



EUROPEAN COMMISSION
DG Competition

Case M.10262 - META / KUSTOMER

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Waiver of the Commitments
Date: 10/11/2023



Brussels, 10.11.2023
C(2023) 7493 final

PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Meta Platforms, Inc.
601 Willow Road, Menlo Park
California 94025
United States of America

Dear Sir/Madam,

Subject: Case M.10262 – META / KUSTOMER
Commission decision on Meta’s request of 19 September 2023 under paragraph 28 of the commitments annexed to the Commission decision of 27 January 2022 in case M.10262 – META / KUSTOMER (‘Commitments’) for a waiver of the Commitments

(1) On 19 September 2023, the Commission received a request from Meta for a waiver of the Commitments. This decision presents the Commission’s assessment of Meta’s request.

1. BACKGROUND

(2) By decision of 27 January 2022 in case M.10262 – Meta / Kustomer pursuant to Article 8(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹ (the ‘**Merger Regulation**’), the Commission declared the operation by which Meta Platforms, Inc. (‘**Meta**’) acquired sole control of Kustomer, Inc. (‘**Kustomer**’) (the ‘**Transaction**’) compatible with the internal market and with the EEA Agreement, subject to full compliance with the Commitments (the ‘**Decision**’).

¹ L 24, 29.1.2004, p. 1-22.

- (3) The Commitments aimed at addressing the Commission’s findings that the Transaction would significantly impede effective competition in the EEA-wide, if not worldwide, market for customer service and support CRM software. The Commitments ensured that following the Transaction, Meta would not restrict or degrade access to its messaging channels (Messenger, Instagram messaging and WhatsApp) by rival customer service CRM providers (‘CS CRMs’).
- (4) The Commitments consist in (i) the API commitment which ensures that Meta will provide non-discriminatory access, without charge, to its publicly-available APIs for its messaging channels (Messenger, Instagram messaging and WhatsApp) to competing CS CRMs, and new entrants; and (ii) the core API access-parity commitment which ensures that, to the extent any features or functionalities of Messenger, Instagram messaging or WhatsApp which are used by Kustomer’s customers may be improved or updated, Meta will make available any such improvements to rivals of Kustomer and new entrants on an equivalent basis. This also holds for any new features or functionalities of Meta messaging channels in the future if used by a material portion (25%) of Kustomer’s customers.
- (5) On 15 May 2023, Meta completed a spinout of Kustomer (the “**Spinout**”), following which Meta only retained a [minority] share in Kustomer. This took place amid a broader, company-wide efficiency drive intended to refocus Meta’s internal resources around its core businesses.

2. META’S REQUEST FOR A WAIVER OF THE COMMITMENTS

- (6) On 19 September 2023, Meta requested, pursuant to paragraph 28 of the Commitments, a waiver of the Commitments in their entirety.
- (7) First, Meta argues that the Spinout represents the complete legal unwinding under the Merger Regulation of Meta’s acquisition of Kustomer which was the subject of the proceedings in Case M.10262 – Meta / Kustomer (and therefore the basis for the Commitments). Meta has divested all control of Kustomer to [Kustomer’s original partners], whereupon, as a passive minority shareholder, it has no control of Kustomer anymore. Therefore, the Commitments have no further application to Meta’s relationship with Kustomer because the concentration on which they were based has been unwound. Meta’s relationship with Kustomer is now outside the scope of the Merger Regulation and thus the Commitments should be waived as a matter of course.
- (8) Second, Meta submits that there will be no integration or collaboration between Meta and Kustomer beyond that which may occur in the normal course of business. Kustomer will operate as a wholly independent company, as before the Transaction and Meta will treat Kustomer the same as any other third party CS CRM.
- (9) Finally, Meta submits that the theory of harm developed in the Decision is premised in a vertical concern that assumes, post-Transaction, that Kustomer’s incentives would be aligned (or at least subsumed) with Meta’s as part of the same corporate group. Once such concentration is unwound, there is no such alignment of incentives.

- (10) Meta provided an updated economic analysis of the vertical arithmetic for input foreclosure and concluded that the Spinout removes the majority of the gains from foreclosure identified in the Decision. According to Meta, given the reduction in Software-as-a-Service (“SaaS”) revenues from Meta’s reduced interest in Kustomer, the level of switching to Kustomer for foreclosure to be profitable increases from [...] businesses to somewhere between [...] businesses depending on 3 different scenarios². Given that since February 2022 to the end of Q1 2023, and despite Meta and Kustomer’s efforts to grow Kustomer’s customer base, the number of Kustomer businesses has grown [...] businesses (from [...] businesses), Meta submits that these scenarios are totally infeasible.
- (11) Meta further considers that the gains related to (i) additional data for online ads, (ii) CTM ads and (iii) steering clients to Meta’s ecosystem presuppose that, following the acquisition, (i) Meta would make changes to Kustomer’s CRM software that would allow its business customers to more seamlessly share various types of data with Meta for ads purposes, (ii) businesses using Kustomer would be more likely to buy CTM ads because Meta would optimise Kustomer’s CRM software to work with Meta’s own B2B messaging channels (and therefore businesses using Kustomer would be best equipped to handle the messaging threads originating from CTM ads), and (iii) Meta would cross-sell its other products and services to Kustomer’s business customers. However, following the Spinout: (i) Kustomer has no incentive to change its software to share data with Meta or (ii) to optimise it for Meta’s B2C messaging channels, (iii) nor to work with Meta to cross-sell Meta’s other products and services to its business customers, because Kustomer will not benefit from this. In addition, Meta does not control Kustomer post-Spinout and will therefore have no ability to procure that Kustomer makes such changes.
- (12) The aggravating factors foreseen in the Decision (*i.e.* offering Kustomer for free or below market price, or bundle Kustomer with Meta’s ecosystem of products) are also fundamentally changed because Kustomer has no incentive to engage in such strategies and Meta has no ability to procure that Kustomer makes such decisions.
- (13) Meta also notes that the losses identified in the Decision that would be sustained by Meta in any foreclosure strategy are unaffected and during the period of Meta’s ownership, Meta has not engaged in any preferential treatment of Kustomer which is confirmed in the Monitoring Trustee reports.

3. OPINION OF THE MONITORING TRUSTEE

- (14) On 21 September 2023, the Monitoring Trustee submitted its opinion on Meta’s request (the “**Opinion**”). In the Opinion, the Monitoring Trustee stated that Meta has shown good cause to waive the Commitments as required under paragraph 28 of the Commitments.
- (15) First, the Monitoring Trustee considers that the Spinout is likely to have resulted in a change of control within the meaning of the Merger Regulation.

² The 3 scenarios are: (i) foreclosure today; (ii) assuming only medium-sized businesses were to switch to Kustomer; and (iii) foreclosure in the future (2025).

- (16) Second, the Monitoring Trustee notes that it has not observed significant market gain by Kustomer during Meta’s full ownership.
- (17) Third, the Monitoring Trustee explains that it has observed no preferential treatment of Kustomer during Meta’s full ownership. During the same period, it observed actions in support of Meta’s stated position to make its B2C messaging channels available to the largest pool of businesses, including via strategic partnerships with major third party CS CRMs (e.g., Salesforce).
- (18) Fourth, the Monitoring Trustee submits that the number of customers that would need to switch to Kustomer to make a foreclosure strategy profitable increased substantially based on Meta’s modelling in the post-Spinout scenario. During Meta’s full ownership of Kustomer, Kustomer had recorded a modest increase in its customer base ([details regarding Meta’s plans for Kustomer]).
- (19) Fifth, the Monitoring Trustee considers that a close alignment between Kustomer and Meta does not appear to be in Kustomer’s interest post-Spinout given the profile of Kustomer’s customer base. Kustomer’s customer base has remained predominantly US-based and WhatsApp and Meta’s other messaging channels have had limited adoption in the US, where SMS messages and calls continue to be the main communication channels. In contrast, Zendesk has a significant presence in Latin America where WhatsApp is a key communication channel. Integration with Meta’s messaging channels requires resources and funding on the CS CRM side and would need to be justified in customer demand, which does not seem to be the case.
- (20) Finally, the Monitoring Trustee notes that Meta has made efforts to increase the usage of its business messaging channels, including the WhatsApp Cloud API, in line with Meta’s commercial objectives. It is therefore not apparent to the Monitoring Trustee that Meta would depart from this strategy absent the Commitments.

4. ASSESSMENT OF THE REQUEST FOR A WAIVER OF THE COMMITMENTS

4.1. Legal Test

- (21) Paragraph 28 of the Commitments provides that “*the Commission may in response to a reasoned request from Meta showing good cause, waive, modify, or substitute, in exceptional circumstances, one or more 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*”.
- (22) In addition, the Court has held that “*a decision concerning a request for the waiver of commitments does not presuppose withdrawal of the decision authorising the merger, which has made those commitments binding, and does not comprise such a withdrawal. Its purpose is to ascertain whether the conditions laid down in the review clause forming part of the commitments are met or, as the case may be,*

*whether the competition concerns identified in the decision authorising the merger subject to the commitments have ceased to exist.*³

- (23) In terms of procedure, the Court has held that “*it is the parties bound by the commitments who must adduce evidence to demonstrate that the conditions for waiving the commitments are fulfilled*”.⁴
- (24) Within this framework, in the following subsection, the Commission will assess Meta’s waiver request against the criteria mentioned above, notably whether Meta has shown good cause to waive, in exceptional circumstances, the Commitments and whether the competition concerns identified in the decision authorising the merger subject to the commitments have ceased to exist.

4.2. Assessment

- (25) The Commission notes that Meta no longer holds control over Kustomer within the meaning of the Merger Regulation.
- (26) The post-Spinout voting rights in Kustomer are as follows: [...].⁵
- (27) Following the Spinout, Meta only holds a minority, non-controlling stake in Kustomer [details regarding ownership of Kustomer]⁶ ⁷. Meta’s only residual rights are consistent with the types of minority shareholder protections that do not give rise to control under the Merger Regulation. The control of Kustomer’s day-to-day operations will be determined by its Board of Directors and there will be no direct shareholder involvement (outside of Board representatives where relevant).
- (28) Further, it appears there is no *de facto* joint control of Kustomer by Meta and the co-founders of Kustomer [...], as there are not enough elements to suggest a common interest and/or mutual dependency to the effect that they would not act against each other in exercising their rights in relation to Kustomer. Kustomer accesses core B2C messaging channel API functionalities on Messenger and Instagram messaging via the publicly available APIs, which are available on Meta’s Developer website to all third party CS CRMs. Kustomer accesses core B2C messaging channel API functionalities on WhatsApp Business Platform via cPaaS providers, as was the case pre-Transaction WhatsApp Cloud API is a publicly available API which is available to third party CS CRMs who register an interest in accessing it (as a Business Solution Provider). Consequently, Meta has no means of influencing those functionalities as compared to those received by any other third party CS CRM. Since Kustomer will have no direct or preferential involvement in Meta’s business messaging activities, Kustomer and its founders will have no role in developing those activities or any other of Meta’s commercial strategies post-Spinout.

³ Judgment of 16 May 2018, *Deutsche Lufthansa AG v European Commission*, T-712/16, EU:T:2018:269, paragraph 42.

⁴ Judgment of 16 May 2018, *Deutsche Lufthansa AG v European Commission*, T-712/16, EU:T:2018:269, paragraph 45.

⁵ [Details regarding ownership of Kustomer].

⁶ [Details regarding ownership of Kustomer].

⁷ [Details regarding management of Kustomer].

- (29) Therefore, Meta no longer has decisive influence over Kustomer and is no longer able to direct the conduct of Kustomer. Nonetheless, the Commitments relate to ensuring access to Meta's B2C messaging channels (WhatsApp, Instagram messaging and Messenger), which will remain fully owned and controlled by Meta. In light of this, the Commission considers it is necessary to assess whether Meta's remaining minority shareholding could potentially still give it a financial incentive to favour Kustomer over its competitors.
- (30) In the Decision, Meta's incentives were based on the following four benefits that Meta could gain from the foreclosure: (i) increase in SaaS revenues downstream; (ii) additional data; (iii) CTM Ads; and (iv) steering into Meta's ecosystem.
- (31) With regards to the increase in SaaS revenues downstream, it is now limited to the indirect profit arising from Meta's [...] stake in Kustomer. Therefore, such profit is now divided by approximately [...] when compared to the situation in which Meta had sole control and 100% of Kustomer's shares. The reduction in SaaS revenues from Meta's reduced interest in Kustomer means that the critical number of businesses that Kustomer would need to serve in order for the attempted foreclosure to be profitable is hugely increased. It is unlikely that businesses will switch to Kustomer following the Spinout at the magnitude required by the various possible scenarios, given that the information provided by Meta and verified by the Monitoring Trustee points to a modest growth in Kustomer's customer base during the period of Meta's ownership [details on Meta internal document relating to Kustomer's customers].
- (32) As regards gains from additional data, CTM Ads and steering into Meta's ecosystem, these presuppose changes in Kustomer's software or cross-selling of products which are no longer plausible as Kustomer is not integrated in Meta anymore and Meta does not control Kustomer's strategy anymore. In addition, the Monitoring Trustee underlines that during the period of active optimisation of Kustomer's integration with Meta's messaging channels, [detail regarding Kustomer's customers]. For the same reasons, the "aggravating circumstances" mentioned in the Decision (*i.e.*, the possibility to bundle Kustomer or offer it below market price), do not apply anymore.
- (33) Therefore, the Commission considers that the Spinout removes Meta's incentives to foreclose rival CS CRMs. For this reason, the Commission concludes that the divestment of Kustomer constitutes an exceptional circumstance within the meaning of paragraph 28 of the Commitments to justify waiving the Commitments and that the competition concerns identified in the Decision have ceased to exist.

5. CONCLUSION

- (34) In light of the assessment set out in paragraphs (25) to (33), the Commission considers that Meta has shown good cause to waive, in exceptional circumstances, the Commitments pursuant to paragraph 28 of the Commitments and that the competition concerns identified in the Decision have ceased to exist.

- (35) Therefore, the Commission accepts Meta's request to waive the Commitments in their entirety.

For the Commission

(Signed)
Didier REYNDERS
Member of the Commission