commitments Market Test), question 7.2 (ID: 2577).

*be later amended to include) the ability for Meta to selectively restrict or degrade API access.”*<sup>961</sup>

- (658) Regarding the fast track dispute resolution mechanism, the majority of the respondents to the market test that expressed a view submitted that it will allow third parties to enforce the Commitments. Only a limited number of respondents provided a negative view on the mechanism<sup>962</sup>, indicating, for example, that it appeared to be too complex or burdensome.<sup>963</sup> One respondent indicated that the procedure should provide for an EEA-based arbitration venue, such as Paris.<sup>964</sup>
- (659) Subject to the point set out above in relation to reporting on beta testing, the majority of the respondents to the market test submitted that the provisions regarding monitoring are sufficient to ensure that the Initial Commitments are complied with.<sup>965</sup> Several respondents indicated that there should also be reporting on any “*new API features and improvements*”<sup>966</sup> which may be introduced, e.g., solely to Kustomer.
- (660) The majority of respondents to the market test that expressed a view also submitted that the provisions of the Initial Commitments are capable of being implemented effectively within a short period of time.<sup>967</sup>

### 8.3.3. *Commission’s assessment of the Initial Commitments*

- (661) The Commission assessed the appropriateness of the Initial Commitments in light of the principles underlying its commitments policy and the results of the market test.
- (662) The Commission concluded that, despite a number of positive elements, the Initial Commitments fell short of completely removing the Commission’s competition concerns as set out in the SO.
- (663) In particular, the Commission identified the following shortcomings in the Initial Commitments:
- (664) First, the Commission considered that the five-year duration was insufficient, and should be increased to at least 10 years, based on market test feedback in addition to the overall policy consideration that access commitments should be “*equivalent to divestitures in their effects*”.<sup>968</sup>
- (665) Second, on pricing, the Commission considered that there should be a clear commitment to not introduce a charge for access to public APIs, in line with the approach today and a confirmation that any usage or volume-based pricing be done in a commercially reasonable way so as not to be applied with a view to disadvantaging rivals of Kustomer.
- (666) Third, the Commission considered that the definition of Core B2C Messaging Channel API Functionalities should be substantially broadened, in particular since the WhatsApp for Business API is not yet a public API (and therefore not covered by the public API access commitment on day one following closing of the Transaction),

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<sup>961</sup> Reply to questionnaire 8 (Commitments Market Test), question 7.2 (ID: 2605).

<sup>962</sup> Replies to questionnaire 8 (Commitments Market Test), question 16.

<sup>963</sup> Reply to questionnaire 8 (Commitments Market Test), questions 16 and 16.1 (ID: 2634).

<sup>964</sup> Reply to questionnaire 8 (Commitments Market Test), questions 16.1 (ID: 2534).

<sup>965</sup> Replies to questionnaire 8 (Commitments Market Test), question 15.

<sup>966</sup> See for example, reply to questionnaire 8 (Commitments Market Test), question 15.1 (ID: 2634).

<sup>967</sup> Replies to questionnaire 8 (Commitments Market Test), question 21.

<sup>968</sup> Remedies Notice, paragraph 17.

with a clear list of all functionalities that would be included from day one, and a fair and workable mechanism to add new functionalities in the future. Effective monitoring of the core API functionality-parity commitment would also require timely reporting to the Monitoring Trustee on any new API, functionality or improvement of a Meta (formerly Facebook) B2C messaging channel that is made available in the future to Kustomer (e.g., via a private or non-public API) but not, or not initially, to third party customer service and support CRM software providers.

- (667) Fourth, on beta testing, the Commission considered that a clear upper limit should be placed on any beta testing carried out with Kustomer, which should be substantially lower than the proposal in the Initial Commitments of 50% of Kustomer's customers. Further, there should be periodic (e.g., quarterly) reporting to the monitoring trustee on all beta testing done with Kustomer, and an explanation should be provided to the monitoring trustee where any such testing exceeds 6 months.
- (668) Fifth, the Commission considered that, in relation to the Facebook and Instagram public comments, it would be necessary to either cover the relevant public APIs by the commitments or, at a minimum, include an ability to read and import such public comments into the conversation/interaction history in the customer service CRM tool, and to respond to them over Meta (formerly Facebook)'s private OTT B2C messaging channels.
- (669) Sixth, the Commission considered that the definition of Third Party CS CRM Providers should be broadened to include potential entrants in the customer service and support CRM software market in the EEA.
- (670) Seventh, the Commission considered that the definition of CS CRM should be broadened to address the comments raised by competing customer service CRM software providers, outlined in Section 8.3.2. above, that the definition was overly restrictive (e.g., limited to 1-to-1 communications).
- (671) Eighth, the Commission considered that the commitments should include language that any changes to the applicable Terms of Service for accessing the relevant APIs and API features would be consistent with the spirit of the commitments, i.e., would not be used as a means to circumvent Meta (formerly Facebook)'s obligations under the commitments.
- (672) Ninth, the Commission considered that, as part of the fast-track dispute resolution mechanism, an EEA-based arbitration forum should be added, at the option of the API access seeker.

#### **8.4. The Final Commitments**

##### *8.4.1. Description of the Final Commitments*

- (673) Following the feedback provided in the market test, the Notifying Party has introduced a number of modifications in order to address the concerns raised by the respondents.
- (674) In particular, the improvements to the Initial Commitments contained in the Final Commitment included the following:
  - (675) First, the duration has been significantly extended, from 5 to 10 years.
  - (676) Second, instead of a commitment not to discriminate between Third Party CS CRM Providers and other comparable users in terms of charging for API access, as included in the Initial Commitments, the Final Commitment include a clear commitment that Meta (formerly Facebook) will not charge Third Party CS CRM Providers for access to its Publicly Available B2C Messaging Channel APIs, in line

with the current situation. Meta (formerly Facebook) may apply usage-based charges (e.g., by reference to volume or other relevant metric), as is currently the case for the WhatsApp for Business API, provided any such charges are commercially reasonable.

- (677) Third, in place of the narrow list of Core B2C Messaging Channel API Functionalities included in the Initial Commitments (i.e., the ability to send text-based messages, images and URL links), Meta (formerly Facebook) has now included a much broader list, in Annex 3 to the Final Commitments. Annex 3 includes all B2C Messaging Channel API Functionalities (i.e., all functionalities of the Messenger, Instagram messaging and WhatsApp for business APIs) that are currently integrated into Kustomer’s CRM software tool, irrespective of the extent to which such functionalities are used by its business customers, in addition to features that enable a business user of a CRM software tool to reply privately to a public comment on the relevant business’s Facebook Page. The Final Commitments also provide for a mechanism to add new Core B2C Messaging Channel API Functionalities in the future, referred to as the “Usage Threshold”, whereby if a new or improved functionality is integrated into the Kustomer Service and is used by more than 25% of individual Kustomer Business Users via the Kustomer Service on a weekly basis in the previous quarter,<sup>969</sup> the functionality will be designated as a Core B2C Messaging Channel API Functionality.<sup>970</sup> In such a case, Meta (formerly Facebook) will be required to make that functionality available to all Third Party CS CRM Providers as soon as reasonably practicable, and in any case not later than 12 months after meeting the Usage Threshold. The Notifying Party explained that such period is to allow that the relevant functionality can be scaled up from being used only by Kustomer Business Users to a much wider set of business users, namely those of all Third Party CS CRM Providers.<sup>971</sup>
- (678) Fourth, the Final Commitments provide that any API Development and Testing conducted on the Kustomer Service can be done with up to 25% of Kustomer Business Users, down from 50% in the Initial Commitments. Once a new API, functionality or improvement is made available to more than 25% of Kustomer Business Users, it then becomes subject to the Usage Threshold procedure, outlined above, to determine if it is to be added to the list of add new Core B2C Messaging Channel API Functionalities, and therefore made available to all Third Party CS CRM Providers. Separately, while the Initial Commitments only required reporting

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<sup>969</sup> Meta (formerly Facebook) confirmed that the “Usage Threshold” may be met by a changeable subset of Kustomer Business Users from one week to the next, i.e., that it does not need to be the same group of Kustomer Business Users that use a new or improved functionality each week in a particular quarter. See Parties’ reply to RFI 25 of 22 December 2021.

<sup>970</sup> In justifying the weekly usage requirement, Meta (formerly Facebook) indicated that, in its view, it is important that functionalities show consistency of usage to become Core. By contrast, a less frequent usage requirement, e.g., “monthly” may bring in features that are only used once or twice in a month and then not used again, which could therefore be unduly burdensome. Meta (formerly Facebook) also pointed out that a weekly usage threshold is consistent with how Meta (formerly Facebook) often tracks the performance of products/features internally to assess their popularity among users.

<sup>971</sup> In the Form RM, footnote 7, Meta (formerly Facebook) explained that “*Making those functionalities available to all Third Party CS CRM Providers would result in exponentially greater messaging volumes relative to Kustomer (especially given Kustomer’s small size in comparison to other Third Party CS CRM Providers), and so a twelve month period is necessary to ensure that Meta can provide the requisite support for the relevant APIs. Releasing an API will also require Meta to build and implement new integrity and programmatic controls to ensure, for example, that the APIs could not be accessed by bad actors. This may include hiring and training new employees.*”

to the Monitoring Trustee of any beta tests that exceeded 12 months in duration, the final Commitments provide for quarterly reporting to the monitoring trustee on any beta tests, including the percentage and number of Kustomer Business Users using the particular functionality being tested, and an explanation must also be provided if any such testing exceeded six months (down from 12 months). In addition, there will also be quarterly reporting on any B2C Messaging Channel API functionalities or improvements of such functionalities made available to the Kustomer Service that are not provided to Third Party CS CRM Providers (e.g., non-core functionalities).

- (679) Fifth, the Final Commitments covers functionalities of the Meta (formerly Facebook's) B2C Messaging channels that enable businesses to read public comments posted by customers on Facebook and Instagram pages and to respond to them over Meta (formerly Facebook)'s private OTT B2C messaging channels. These are covered not only under the public API access commitment, but also under the core functionality parity commitment, through the addition of the "Private Reply" features of Messenger and Instagram Messaging to the list of "core" functionalities in Annex 3.
- (680) Sixth, the Final Commitments cover not only third party CS CRM providers with sales in the EEA (i.e., existing competitors of Kustomer) but also new entrants, that actively target customers in the EEA (e.g., through entering into a contract to provide CS CRM services in the EEA or establishing a local sales team in the EEA).<sup>972</sup>
- (681) Seventh, the Final Commitments address the concerns, outlined in Section 8.3.2. above, that the initial definition of CS CRM was overly restrictive. For example, the revised definition is no longer limited to 1-to-1 communications. Similarly, it is no longer limited to CS CRM software applications used by "*customer service agents*", but also covers CS CRM software applications used by "*customer service ... functions*" of a business more generally.<sup>973</sup>
- (682) Eighth, in order to address concerns raised in the market test that Meta (formerly Facebook) may seek to circumvent the commitments through changes to its Terms of Service, the Final Commitments now clarify that it will not make any such changes that would be equivalent to a breach of paragraph 1 (i.e., the public API access commitment) or paragraph 2 (i.e., the core functionality parity commitment) of the commitments.
- (683) Ninth, and finally, as regards the fast-track dispute resolution, an arbitration venue based in the EEA, namely Dublin, was added at the option of the relevant third party CRM software provider.

#### 8.4.2. *Commission's assessment of the Final Commitments*

- (684) The Commission concludes that the Final Commitments are capable of eliminating the Commission's competition concerns.

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<sup>972</sup> Similarly to the absence of any minimum sales threshold (where the Parties clarified that a "*single sale in the EEA*" is sufficient, see Parties' reply to RFI 24, question 4) the Final Commitments make no mention of a minimum threshold as regards actively targeting customers in the EEA.

<sup>973</sup> Moreover, Meta (formerly Facebook) specifically confirmed, in a comment to a draft of the Commitments submitted on 16 December 2021 that the CS CRM software providers that responded to the market test would be covered by the definition (and therefore by the Final Commitments): "*We understand that the following CS CRMs participated in the market test and would be included in the definition - each of these refer to "agents" on their websites: Microsoft; Zendesk; Oracle; SAP; Salesforce; Hubspot; Pegasystems; Crisp; Sprinklr.*"

- (685) First, the 10-year duration addressed the concerns raised in the market test and by a Member State and, in line with the Remedies Notice, means that the commitments may be considered, in this case, to be “*equivalent to divestitures in their effects*”.<sup>974</sup>
- (686) Second, the commitment that there will be no charge for access to public APIs addresses clear concerns raised in the market test, and avoid a means of circumvention whereby Meta (formerly Facebook) could have favoured Kustomer by introducing API access fees for rivals of Kustomer.
- (687) Third, the fact that (i) the list of Core B2C Messaging Channel API Functionalities includes all functionalities integrated by Kustomer today<sup>975</sup>, and (ii) there is a clear yet balanced mechanism to add new core functionalities in the future addresses the concerns raised in the market test while being cognisant of the potential technical and resource-related constraints that may be involved in rolling out a new API or API feature at scale.
- (688) Fourth, the reduction of the maximum percentage of Kustomer’s customers that may be involved in beta testing to 25% (from 50%), together with enhanced reporting to the Monitoring Trustee, sufficiently reduces the risk that Meta (formerly) Facebook may circumvent the Commitments by rolling out important new features exclusively to Kustomer, and making them available to a large number of Kustomer’s customers for an extended period, under the guise of beta testing those features.
- (689) Fifth, the finding from the market test that the ability to respond to public comments on Facebook or Instagram pages is important for customer support has now also been addressed. While the public APIs for Facebook and Instagram public comments have not been included in the Final Commitments, features of the Messenger and Instagram messaging APIs that allow for private replies to such public comments are now covered by both the public API access commitment and the core functionality parity commitment, which the Commission considers is sufficient to address the concerns raised in the market test.
- (690) Sixth, the definition of Third Party CS CRM Provider now includes new entrants that target customers in the EEA, which ensures that the Final Commitments address the concern identified by the Commission that such new entrants could be targeted by an input foreclosure strategy. The definition of CS CRM has also been broadened sufficiently to address the main concerns raised by the market test that it may have been narrowly defined, which provides further comfort that those customer service and support CRM software providers that responded to the market test will be covered by the Final Commitments.
- (691) Seventh, the language in the Final Commitments that Meta (formerly Facebook) will not change the applicable Terms of Service in a way that would breach the commitments addresses, in the Commission’s view, the concerns raised by certain respondents to the market test about potential circumvention of the Commitments in this manner.
- (692) Eighth, the addition of an arbitration venue based in the EEA, namely Dublin, addresses a concern raised by one respondent to the market test about enforceability

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<sup>974</sup> Remedies Notice, paragraph 17.

<sup>975</sup> This list is likely to be sufficient, at least on day one following closing of the Transaction to enable rivals of Kustomer to effectively compete, in particular because one of the key reasons why Kustomer was “*attractive to Facebook [as an acquisition target in the first place] was [Meta strategic considerations for acquiring Kustomer].*” Meta (formerly Facebook)’s internal document, [...].

in the EEA, as well as a broader policy consideration for having an EEA-based dispute resolution forum in any commitments that may be accepted by the Commission.

- (693) Moreover, the Final Commitments are capable of being implemented effectively within a short period of time and are proportionate to the competition concerns identified by the Commission.

## **9. CONCLUSION**

- (694) In the light of the above, the Commission considers the Final Commitments capable of rendering the Transaction compatible with the internal market and the EEA Agreement as it will not create a significant impediment to effective competition in all relevant markets in which competition concerns were identified, in particular on the EEA-wide, if not worldwide, downstream market for customer service and support CRM software. Although the Commission only identified competition concerns on the narrower market for customer service and support CRM software, the Final Commitments also address any concerns on the broader potential downstream market for CRM software overall. Similarly, and for the same reasons as outlined in Section 7.3.2.2.(a.i) above, the Commission's conclusion that the Final Commitments are capable of eliminating the competition concerns identified would not change on the basis of the potential segments of the customer service and support CRM software market, or the overall CRM software market, based on (i) business customer size, (ii) mode of deployment or (iii) the industry sector of the business customer.

## **10. CONDITIONS AND OBLIGATIONS**

- (695) Pursuant to the second subparagraph of Article 8(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the internal market.
- (696) The fulfilment of the measure that gives rise to the structural change of the market is a condition, whereas the implementing steps which are necessary to achieve this result are generally obligations on the parties. Where a condition is not fulfilled, the Commission's decision declaring the concentration compatible with the internal market is no longer applicable. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke the clearance decision in accordance with Article 8(6) of the Merger Regulation. The undertakings concerned may also be subject to fines and periodic penalty payments under Articles 14(2) and 15(1) of the Merger Regulation.
- (697) In accordance with the basic distinction described in the preceding Recital as regards conditions and obligations, all Sections (including Annexes 1 to 4) of the Final Commitments should be obligations within the meaning of Article 8(2) of the Merger Regulation. The full text of the commitments is attached as a Schedule to this Decision and forms an integral part thereof.

HAS ADOPTED THIS DECISION:

*Article 1*

The notified operation whereby Meta Platforms, Inc. acquires sole control of Kustomer, Inc. within the meaning of Article 3(1)(b) of the Merger Regulation is hereby declared compatible with the internal market and the EEA Agreement.

*Article 2*

Meta Platforms, Inc. shall comply with the obligations set out in the Schedule to this Decision.

*Article 3*

This Decision is addressed to:

Meta Platforms, Inc.  
601 Willow Road, Menlo Park  
California 94025  
United States of America

Done at Brussels, 27.1.2022

*For the Commission*

*(Signed)*  
*Margrethe VESTAGER*  
*Member of the Commission*



**Case No. M.10262 – META / KUSTOMER  
COMMITMENTS TO THE EUROPEAN COMMISSION**

Pursuant to Article 8(2) and 10(2) of Council Regulation (EC) No 139/2004 (the “**Merger Regulation**”), Meta Platforms, Inc. hereby enters into the following Commitments (the “**Commitments**”) vis-à-vis the European Commission (the “**Commission**”) with a view to rendering its proposed acquisition of Kustomer, Inc. (the “**Concentration**”) compatible with the internal market and the functioning of the EEA Agreement.

This text shall be interpreted in light of the Commission’s decision pursuant to Article 8(2) of the Merger Regulation to declare the Concentration compatible with the internal market and the functioning of the EEA Agreement (the “**Decision**”), in the general framework of European Union law, in particular in light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under the Merger Regulation and under Commission Regulation (EC) No 802/2004.

**Section A. Commitments**

1. Meta commits from the Closing Date to make the Publicly Available B2C Messaging Channel APIs available to Third Party CS CRM Providers without charging for access and on a non-discriminatory basis, meaning without differentiating between Third Party CS CRM Providers and other comparable users in terms of eligibility criteria, functionality, and performance. Meta also commits from the Closing Date not to discriminate against Third Party CS CRM Providers in relation to denying or unreasonably delaying access to, changing, suspending or deprecating Publicly Available B2C Messaging Channel APIs. For the avoidance of doubt, Meta may apply commercially reasonable charges based on usage of the Publicly Available B2C Messaging Channel APIs (by reference to volume or any other relevant metric).
2. Meta further commits from the Closing Date to make equivalent Core B2C Messaging Channel API Functionalities available to Third Party CS CRM Providers as to the Kustomer Service on a non-discriminatory basis, meaning without materially differentiating in terms of functionality and performance (including rate limits) depending on whether the Core B2C Messaging Channel API Functionalities are accessed by a Third Party CS CRM Provider or the Kustomer Service. For the avoidance of doubt, Meta also commits from the Closing Date not to discriminate against Third Party CS CRM Providers relative to the Kustomer Service in relation to denying or unreasonably delaying access to, changing, suspending or deprecating Core B2C Messaging Channel API Functionalities.
3. Meta shall publish on Meta’s Developer Website, and update on a quarterly basis, a list of:
  - a. Publicly Available B2C Messaging Channel API(s); and

- b. Core B2C Messaging Channel API Functionalities made available to the Kustomer Service (other than those made available to the Kustomer Service only through Publicly Available B2C Messaging Channel APIs).
4. Meta shall be permitted under these Commitments to:
- a. Conduct API Development and Testing solely on the Kustomer Service, with Kustomer Business Users, and/or with certain third parties.
  - b. Develop features associated with Meta Services for use solely with the Kustomer Service (or any other Meta Service, or as part of a partnership with a third party), including features that complement (but do not in themselves constitute features of) the Publicly Available B2C Messaging Channel APIs and/or Core B2C Messaging Channel API Functionalities, provided that the development and implementation of such features shall not impede the functioning of and access to functionalities of Publicly Available B2C Messaging Channel APIs or Core B2C Messaging Channel API Functionalities. Nothing in these Commitments shall require Meta to license versions of Meta Services other than the Publicly Available B2C Messaging Channel APIs and Core B2C Messaging Channel API Functionalities (in each case in accordance with the terms of these Commitments). For the avoidance of doubt, any Third Party CS CRM Provider shall remain free similarly to develop and make available features associated with their own first-party products, apps, or services.
5. Meta shall not be in breach of these Commitments in the event of any degradation or non-availability of the Publicly Available B2C Messaging Channel APIs or Core B2C Messaging Channel API Functionalities that is solely or primarily attributable to any acts or omissions of a third party or other events outside of Meta's reasonable control (including unplanned service outages and downtime).

## **Section B. Monitoring Trustee**

### **B. 1 Appointment procedure**

6. No later than the Closing Date, Meta shall appoint a Monitoring Trustee to carry out the functions specified in these Commitments for a Monitoring Trustee.
7. The Monitoring Trustee shall:
- a. At the time of appointment, be independent of the Parties;
  - b. Possess the necessary experience, competence, and qualifications to carry out its mandate, including via any technical expert appointed pursuant to paragraph 17 below; and
  - c. Neither have, nor become exposed to, a Conflict of Interest.

8. The Monitoring Trustee shall be remunerated by Meta in a way that does not impede the independent and effective fulfillment of its mandate.
9. *Proposal by Meta.* No later than four weeks after the Effective Date, Meta shall submit the name or names of one or more natural or legal persons whom Meta proposes to appoint as the Monitoring Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the person or persons proposed as Monitoring Trustee fulfil the requirements set out in paragraph 7 and shall include:
  - a. The full terms of the proposed mandate, which shall include all provisions necessary to enable the Monitoring Trustee to fulfil its duties under these Commitments; and
  - b. The outline of a work plan that describes how the Monitoring Trustee would carry out its duties under these Commitments.
10. *Approval or rejection by the Commission.* The Commission shall have the discretion to approve or reject the proposed Monitoring Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Monitoring Trustee to fulfil its obligations. If only one name is approved, Meta shall appoint or cause to be appointed the person or persons concerned as Monitoring Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, Meta shall be free to choose the Monitoring Trustee to be appointed from among the names approved. The Monitoring Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.
11. *New proposal by Meta.* If all the proposed Monitoring Trustees are rejected, Meta shall submit the names of at least two more natural or legal persons within one week of being informed of the rejection, in accordance with paragraphs 9 and 10 of these Commitments.
12. *Monitoring Trustee nominated by the Commission.* If all further proposed Monitoring Trustees are rejected by the Commission, the Commission shall nominate a Monitoring Trustee, whom Meta shall appoint, or cause to be appointed, in accordance with a Monitoring Trustee mandate approved by the Commission.

## **B. 2 Functions of the Monitoring Trustee**

13. The Monitoring Trustee shall assume its specified duties and obligations in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Monitoring Trustee or Meta, give any orders or instructions to the Monitoring

Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

14. The Monitoring Trustee shall:
  - a. Monitor the performance of the Commitments by Meta;
  - b. Propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision;
  - c. Provide to the Commission a written report, sending Meta a non-confidential copy at the same time, within fifteen working days after the end of each six-month period so that the Commission can assess whether the Commitments are being complied with;
  - d. Propose, as applicable, to Meta such measures as the Monitoring Trustee considers necessary to ensure Meta's compliance with the Commitments;
  - e. Promptly report in writing to the Commission, sending Meta a non-confidential copy at the same time, if it concludes on reasonable grounds that Meta has failed to comply with the Commitments;
  - f. Act as a contact point for questions from third parties about the nature and scope of the Commitments; and
  - g. Assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision.

### **B. 3 Duties and obligations of the Parties**

15. Meta shall provide and shall cause its advisors to provide the Monitoring Trustee with all such cooperation, assistance and information as the Monitoring Trustee may reasonably require to perform its tasks (including the information set out in **Annex 2**). The Monitoring Trustee shall have full and complete access to any of Meta's books, records, documents, management or other personnel, facilities, sites and technical information reasonably necessary for fulfilling its duties under the Commitments and Meta shall provide the Monitoring Trustee upon request with copies of any documents.
16. Meta shall indemnify the Monitoring Trustee and its employees and agents (each an "**Indemnified Party**") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to Meta for, any liabilities arising out of the performance of the Monitoring Trustee's duties under the Commitments, except

to the extent that such liabilities result from the willful default, recklessness, gross negligence or bad faith of the Monitoring Trustee, its employees, agents or advisors.

17. At the expense of Meta, the Monitoring Trustee shall appoint a technical expert and may appoint other advisors, subject to Meta's approval (this approval not to be unreasonably withheld or delayed) if the Monitoring Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the mandate, provided that any fees and other expenses incurred by the Monitoring Trustee are reasonable. Should Meta refuse to approve the technical expert and/or advisors proposed by the Monitoring Trustee the Commission may approve the appointment of such technical expert and/or advisors instead, after having heard Meta. Only the Monitoring Trustee shall be entitled to issue instructions to the technical expert and/or advisors. Paragraph 16 of these Commitments shall apply *mutatis mutandis*.
18. Meta agrees that the Commission may share Confidential Information proprietary to Meta with the Monitoring Trustee. The Monitoring Trustee shall not disclose Confidential Information received from the Commission, Meta, or Kustomer to any third party other than the Commission and a technical expert appointed pursuant to paragraph 17. The principles contained in Article 17(1) and (2) of the Merger Regulation apply *mutatis mutandis*.
19. Meta agrees that the contact details of the Monitoring Trustee shall be published on the website of the Commission's Directorate-General for Competition and they shall inform interested third parties of the identity and the tasks of the Monitoring Trustee.

#### **B. 4 Replacement, discharge and reappointment of the Monitoring Trustee**

20. If the Monitoring Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Monitoring Trustee to a Conflict of Interest:
  - a. The Commission may, after hearing the Monitoring Trustee and Meta, require Meta to replace the Monitoring Trustee; or
  - b. Meta may, with the prior approval of the Commission, replace the Monitoring Trustee.
21. If the Monitoring Trustee is removed according to paragraph 20 of these Commitments, the Monitoring Trustee may be required to continue its function until a new Monitoring Trustee is in place to whom the Monitoring Trustee has affected a full hand over of all the relevant information. The new Monitoring Trustee shall be appointed in accordance with the procedure referred to in paragraphs 7 to 12 of these Commitments.
22. Unless removed according to paragraph 20 of these Commitments, the Monitoring Trustee shall cease to act as Monitoring Trustee only after the Commission has discharged it from

its duties after all the Commitments with which the Monitoring Trustee has been entrusted have been implemented.

### **Section C. Dispute Resolution**

23. In the event that a Third Party CS CRM Provider, showing a sufficient legitimate interest, claims that Meta is failing to comply with its obligations arising from the Commitments, the Fast-Track Dispute Resolution Procedure described in **Annex 1** shall apply.

### **Section D. General Provisions**

24. Notwithstanding any other provision of these Commitments, Meta shall be permitted under these Commitments to take steps (including, for the avoidance of doubt, by amending the Terms of Service and any relevant Meta or Kustomer policies) to: (i) comply with any applicable law, regulation, legal process, or governmental request; (ii) detect, prevent, promote, or otherwise address fraud, security, integrity, or technical issues; (iii) improve user or platform privacy or security; (iv) enforce the relevant Terms of Service or policies; or (v) protect against harm to the rights, property, or safety of Meta, Meta users, or the public as required or permitted by law.
25. Subject to paragraph 24, Meta shall not make changes to the Terms of Service in a manner that would be equivalent to a breach of paragraph 1 or paragraph 2 of these Commitments.
26. The Commitments shall take effect upon the Effective Date.
27. The Commitments shall remain in effect for ten years from the Closing Date.

### **Section E. Review**

28. The Commission may in response to a reasoned request from Meta showing good cause, waive, modify, or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments. This request shall be accompanied by a report from the Monitoring Trustee, who shall at the same time send a non-confidential copy of the report to Meta. The request shall not have the effect of suspending the application of the undertaking and, in particular, of suspending the expiry of any time period in which the undertaking has to be complied with.

### **Section F. Definitions**

29. For the purpose of the Commitments, the following terms shall have the following meaning:

**Affiliated Undertakings:** undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated

Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

**API Development and Testing:** the process by which Meta develops and tests new B2C Messaging Channel APIs (or new functionalities or improvements), subject in each case to the procedure in Annex 4. For the avoidance of doubt, API Development and Testing may include Meta's use of the Kustomer Service or certain third party developers and/or products to develop and test new B2C Messaging Channel APIs (or new functionalities or improvements).

**B2C Messaging:** the over the top (OTT) messaging services:

- (a) offered through WhatsApp Business Platform, Messenger Platform, and Instagram Messaging that provide businesses the means to receive and send private messages from and to B2C Messaging Channel Users at scale; and/or
- (b) that provide businesses the means to read and respond via private message to public comments from B2C Messaging Channel Users on Facebook and Instagram posts at scale.

**B2C Messaging Channel API(s):** APIs (including any future APIs) that Meta offers which are necessary to implement B2C Messaging (other than in the context of API Development and Testing), access to which is subject to the applicable eligibility criteria and Terms of Service and the Third Party and App Assessment Process.

**B2C Messaging Channel Users:** individual (non-business) users of the consumer versions of WhatsApp, Messenger, Facebook and Instagram.

**Closing Date:** closing date of the Concentration.

**Confidential Information:** any business secrets, know-how, commercial information, or any other information of a proprietary nature that is not in the public domain.

**Conflict of Interest:** any conflict of interest that impairs the Monitoring Trustee's objectivity and independence in discharging its duties under the Commitments.

**Core B2C Messaging Channel API Functionalities:** (i) the functionalities of the B2C Messaging Channel APIs listed at Annex 3; (ii) functionalities of B2C Messaging Channel APIs accessed by the Kustomer Service after the Effective Date as set out in Annex 4; and (iii) in each case, any improvements of those functionalities accessed by the Kustomer Service as set out in Annex 4. Core B2C Messaging Channel API Functionalities shall not include any functionalities which are primarily associated with other Meta Services (e.g. where the B2C Messaging Channel Users view or access another Meta Service via a distinct interface such as an app switch, modal, popup, plugin or webview).

**CS CRM:** a software application used by businesses for the purpose of collecting, storing, and organising customer data for use by customer service agents or functions to manage and respond to customer service communications.

**EEA:** the 27 Member States of the European Union (Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden), Iceland, Liechtenstein and Norway.

**Effective Date:** the date of adoption of the Decision.

**Instagram Messaging:** Instagram messaging on Messenger Platform, currently described at <https://developers.Meta.com/docs/messenger-platform/instagram>.

**Kustomer:** Kustomer, Inc. or any Affiliated Undertakings of Kustomer, Inc. or any successor entities or businesses (irrespective of branding).

**Kustomer Service:** any CS CRM product or service provided by Kustomer at any time during the term of the Commitments.

**Kustomer Business User:** Any business customer of the Kustomer Service that subscribes to the Kustomer Terms of Service.

**Kustomer Terms of Service:** the terms of service applicable to the use of the Kustomer Service.

**Monitoring Trustee:** one or more natural or legal persons who are approved by the Commission and appointed by Meta, and who have the duty to carry out the functions specified in the Commitments for a Monitoring Trustee.

**Messenger Platform:** Messenger Platform, currently described at <https://developers.facebook.com/products/messenger/>.

**Meta:** Meta Platforms, Inc. or any Affiliated Undertakings of Meta Platforms, Inc.

**Meta's Developer Website:** The version of <https://developers.facebook.com/> available without logging in, and any successor site.

**Meta Services:** any product or service (including algorithms) operated by Meta at any time during the term of the Commitments. For the avoidance of doubt, Meta Services include any product or service Meta may develop in the future, including via acquisitions, regardless of its branding.

**Parties:** Meta and Kustomer.



**Publicly Available B2C Messaging Channel API(s):** B2C Messaging Channel APIs that are publicly available on Meta's Developer Website as may be updated from time to time, excluding any APIs made available for API Development and Testing.

**Terms of Service:** the terms of service applicable to the use of the B2C Messaging Channel APIs as may be updated from time to time, for instance to comply with legal requirements or policy objectives as set out in paragraph 24 of these Commitments.

**Third Party and App Assessment Process:** the review process by which Meta verifies (including on an ongoing basis) that a third party's use of its B2C Messaging channels complies with Meta's applicable policies.

**Third Party CS CRM Provider:** Provider, other than Kustomer (and for the avoidance of doubt other than Meta), of a CS CRM which has sales in the EEA, or which actively targets customers in the EEA (e.g. through entering into a contract to provide CS CRM services in the EEA or establishing a local sales team in the EEA) and that meets Meta's Third Party and App Assessment Process and agrees to the applicable Terms of Service. References in these Commitments to Third Party CS CRM Providers shall (i) apply only to their CS CRM activities; (ii) apply to both direct and indirect access by Third Party CS CRM Providers to B2C Messaging Channel APIs; and (iii) include the arrangements by which business users of that Third Party CS CRM Provider access B2C Messaging via that Third Party CS CRM Provider.

**WhatsApp Business Platform:** The WhatsApp Business Platform, currently described at <https://www.whatsapp.com/business/api>.

duly authorised for and on behalf of Meta Platforms, Inc.

Signature Page for Case No. M.10262 - Meta / Kustomer Commitments to the European Commission

[signed]

## Annex 1 - Fast Track Dispute Resolution Procedure

1. A Third Party CS CRM Provider showing a sufficient legitimate interest that wishes to avail itself of the fast track dispute resolution procedure (the "**Requesting Party**") shall inform Meta and the Monitoring Trustee in writing, setting out in detail the reasons why the Requesting Party believes that Meta is failing to comply with the Commitments. The Requesting Party and Meta will use commercially reasonable efforts to settle all disputes that may arise through cooperation and consultation within a reasonable period of time not exceeding fifteen working days (such period being extendable by mutual consent of Meta and the Requesting Party) (the "**Consultation Period**") after receipt of the request.
2. The Monitoring Trustee shall present its own proposal (the "**Trustee Proposal**") for resolving the dispute within ten working days of the request to Meta, the Requesting Party and the Commission, specifying in writing the rationale for the Trustee Proposal, and the action, if any, to be taken by Meta in order to ensure compliance with Commitments vis-à-vis the Requesting Party.
3. Should the Requesting Party and Meta (together, the "**Parties to the Arbitration**") fail to resolve their dispute in the Consultation Period, then the Requesting Party may, within 20 working days after the Consultation Period has expired, serve a notice (the "**Notice**"), in the sense of a request for arbitration, to the International Chamber of Commerce (the "**Arbitral Institution**"), with a copy of such Notice and request for arbitration to Meta.
4. The Notice shall set out in detail the dispute, difference or claim (the "**Dispute**") and shall contain, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon shall be attached, e.g., documents, agreements, expert reports, and witness statements. The Notice shall also contain a detailed description of the Trustee Proposal, including a comment as to its appropriateness.
5. Meta shall, within ten working days from receipt of the Notice, submit its answer (the "**Answer**"), which shall provide detailed reasons for its conduct and set out, inter alia, all issues of both fact and law, including any suggestions as to the procedure, and all documents relied upon, e.g., documents, agreements, expert reports, and witness statements. The Answer shall, if appropriate, contain a detailed description of the action which Meta proposes to undertake vis-à-vis the Requesting Party and a detailed description of the Trustee Proposal (if not already submitted), including a comment as to its appropriateness.

### *Appointment of the Arbitrators*

6. The Arbitral Tribunal shall consist of three persons. The Requesting Party shall nominate its arbitrator in the Notice; Meta shall nominate its arbitrator in the Answer. The arbitrator nominated by the Requesting Party and by Meta shall, within five working days of the nomination of the latter, nominate the chair, making such nomination known to the parties and the Arbitral Institution which shall forthwith confirm the appointment of all three arbitrators.

7. Should the Requesting Party wish to have the Dispute decided by a sole arbitrator it shall indicate this in the Notice. In this case, the Requesting Party and Meta shall agree on the nomination of a sole arbitrator within five working days from the communication of the Answer, communicating this to the Arbitral Institution.
8. Should Meta fail to nominate an arbitrator, or if the two arbitrators fail to agree on the chair, or should the Parties to the Arbitration fail to agree on a sole arbitrator, the default appointment(s) shall be made by the Arbitral Institution.
9. The three-person arbitral tribunal or, as the case may be, the sole arbitrator, are herein referred to as the “**Arbitral Tribunal**”.

*Arbitration Procedure*

10. The Dispute shall be finally resolved by arbitration under the International Chamber of Commerce Rules of Arbitration, with such modifications or adaptations as foreseen herein or necessary under the circumstances (the “**Rules**”). The arbitration shall be conducted in New York, New York, United States of America (or, at the option of the Requesting Party, Dublin, Ireland), in the English language. For good cause, any Party may apply to the Arbitral Institution (or Arbitral Tribunal as may be appropriate) for an extension of the timelines provided in this Annex.
11. The procedure shall be a fast-track procedure. For this purpose, the Arbitral Tribunal shall shorten all applicable procedural time-limits under the Rules as far as admissible and appropriate in the circumstances. The Parties to the Arbitration shall consent to the use of email for the exchange of documents.
12. The Arbitral Tribunal shall, as soon as practical after the confirmation of the Arbitral Tribunal, hold an organizational conference to discuss any procedural issues with the Parties to the Arbitration. Terms of Reference shall be drawn up and signed by the Parties to the Arbitration and the Arbitral Tribunal at the organizational meeting or thereafter and a procedural time-table shall be established by the Arbitral Tribunal. An oral hearing shall, as a rule, be established within two months of the confirmation of the Arbitral Tribunal.
13. In order to enable the Arbitral Tribunal to reach a decision, it shall be entitled to request any relevant information from the Parties to the Arbitration, to appoint experts and to examine them at the bearing, and to establish the facts by all appropriate means. The Arbitral Tribunal is also entitled to ask for assistance by the Monitoring Trustee in all stages of the procedure if the Parties to the Arbitration agree.
14. The Arbitral Tribunal shall not disclose confidential information and apply the standards attributable to confidential information under the Merger Regulation. The Arbitral Tribunal may take the measures necessary for protecting confidential information in particular by restricting access to confidential information to the Arbitral Tribunal, the Monitoring Trustee, and outside counsel and experts of the opposing party.

15. The burden of proof in any dispute under these Rules shall be borne as follows: (i) the Requesting Party must produce evidence of a prima facie case; and (ii) if the Requesting Party produces evidence of a prima facie case, the Arbitral Tribunal must find in favor of the Requesting Party unless Meta can produce evidence to the contrary.

*Involvement of the Commission*

16. The Commission shall be allowed and enabled to participate in all stages of the procedure by
  - a. receiving all written submissions (including documents and reports, etc.) made by the Parties to the Arbitration;
  - b. receiving all orders, interim and final awards and other documents exchanged by the Arbitral Tribunal with the Parties to the Arbitration (including Terms of Reference and procedural time-table);
  - c. filing amicus curiae briefs; and
  - d. being present at the hearing(s) and with the permission of the Arbitral Tribunal, it may also make oral observations.
17. The Arbitral Tribunal shall forward, or shall order the Parties to the Arbitration to forward, the documents mentioned to the Commission without delay.
18. In the event of disagreement between the Parties to the Arbitration regarding the interpretation of the Commitments, the Arbitral Tribunal may seek the Commission's interpretation of the Commitments before finding in favour of any Party to the Arbitration and shall be bound by the interpretation.

*Decisions of the Arbitral Tribunal*

19. The Arbitral Tribunal shall decide the dispute on the basis of the Commitments and the Decision. Issues not covered by the Commitments and the Decision shall be decided (in the order as stated) by reference to the Merger Regulation, EU law and general principles of law common to the legal orders of the Member States without a requirement to apply a particular national system. The Arbitral Tribunal shall take all decisions by majority vote.
20. Upon request of the Requesting Party, the Arbitral Tribunal may make a preliminary ruling on the Dispute. The preliminary ruling shall be rendered within one month after the confirmation of the Arbitral Tribunal, shall be applicable immediately and, as a rule, remain in force until a final decision is rendered.
21. The Arbitral Tribunal shall, in the preliminary ruling as well as in the final award, specify the action, if any, to be taken by Meta in order to comply with the Commitments vis-à-vis the Requesting Party (e.g., specify that the Requesting Party gain access to the relevant Publicly Available B2C Messaging Channel API or Core B2C Messaging Channel API Functionality). The final award shall be final and binding on the Parties to the Arbitration

and shall resolve the Dispute and determine any and all claims, motions or requests submitted to the Arbitral Tribunal. The arbitral award shall also determine the reimbursement of the costs of the successful party and the allocation of the arbitration costs. In case of granting a preliminary ruling or if otherwise appropriate, the Arbitral Tribunal shall specify that terms and conditions determined in the final award apply retroactively.

22. The final award shall, as a rule, be rendered within six months after the confirmation of the Arbitral Tribunal. The time-frame shall, in any case, be extended by the time the Commission takes to submit an interpretation of the Commitments if asked by the Arbitral Tribunal.
23. The Parties to the Arbitration shall prepare a non-confidential version of the final award, without business secrets. The Commission may publish the non-confidential version of the award. The Parties to the Arbitration, the Arbitral Tribunal, all other persons participating in the proceedings and all further persons involved, i.e. in the administration of the arbitral proceedings, shall maintain confidentiality towards all persons regarding the conduct of arbitral proceedings. All proceedings will be held in private and remain confidential.
24. Nothing in the arbitration procedure shall affect the power to the Commission to take decisions in relation to the Commitments in accordance with its powers under the Merger Regulation.

## **Annex 2 - Information to be provided by Meta to the Monitoring Trustee**

1. Meta shall notify the Monitoring Trustee on a quarterly basis of:
  - a. any non-trivial changes to the terms of access to Publicly Available B2C Messaging Channel API(s);
  - b. the nature, extent, cause and duration of any non-trivial degradation or non-availability of the Publicly Available B2C Messaging Channel APIs within the meaning of paragraph 5 of these Commitments;
  - c. any B2C Messaging Channel API functionalities or improvements of such functionalities made available to the Kustomer Service (other than those made available to the Kustomer Service only through Publicly Available B2C Messaging Channel APIs or API Development and Testing), including the percentage and number of Kustomer Business Users using such functionality or improvement of such functionalities on a weekly basis in the previous quarter; and
  - d. any API Development and Testing, including the percentage and number of Kustomer Business Users using such functionality. If any such API Development and Testing has exceeded six (6) months in duration, Meta shall also provide the Monitoring Trustee an explanation of why the testing period has exceeded such duration.

**Annex 3 - Core B2C Messaging Channel API Functionalities as at the Effective Date, including of all B2C Messaging Channel APIs integrated by the Kustomer Service as at the Effective Date**

**Table 1: B2C Messaging Channel API functionalities on Messenger Platform (direct access)**

API	Functionality
Handover Protocol V2	<ul style="list-style-type: none"> <li>● Pass control of a conversation between multiple apps</li> </ul>
Human Agent Tag	<ul style="list-style-type: none"> <li>● Send the HUMAN_AGENT message tag</li> </ul>
Private Replies	<ul style="list-style-type: none"> <li>● Send a single message as a private reply to a public comment on the relevant business's Facebook Page</li> </ul>
Receive API (webhooks)	<ul style="list-style-type: none"> <li>● Be notified of interactions or events, including when a B2C Messaging Channel User sends or reads a message, replies and reacts</li> </ul>
Send API	<ul style="list-style-type: none"> <li>● Send text-based messages up to a maximum of 2000 characters</li> <li>● Send image attachments up to 25MB in size and a maximum resolution of 85 megapixels</li> <li>● Send audio attachments up to 25MB in size</li> <li>● Send video attachments up to 25MB in size</li> <li>● Send file attachments up to 25MB in size</li> </ul>
User Profile API	<ul style="list-style-type: none"> <li>● Retrieve the profile name and picture of a B2C Messaging Channel User</li> </ul>

**Table 2: B2C Messaging Channel API functionalities on Instagram Messaging (direct access)**

API	Functionality
Human Agent Tag	<ul style="list-style-type: none"> <li>• Send the HUMAN_AGENT message tag</li> </ul>
Private Replies	<ul style="list-style-type: none"> <li>• Send a single message as a private reply to a public comment on the relevant business's Instagram post</li> </ul>
Reaction webhook	<ul style="list-style-type: none"> <li>• Be notified of when a B2C Messaging Channel User reacts to a message</li> </ul>
Read webhook	<ul style="list-style-type: none"> <li>• Be notified of when a B2C Messaging Channel User reads a message</li> </ul>
Receive API (webhooks)	<ul style="list-style-type: none"> <li>• Be notified of interactions or events, including when a B2C Messaging Channel User sends or replies to a message</li> </ul>
Send API	<ul style="list-style-type: none"> <li>• Send text-based messages up to a maximum of 2000 characters</li> <li>• Send jpg, png, ico and bmp image attachments up to 8MB in size</li> <li>• Media share (image and video)</li> <li>• Send love reactions</li> </ul>
Story Mentions	<ul style="list-style-type: none"> <li>• Be notified of when a B2C Messaging Channel User mentions the business in a story</li> </ul>
User Profile API	<ul style="list-style-type: none"> <li>• Retrieve the profile name and picture of a B2C Messaging Channel User</li> </ul>



**Table 3: B2C Messaging Channel API functionalities on WhatsApp Business Platform (indirectly accessed by Kustomer via a third party CPaaS provider)**

<b>Functionality</b>
Be notified of an incoming message, including the profile name and WhatsApp ID of the B2C Messaging Channel User
Send audio media messages up to 16MB in size
Send document media messages up to 100MB in size
Send H.264 video codec and AAC audio codec video media messages with a single audio stream, up to 16MB in size
Send jpeg and png image media messages up to 5MB in size
Send text-based messages to a maximum of characters set by the relevant CPaaS provider
Send text-based messages with URL link to a maximum of characters set by the relevant CPaaS provider

**Annex 4 - B2C Messaging Channel API functionalities and improvements accessed by the Kustomer Service after the Effective Date**

1. B2C Messaging Channel API functionalities or improvements not included within the scope of Core B2C Messaging Channel API Functionalities as at the Effective Date shall become Core B2C Messaging Channel API Functionalities pursuant to the following procedure:
  - a. Subject to paragraph 1c. of this Annex 4, B2C Messaging Channel API functionalities or improvements accessed by the Kustomer Service through any means other than a Publicly Available B2C Messaging Channel API (including for API Development and Testing) shall constitute Core B2C Messaging Channel API Functionalities and shall be made available to Third Party CS CRM Providers as soon as reasonably practicable and not later than twelve (12) months of meeting the Usage Threshold.
  - b. On a quarterly basis for the twelve (12) month period following the date of the Usage Threshold being met, Meta shall provide the Monitoring Trustee with a progress update in relation to the status of the roll-out to Third Party CS CRM Providers of access to such functionality.
  - c. Meta may notify the Monitoring Trustee in writing of any B2C Messaging Channel API functionality accessed by the Kustomer Service after the Effective Date that meets the criteria of paragraph 1a. of this Annex 4, but which Meta does not consider to be essential for Third Party CS CRM Providers to implement B2C Messaging and should not constitute a Core B2C Messaging Channel API Functionality, providing detailed reasons. Such notification shall be made within one month following the date of such functionality meeting the Usage Threshold. Following consultation with Meta, the Monitoring Trustee in agreement with the Commission shall confirm within one month of receipt of such notice whether the relevant B2C Messaging Channel API functionality is essential for Third Party CS CRM Providers to implement B2C Messaging (in which case it shall constitute a Core B2C Messaging Channel API Functionality pursuant to paragraph 1a. of this Annex 4 and shall be made available to Third Party CS CRM Providers as soon as reasonably practicable and not later than twelve (12) months of the date of the Monitoring Trustee's confirmation).
2. For the avoidance of doubt, Core B2C Messaging Channel API Functionalities shall remain Core B2C Messaging Channel API Functionalities unless excepted pursuant to paragraph 1c. of this Annex 4 (or deprecated in accordance with paragraph 2 of these Commitments), irrespective of whether their usage falls beneath the Usage Threshold.
3. For the purposes of this Annex 4, "**Usage Threshold**" shall mean used by more than 25% of individual Kustomer Business Users via the Kustomer Service on a weekly basis during the previous quarter.