

**In the matter of the General Data Protection Regulation**

**DPC Case Reference: IN-18-08-3**

**In the matter of LinkedIn Ireland Unlimited Company**

**Decision of the Data Protection Commission made pursuant to Section 113 of the Data Protection Act 2018 and Article 60 of the General Data Protection Regulation**

**Further to a complaint-based inquiry commenced pursuant to Section 110 of the Data Protection Act 2018**

**DECISION**

**Decision makers for the Data Protection Commission:**

**Dr Des Hogan, Commissioner for Data Protection and**

**Mr Dale Sunderland, Commissioner for Data Protection**

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**22 October 2024**



Data Protection Commission  
2 Fitzwilliam Square South  
Dublin 2, Ireland

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## 1. Introduction

1. The General Data Protection Regulation (**'GDPR'**) is a regulation in European Union law on the protection of individuals with regard to the processing of their personal data. The date of application of the GDPR is 25 May 2018.
2. The Data Protection Commission (**'the DPC'**) was established on 25 May 2018, pursuant to the Data Protection Act 2018 (**'the 2018 Act'**), as Ireland's supervisory authority within the meaning of, and for the purposes specified in, the GDPR.
3. The GDPR elaborates on the indivisible, universal values of human dignity, freedom, equality and solidarity as enshrined in the Charter of Fundamental Rights of the EU (**'the Charter'**) and Article 8 in particular, which safeguards the protection of personal data. Article 8 of the Charter provides:
  1. Everyone has the right to the protection of personal data concerning him or her.
  2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
  3. Compliance with these rules shall be subject to control by an independent authority.
4. This Decision considers particular aspects of this fundamental right in relation to the processing of personal data by means of behavioural analysis and targeted advertising. Such processing of personal data can create risks to the fundamental rights and freedoms of individuals, in particular if such processing occurs without a valid lawful basis, in a non-transparent manner, or in an unfair manner.

### A. *Purpose of this Document*

5. This is the Decision adopted by the DPC in accordance with section 113(2)(b) of the 2018 Act. It arises from an inquiry conducted under Section 110 of the 2018 Act (the **'Inquiry'**) on the basis of a complaint (the **'Complaint'**) lodged by the French non-profit organisation La Quadrature du Net (**'LQdN'** or the **'Complainant'**) in respect of processing of personal data of LinkedIn members by LinkedIn Ireland Unlimited Company (**'LinkedIn'**).
6. The Inquiry examined whether LinkedIn complied with its obligations under Articles 5(1)(a), 6(1)(a), 6(1)(b), 6(1)(f), 13(1)(c), 13(1)(d), 14(1)(c) and 14(2)(b) of the General Data Protection Regulation (Regulation (EU) 2016/679 of the European Parliament and the Council) (**'GDPR'**). It was commenced on 20 August 2018, and a notice of commencement was sent to LinkedIn on that date (the **'Notice'**).

7. Further to a preliminary draft of this draft decision issued to LinkedIn on 25 April 2023, ('the **Preliminary Draft Decision**'), the DPC prepared a draft of this decision proposed to be adopted by the DPC in accordance with Section 113(2)(b) of the 2018 Act, and in accordance with Article 60 GDPR, ('the **Draft Decision**') in relation to LinkedIn.
8. The Draft Decision was submitted by the DPC to concerned supervisory authorities for their views, in accordance with Article 4(22) and 60(3) GDPR, on 11 July 2024. Given that the cross-border processing under examination entailed the processing of personal data throughout Europe, all other EU/EEA data protection supervisory authorities (the '**SAs**', each one being an '**SA**') were engaged as a concerned supervisory authority ('**CSA**') for the purpose of the cooperation process outlined in Article 60 GDPR. The CSAs expressed their views in response to the Draft Decision as follows:
  - a. The Italian SA ('**IT SA**') exchanged a comment on 29 July 2024;
  - b. The French SA ('**FR SA**') exchanged a comment on 6 August 2024;
  - c. The Bavarian SA ('**BY SA**') exchanged a comment on 8 August 2024collectively referred to as ('**CSA Comments**').
9. This Decision sets out the DPC's findings in this matter in relation to (i) whether or not an infringement of the GDPR has occurred or is occurring and (ii) if an infringement is found to have occurred or to be occurring, whether a corrective power will be exercised in respect of LinkedIn as the controller concerned, and the corrective power that will be exercised. An infringement of a relevant enactment, for this purpose, means an infringement of the GDPR or an infringement of a provision of, or regulation under, the 2018 Act, which gives further effect to the GDPR.<sup>1</sup>

## 2. Preliminary legal matters

10. This section will consider (a) the competence of the DPC as lead supervisory authority under the GDPR, (b) whether the complaint mandate complies with Article 80 GDPR and (c) the fair procedures followed by the Inquiry.
  - A. *Competence of the DPC as lead supervisory authority*
11. The Complaint concerned the processing by LinkedIn of personal data of its members within the European Union ('**EU**') and European Economic Area ('**EEA**') for the purpose of behavioural analysis and targeted advertising ('**BA & TA**') and was initially received by the Commission Nationale de l'Informatique et des Libertés ('**CNIL**'). The CNIL referred the Complaint to the DPC as it understood that the DPC is the lead supervisory authority ('**LSA**') competent to handle the Complaint. On receipt of the Complaint, the DPC considered its competence as LSA. For the reasons outlined in this section, the DPC formed a view that it was competent to act as LSA in respect of the processing the subject matter of the Inquiry.

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<sup>1</sup> Sections 105(1) and 107 of 2018 Act.

12. Article 55(1) GDPR provides that each supervisory authority shall be competent for the performance of the tasks assigned to it and the exercise of powers conferred on it in accordance with the GDPR on the territory of its own Member State. Article 56(1) states,

*Without prejudice to Article 55, the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the procedure under Article 60.*

13. In line with those provisions, the DPC has examined whether:

- a. the Inquiry relates to cross border processing;
- b. if so, whether that cross border processing was carried out by LinkedIn as controller; and
- c. whether LinkedIn's main or single establishment in the EU/EEA was in Ireland.

i. Cross border processing

14. Cross border processing is defined in Article 4(23) GDPR as:

*(a) processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or (b) processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.*

15. The DPC is satisfied that that the subject matter of the Inquiry relates to cross-border processing of personal data, within the meaning of Article 4(23) GDPR.

16. LinkedIn's services were (and continue to be) provided across the EEA. In particular, LinkedIn's privacy policy as at the date of the Complaint (the '**Privacy Policy**') and as at 20 August 2018 (the date of commencement of the Inquiry) states as follows:

*If you are in the 'Designated Countries', LinkedIn Ireland Unlimited Company ('LinkedIn Ireland') will be the controller of your personal data provided to, or collected by or for, or processed in connection with our Services.<sup>2</sup>*

17. "Designated countries" are defined in the Privacy Policy as countries in the EU, European Economic Area ('EEA') and Switzerland. The DPC also notes that the CNIL's transmission

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<sup>2</sup> <https://www.linkedin.com/legal/privacy-policy> in 'Introduction', accessed 25 May 2018 and 20 August 2020. 'Reside' is used in the Privacy Policy of 25 May whereas 'are in' is used in the Privacy Policy of 11 August.



of the Complaint to the DPC was predicated on its understanding that the subject matter of the Complaint related to cross border processing.

18. On this basis, the DPC is satisfied that the processing of personal data in the context of LinkedIn's services, which is the subject matter of the Complaint, relates to the cross-border processing of personal data within the meaning of Article 4(23) GDPR.

ii. LinkedIn as controller for the cross border processing at issue

19. Article 4(7) GDPR defines a "controller" as:

*the natural or legal person, public authority, agency, or other body which, alone or jointly with others, determines the purposes and means of processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.*

20. The European Data Protection Board ('EDPB') Guidelines 07/2020 on the concepts of controller and processor in the GDPR state that the concepts of controller and processor are functional.<sup>3</sup> A controller decides key elements about processing,<sup>4</sup> and makes decisions as to both the purposes and means, i.e. "why the processing is taking place (i.e., 'to what end'; or 'what for') and how this objective shall be reached."<sup>5</sup>

21. LinkedIn is a social network which was launched in 2003 that focusses on professional networking and career development. As of May 2022, there were 830 million members of LinkedIn in more than 200 countries.<sup>6</sup> In a similar way to other social networks, users can create a profile by entering information about themselves, in this case also by providing information about their employment, academic and professional qualifications, and experience. They can post content themselves and engage with the content of others and make connections. As with other social networks, LinkedIn processes its members' personal data in order to provide its customers with the ability to serve targeted advertising to its members.

22. On 1 October 2018, LinkedIn confirmed that it (i.e. LinkedIn Ireland Unlimited Company, which it referred to as 'LinkedIn-I') is a controller, pursuant to Article 4(7) GDPR, for the processing of personal data for the LinkedIn service in the EU. It indicated that the following matters were demonstrative of its controllership status:

*i. LinkedIn-I has reviewed and revised the contracts into which it has entered with its data processors including LinkedIn Corporation and LinkedIn Singapore. The revisions take account of the application of the GDPR, particularly Articles 28 and 32. These*

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<sup>3</sup> EDPB Guidelines 07/2020 on the concepts of controller and processor in the GDPR (adopted 7 July 2021), Version 2.1, p3.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, p14.

<sup>6</sup> <https://news.linkedin.com/about-us#Statistics>.

*contracts continue to incorporate terms that comply with the Standard Contractual Clauses approved by the EU Commission in 2010/87/EU.*

*ii. LinkedIn-I has established a Data Protection Committee of its Board. The responsibilities of that Committee are set out in its guidelines and include:*

- issuing instructions on behalf of [LinkedIn-I] to its data processors (including but not limited to LinkedIn Corporation);*
- ensuring that Personal Data is processed on the lawful bases set out in the Data Protection Laws;*
- ensuring that the rights of Data Subjects (including end users, employees and other third parties) are being facilitated and capable of exercise in relation to the Processing of their Personal Data;*
- ensuring the implementation of appropriate technical and organisational measures, taking into account the nature and likelihood of risk to Data Subjects, to ensure that their Personal Data is Processed in accordance with Data Protection Laws and reviewing and updating such measures where necessary;*
- Ensuring the implementation of appropriate data protection policies or other methods in order to meet the transparency requirements of Data Protection Laws;*
- Ensuring that where processing is carried out on LinkedIn's behalf by a Processor or other third party, appropriate contracts or other legal acts are in place in respect of such Processing in accordance with Data Protection Laws;*
- Ensuring the maintenance of records of Processing activities in accordance with the Data Protection Laws;*
- Ensuring the security of Processing including the effectiveness and adequacy of security measures to protect Personal Data from unauthorised access or disclosure, in accordance with Data Protection Laws.<sup>7</sup>*

23. In addition, LinkedIn stated that the guidelines of the LinkedIn Data Protection Committee also set out that:

- Where [LinkedIn-I] appoints a processor to process such personal data the processor may only act on the documented instructions of [LinkedIn-I] and [LinkedIn-I] shall be empowered to nominate individuals in [LinkedIn-I] who may give such documented instructions on behalf of [LinkedIn-I] and;*

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<sup>7</sup> LinkedIn submissions, 1 October 2018, p3.

- *Material instructions to a processor may from time to time be reviewed by the Committee. The Committee may amend, revoke or revise such instructions following such a review.*<sup>8</sup>
24. LinkedIn asserts that the above matters demonstrate that it is a controller of personal data for the LinkedIn service in the EU.
  25. In light of these submissions and the wording in LinkedIn’s Privacy Policy set out at paragraph 16, the DPC accepts that LinkedIn determines the purposes and means of processing undertaken in connection with the delivery of its services to users in the EU. The DPC accepts that LinkedIn is a controller in respect of that processing.
  26. Whereas the DPC has determined that LinkedIn is a controller in relation to the delivery of services to users in the EU/EEA with respect to the processing under examination in this Decision, the DPC understands that this does not preclude LinkedIn and its customers from potentially also having a role of controller/joint controllers, depending on the nature of the processing. However, such an examination is not within the scope of this Inquiry, and, for the purposes of this Decision, the DPC is satisfied that LinkedIn determines the purposes and means of the processing undertaken in connection with the delivery of its services to users in the EU/EEA, and is the controller in respect of the processing of personal data being examined in this Decision.
- iii. Main establishment of LinkedIn within the EU/ EEA*
27. The term “*main establishment*” is defined in respect of a controller by Article 4(16) GDPR as the “*place of its central administration in the Union unless the decisions on the purposes and means of the processing of personal data are taken in another establishment of the controller and the latter establishment has the power to have such decisions implemented.*” Recital 22 GDPR provides:
 

*Establishment implies the effective and real exercise of activity through stable arrangements. The legal form of such arrangements, whether through a branch or a subsidiary with a legal personality, is not the determining factor in that respect.*
  28. The Article 29 Working Party (‘**A29WP**’), the predecessor to the EDPB, stated in guidelines which were subsequently endorsed by the EDPB (the ‘**LSA Guidelines**’):
 

*The approach implied in the GDPR is that the central administration in the EU is the place where decisions about the purposes and means of the processing of personal data are taken and this place has the power to have such decisions implemented.*<sup>9</sup>
  29. In its Opinion 04/2024 on the notion of main establishment of a controller in the Union under Article 4(16)(a) GDPR, the EDPB has additionally clarified that: (i) a controller’s place of central administration in the Union “*can be considered as a main establishment*

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<sup>8</sup> Ibid, p4.

<sup>9</sup> A29WP, Guidelines for identifying a controller or processor’s lead supervisory authority (adopted on 13 December 2016, last revised and adopted on 5 April 2017), p 5.

*under Article 4(16)(a) GDPR only if it takes the decisions on the purposes and means of the processing of personal data and it has power to have these decisions implemented*"; and (ii) the one-stop-shop mechanism will only apply if an establishment of a controller in the EU/EEA takes decisions on the purposes and means of processing and has the power to have the decisions implemented.<sup>10</sup>

30. LinkedIn has confirmed to the DPC that it (i.e. LinkedIn-I) has establishments in other EU member states but that its "*main establishment in the Union*" is LinkedIn-I.<sup>11</sup> LinkedIn has permanent premises in Ireland since 2010 with a registered corporate address at 70 Sir John Rogerson's Quay, Dublin 2. LinkedIn has approximately 1200 employees based at those premises (as of January 2022).<sup>12</sup>
31. Whereas the DPC in a preliminary draft of this Decision concluded that LinkedIn had its single establishment in Ireland, having considered the guidance of the A29WP, EDPB and the EDPB binding Opinion 04/2024 cited above, as well as the totality of LinkedIn's submissions, its privacy policy and the nature of the processing at issue, the DPC is satisfied that LinkedIn's establishment in Ireland is its place of central administration in the EU/EEA, and that the decisions on the purposes and means of the processing of personal data relevant to the inquiry are taken there. LinkedIn accordingly has its "*main establishment*" within the meaning of Article 4(16) GDPR in Ireland.

iv. Competence of the DPC

32. In light of the analysis above, the DPC is satisfied that LinkedIn's establishment in Ireland is its place of central administration in the EU/EEA and that its decisions on the purposes and means of personal data of LinkedIn users in the EU/EEA are taken in that establishment.
33. Therefore, the DPC is satisfied that it is competent to act as LSA within the meaning of Article 56(1) GDPR in respect of the processing that is the subject of the Complaint, i.e. the cross border processing (within the meaning of Article 4(23) GDPR) of personal data of its members carried out by LinkedIn in the context of its activities in the EU/EEA for the purposes of BA & TA.
34. In reaching this view, the DPC has also taken note of the fact that the Complaint was transmitted to the DPC on the CNIL's understanding that LinkedIn was the controller for the processing referenced in the Complaint, as an entity which has its main establishment for the purposes of the GDPR in Ireland. Furthermore, the DPC notes that the other concerned supervisory authorities for the purposes of the subject matter under examination in this Complaint (being all of the other members of the EDPB) have been

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<sup>10</sup> EDPB Opinion 04/2024 on the notion of main establishment of a controller in the Union under Article 4(16)(a) GDPR (adopted 13 February 2024).

<sup>11</sup> LinkedIn letter to the DPC of 30 March 2023, p1.

<sup>12</sup> [LinkedIn plans major new campus in Dublin city centre \(siliconrepublic.com\)](https://www.siliconrepublic.com), <<https://www.siliconrepublic.com/careers/linkedin-new-dublin-campus-4000-workers>> (accessed 15 November 2022).

on notice, since the date of the transmission of the Complaint to the DPC, of this fact. Similarly, other concerned supervisory authorities have not raised any objections to dispute that LinkedIn is the controller in question and that the DPC is competent to act as LSA.

B. *Compliance with Article 80 GDPR*

35. LQdN submitted the Complaint on behalf of 8,540 data subjects who authorised it to lodge a complaint on their behalf in respect of the processing of their personal data by LinkedIn. The Complaint was made on 28 May 2018 and received by the DPC on 6 July 2018.

36. The Complaint was submitted pursuant to Article 80(1) GDPR, which states as follows:

*The data subject shall have the right to mandate a not-for-profit body, organisation or association which has been properly constituted in accordance with the law of a Member State, has statutory objectives which are in the public interest, and is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data to lodge the complaint on his or her behalf, to exercise the rights referred to in Articles 77, 78 and 79 on his or her behalf, and to exercise the right to receive compensation referred to in Article 82 on his or her behalf where provided for by Member State law.*

37. First, for a complaint to meet the requirements of Article 80 GDPR, the specified formal requirements must be met. The complainant in question must be:

- a. a not-for-profit body, organisation or association;
- b. properly constituted in accordance with the law of a Member State;
- c. have statutory objectives which are in the public interest; and
- d. be active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data.<sup>13</sup>

38. The CNIL have confirmed to the DPC that the Complaint meets all of those formal requirements.<sup>14</sup> In deference to their knowledge of the French legal system, the DPC accepts their assessment of those matters.

39. Second, the complainant must be mandated by data subjects in relation to one of Articles 77, 78, 79 or 82. In this regard, according to LQdN,

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<sup>13</sup> Recital 142 GDPR.

<sup>14</sup> Email from CNIL to DPC dated 6 December 2019. The DPC has also verified the existence of LQdN as a not-for-profit organisation appearing on the French National Directory of Associations (*Répertoire national des associations*) as of 5 February 2013, and that it is active in the field of the protection of data subjects' rights and freedoms with regard to the protection of their personal data via its website <<https://www.laquadrature.net/en/personnal-data>> accessed 24 April 2023.

*From 16 April [sic] to mid-May, we published each week on this page a general and political analysis about Facebook, Google, Apple and finally Microsoft. Technically, these analysis were not supporting the mandate or complaint, but only aimed at showing how our campaign was an important political matter. For instance, our analysis about Microsoft was not even about LinkedIn but about Cortana, which allowed us to criticize the ‘personal assistant’ developed by all of these companies. Each of these analysis was published alongside a short and simple video having the same political purpose. Both these analysis and videos are still online at <https://gafam.laquadrature.net> The only texts directly supporting the mandate were those published under the section ‘Rejoindre la procédure’ in my last screenshot, and specifically the text accessible by clicking on ‘Voir les détails du mandat’.*<sup>15</sup>

40. By clicking on the link referred to above under “*Voir les détails du mandat*” (See the details of the mandate) the text set out in **Appendix A** appeared. A list of various controllers was then provided, which allowed data subjects to tick “*LinkedIn*,” amongst other controllers. This list is set out in **Appendix B**.
41. Some 8,540 individuals mandated LQdN to make the Complaint using the above process. This full list has been received by the CNIL. The CNIL provided the DPC, on 29 May 2019, with the name and details of a single sample user for the purposes of verifying that there was (at least) one identifiable data subject behind the Complaint.<sup>16</sup> The identity of that sample data subject was provided to LinkedIn by the DPC on 17 January 2020.
42. LinkedIn submitted that the Notice did not make it immediately clear, at the outset of this Inquiry, that the Inquiry related to the LinkedIn user population in general and not just to the sample user. The DPC does not accept that this was the case. The Notice clearly stated that the DPC considered it appropriate to “*establish a full set of facts*” to assess whether “*discharged its obligations as data controller in connection with the subject matter of the Complaint*”. Therefore, it was clear that the scope of the Inquiry related to the LinkedIn’s obligations as a controller in connection with the subject matter raised in the complaint, and was not limited to the processing of a specific data subject(s)’ personal data. Furthermore, on 14 September 2020, the DPC clarified to LinkedIn that the Inquiry related to the user population in general and not just to the sample user. LinkedIn subsequently addressed DPC queries in relation to their user population in general and not just as those operations related to the sample data subject.<sup>17</sup> The DPC considers that LinkedIn has had a full opportunity, throughout the course of this Inquiry and in its submissions on the Preliminary Draft Decision, in accordance with fair procedures, to make submissions to the DPC on the basis that the scope of this Inquiry relates to the LinkedIn user population in general.
43. In light of all of the above, the DPC is satisfied that the process enabled individuals to take active steps to mandate LQdN to make a complaint in respect of the lawful basis for the

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<sup>15</sup> Email from LQdN to the DPC of 9 May 2019.

<sup>16</sup> Email from the CNIL to the DPC dated 29 May 2019.

<sup>17</sup> LinkedIn submissions of 2 November 2020.

processing by LinkedIn of their personal data in accordance with the requirements of Article 80(1) GDPR. As such, the DPC considers the Complaint to be valid for the purposes of the GDPR and the 2018 Act.

### *C. Fair procedures*

44. Having reviewed the Inquiry file, the DPC is satisfied that the Inquiry was correctly conducted and that fair procedures were afforded to LinkedIn throughout. This includes, but is not limited to, the steps taken by the DPC (i) to notify LinkedIn of the issues under examination in the Inquiry and the information and documentation required by the DPC, (ii) to provide LinkedIn with an opportunity to provide responses and submissions in respect of the issues under consideration in the Inquiry at appropriate stages, (iii) to provide LinkedIn with sufficient time (including extensions of time, where necessary) to furnish the information and documentation requested by the DPC in course of the Inquiry; (iv) to make submissions to the DPC on the Preliminary Draft Decision; and (v) to make submissions on a number of changes the DPC proposed to make to the Draft Decision to take account of the CSA Comments.
45. The DPC notes that, in its submissions on the Preliminary Draft Decision, and subsequent submissions received on 8 October 2024 following the CSA Comments, LinkedIn has raised a number of concerns regarding the DPC's compliance with fair procedures in this Inquiry. Having reviewed the Inquiry File, the DPC is of the view that LinkedIn has been afforded fair procedures during the conduct of this inquiry, as outlined at paragraph 44 above.

## **3. The Inquiry**

46. This section will consider (a) the legal basis for the Inquiry, (b) the material scope of the Inquiry, (c) the temporal scope of the Inquiry, (d) an explanation of the exclusion of the E-Privacy Directive from the Inquiry scope, and (e) a summary of the conduct of the Inquiry.

### *A. Legal basis for Inquiry*

47. As stated above, the Inquiry was commenced pursuant to Section 110 of the 2018 Act. Section 110(1) of the 2018 Act provides that the DPC may, for the purpose of Section 113(2) of the 2018 Act, cause such inquiry as it thinks fit to be conducted in order to ascertain whether an infringement has occurred or is occurring of the GDPR or a provision of the 2018 Act, or regulations made under the Act, that gives further effect to the GDPR.<sup>18</sup> Section 113(1) and (2) read together, require the DPC, in respect of a complaint for which the DPC is the LSA, to make a draft decision for the purposes of Article 60 GDPR. Accordingly, this Inquiry has been conducted under Section 110(1) of the 2018 Act in

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<sup>18</sup> Section 110(2) of the 2018 Act provides that the DPC may, for the purposes of Section 110(1), where it considers it appropriate to do so, cause any of its powers under Chapter 4 of Part 6 of the 2018 Act (excluding Section 135) to be exercised and/or cause an investigation under Chapter 5 of Part 6 of the 2018 Act to be carried out.

respect of a complaint as referred to in Section 113, for the purposes of producing a draft decision within the meaning of Article 60 GDPR.

B. *Material Scope of Inquiry and Decision*

48. The Notice stated as follows

*The Inquiry commenced by this Notice will examine whether or not LinkedIn has discharged its obligations in connection with the subject matter of the Complaint and determine whether or not any provision(s) of the Act and/or the GDPR has been contravened by LinkedIn in that context.*<sup>19</sup>

49. The Complaint raises a number of allegations of non-compliance with the GDPR as regards the lawful basis for the processing of personal data by LinkedIn of its members for the purpose of BA & TA and the transparency and fairness requirements set out in the GDPR. A summary of the core claims in the Complaint is set out in the assessment of each issue below.

50. As the Complaint refers at the outset to the account opening experience of members of LinkedIn, this Inquiry has focussed on the lawful basis for the processing by LinkedIn of personal data of its members (as distinct from non-registered users or non-members) for the purposes of BA & TA.

51. This section outlines the scope of the Inquiry as set out in the Notice and makes an assessment of certain key factual matters relevant to the scope as follows:

- a. a definition of “behavioural analysis” and “targeted advertising”,
- b. an assessment of LinkedIn’s submission that analytics is a separate processing purpose from BA & TA,
- c. the lawful bases relied on by LinkedIn for BA & TA, and
- d. the meaning of the terms “first party” and “third party” data used in this Decision.

i. Definition of BA & TA

52. The scope of this Inquiry relates to BA & TA. However, the terms “*behavioural analysis*” and “*targeted advertising*” are not defined within the GDPR.<sup>20</sup> Accordingly, this section sets out the DPC’s understanding of what is meant by BA & TA for the purposes of the scope of this Inquiry.

53. In its Opinion on Online Behavioural Advertising, the Article 29 Working Party (‘**A29WP**’) defined “behavioural advertising” as:

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<sup>19</sup> The Notice, [6].

<sup>20</sup> Online advertising is referred to in Recital 58 but not targeted advertising and while there are a number of references throughout (in particular the Recitals to) the GDPR to the monitoring of behaviour of data subjects, there are no references to behavioural advertising.



*advertising that is based on the observation of the behaviour of individuals over time. Behavioural advertising seeks to study the characteristics of this behaviour through their actions (repeated site visits, interactions, keywords, online content production, etc.) in order to develop a specific profile **and thus provide data subjects with advertisements tailored to match their inferred interests.***<sup>21</sup> (emphasis added).

54. The EDPB, in its Guidelines 08/2020 on the targeting of social media users ('**Guidelines 08/2020**'),<sup>22</sup> also considered the concept of online behavioural (or targeted) advertising, stating that:

*targeting services make it possible for natural or legal persons ('targeters') to communicate specific messages to the users of social media in order to advance commercial, political, or other interests. A distinguishing characteristic of targeting is the perceived fit between the person or group being targeted and the message that is being delivered. The underlying assumption is that the better the fit, the higher the reception rate (conversion) and thus the more effective the targeting campaign (return on investment).*<sup>23</sup>

55. Guidelines 08/2020 further outline how social media targeting takes place on the basis of a wide range of criteria. It is sometimes based on information provided directly by data subjects. Increasingly, targeting criteria are developed on the basis of personal data which has been observed or inferred (either by the social media company or third parties) and collected or aggregated by the platform or other actors, such as data brokers, to provide targeted ads. In this respect, the EDPB states:

*In other words the targeting of social media users involves not just the act of 'selecting' the individuals or groups of individuals that are the intended recipients of a particular message ('the target audience') but rather it involves an entire process carried out by a set of stakeholders which results in the delivery of specific messages to individuals with social media accounts.*<sup>24</sup>

56. Having regard to the EDPB and A29WP materials referenced above, the DPC considers that '**behavioural analysis**' can be considered to be the entire process whereby information which is provided by, inferred from or observed about an individual is used to inform the advertisements that are targeted to that individual, or is aggregated with other information for the purpose of conducting targeted advertising.

57. The DPC considers that '**targeted advertising**' is the process by which specific advertisements are targeted to an individual, based on information which is held about the individual (whether provided by them or inferred and/or observed about them) such

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<sup>21</sup> A29WP, Opinion 2/2010 on online behavioural advertising, WP 171, p4.

<sup>22</sup> EDPB Guidelines 08/2020 on the targeting of social media users (adopted on 13 April 2021)

<sup>23</sup> Ibid, p4.

<sup>24</sup> Ibid, p5.

as their interests, or targeting criteria which have been developed based on such information.

58. The DPC has also considered the submissions made by LinkedIn<sup>25</sup> by which LinkedIn criticises the aforementioned understanding of the concepts of ‘behavioural analysis’ and ‘targeted advertising’ on the basis that this understanding allegedly differs from the position of the DPC set out in its previous correspondence with LinkedIn. The DPC does not agree with LinkedIn’s submission in this regard and considers that the aforementioned understanding is consistent with, and is not in any way materially distinct from, the DPC’s understanding of the concepts of ‘behavioural analysis’ and ‘targeted advertising’ as set out in previous correspondence which are, as set out above, based on the long-established guidance of the A29 WP and the EDPB.
59. Following the foregoing analysis, and the fact that the Complaint relates to both behavioural analysis and targeted advertising, those concepts will be considered collectively as ‘**BA & TA**’ for the purposes of this Decision.
- ii. *A factual assessment of the processing carried out by LinkedIn for the purposes of BA & TA and the DPC’s view on LinkedIn’s submission that ‘analytics’ is a separate processing purpose*
60. This section sets out the DPC’s understanding of LinkedIn’s advertising and analysis tools based on submissions and other information obtained from LinkedIn during the Inquiry.

#### *Summary*

61. LinkedIn states that its customers can target ads to members by: (1) re-targeting ads to visitors to their websites or re-targeting based on engagement (“*re-targeting*”) or (2) targeting ads to their contact lists (“*contact targeting*”) which enables customers to upload information about individuals to whom they would like to target advertising.<sup>26</sup> Ad re-targeting uses data which customers provide to LinkedIn via LinkedIn’s Insight Tag. The Insight Tag is a tool through which LinkedIn receives information, including personal data, from its enterprise customers. LinkedIn states that the Insight Tag is a piece of code that sends a signal, via a HTTP call, to LinkedIn when a user visits the website of a LinkedIn customer which has an Insight Tag placed on it.<sup>27</sup> The signal received via the Insight Tag also provides LinkedIn with access to LinkedIn cookies, if any, present on a member’s browser.<sup>28</sup>

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<sup>25</sup> At paragraphs 95 to 104 of its Submissions on the Preliminary Draft Decision.

<sup>26</sup> LinkedIn’s 2 November 2020 submissions, at p29 sets out the information used by LMS enterprise customers to engage in contact targeting using: i) hashed or unhashed email addresses (LinkedIn says that if the email addresses are unhashed, it hashes them at time of onboarding); ii) mobile operating system IDs (IDFA or AAID); or iii) individuals’ names along with employer, job title and country.

<sup>27</sup> LinkedIn’s 2 November 2020 submissions, p3.

<sup>28</sup> As has been set out in paragraphs 82-84 the placing of cookies on the terminal equipment of users is governed by the E-Privacy Directive and as such is not the subject of this Inquiry. Any subsequent processing of personal data, which may have been acquired through the use of cookies, falls to be examined under the GDPR and, insofar as an examination of the lawful basis for the processing of such

62. Such “*ad re-targeting*” meets the DPC’s understanding of BA & TA outlined above and is therefore within the scope of the Inquiry.
63. Contact targeting relies on lists of contact information uploaded by LinkedIn’s LinkedIn Marketing Solutions customers.<sup>29</sup> As contact targeting does not meet the DPC’s understanding of BA & TA outlined above, contact targeting is therefore outside the scope of the Inquiry.
64. In addition to the above-described types of ad targeting, LinkedIn considers processing for analytics purposes not to constitute BA & TA, but rather to be processing for a separate purpose falling outside the scope of this inquiry.
65. The DPC has considered whether “analytics” falls within the concept of BA & TA for the purpose of the scope of this Inquiry below.

#### Analytics

66. LinkedIn enables its customers (referred to by LinkedIn as its ‘enterprise customers’ and referred to by both terms interchangeably throughout this Decision) to advertise via a tool called LinkedIn Marketing Solutions (‘LMS’). LinkedIn offers its enterprise customers a number of advertising options such as sponsored content<sup>30</sup>; sponsored messaging<sup>31</sup>; conversation ads<sup>32</sup>; message ads<sup>33</sup>; video ads; text ads; dynamic ads<sup>34</sup> and carousel ads.<sup>35</sup>
67. LinkedIn provided a diagram in its 2 November 2020 submissions, set out in **Appendix D**, which displayed the processing activities it carried out under the heading of LMS. These two sets of processing operations are described as i) “targeted advertising” and ii) “analytics”. LinkedIn describes the two services it offers under its “analytics” heading as i) “website audience insights” and ii) “ad performance measurement”. LinkedIn states that:

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personal data for targeted advertising arises, such processing will be examined as appropriate as part of this Inquiry.

<sup>29</sup> LinkedIn’s 2 November 2020 submissions, p3.

<sup>30</sup> “*Sponsored content*” is defined in LinkedIn’s third submissions of 2 November 2020 as content that “*appears in members’ LinkedIn feeds. It may feature text, an image, a video or a single job posting and links to a related website of the advertiser’s choice. Sponsored content can be identified by terms such as ‘promoted’ or ‘sponsored’ that appear in the upper left corner of the post, under the company name.*”

<sup>31</sup> “*Sponsored messaging*” is defined in LinkedIn’s third submissions of 2 November 2020 as comprising “*message ads and conversation ads. These native ads are displayed in members’ LinkedIn messaging tab and can be identified by the word ‘Sponsored’ in the subject line.*”

<sup>32</sup> LinkedIn offers LMS (enterprise) customers the ability to start conversations in LinkedIn messaging.

<sup>33</sup> LinkedIn’s website says that “*messages are delivered to your prospects*”.

<sup>34</sup> “*Dynamic Ads*” are defined in LinkedIn’s third submissions of 2 November 2020 as ads that “*may appear in the right rail of LinkedIn.com pages on desktop when a member is signed in to their LinkedIn account. Dynamic ads change dynamically for each member (based on the relevant member’s profile image, name, and job function.) and may advertise jobs or companies the member might be interested in, or professional content relevant to that member. Dynamic ads can be identified by the term ‘Ad’ that appears on the upper right corner or the ad.*”

<sup>35</sup> LinkedIn’s submissions of 2 November 2020, p3.

*The Website Audience Insights service provides LMS customers with analytics about the LinkedIn members visiting their websites, to help them better understand potential audiences for their ads. The Ad Performance Measurement service enables LMS customers to understand the impact and success of their advertisements. Data obtained via Insight Tags enables both of these solutions. The reports we provide to LMS customers do not include personal data. Members can opt out of their data being used for the Website Audience Insights service using the ‘Audience insights for websites you visit’ control in the Settings Hub. Members can also opt out of their data being used for the Ad Performance Measurement service using the ‘Ad-related actions’ control.<sup>36</sup>*

68. LinkedIn asserts that analytics is a separate and distinct processing purpose from BA & TA and that accordingly processing for the purpose of analytics falls outside the scope of this Inquiry.

69. LinkedIn takes the position that its,

*use of third party data for behavioural analysis and targeted advertising involves monitoring which specific individuals have visited an enterprise customer’s site and displaying ads from that enterprise customer to those specific individuals. By contrast, our use of third party data for analytics involves aggregating that data so that our enterprise customers can understand the sorts of visitors that view their websites and ads- for example whether their visitors are mostly lawyers, or engineers, or doctors.<sup>37</sup>*

70. LinkedIn further states that its “analytics services do not enable ad personalisation or re-targeting as suggested.”<sup>38</sup> LinkedIn states that its enterprise customers can obtain aggregated information about content downloads, sign-ups, ad views and purchases by LinkedIn members. LinkedIn states that enterprise customers do not receive information about LinkedIn members’ interaction with any ads other than the enterprise customer’s own, and that the information passed to enterprise customers, as part of LinkedIn’s analytics services, does not contain personal data as reports are presented to enterprise customers in the aggregate.<sup>39</sup> On this basis, LinkedIn submits that its analytics reports do not allow its enterprise customers to personalise ads to specific LinkedIn members or understand the behaviour of specific LinkedIn members, do not facilitate the tailoring of ads to match individuals’ inferred interests or the developing of specific profiles of individuals and do not amount to profiling.<sup>40</sup>

71. In relation to the technical flow of data between LinkedIn and its LMS customers, this takes place via an Insight Tag. LinkedIn states that once it receives data from the Insight Tag call, it processes it to determine whether it can match the visitor to the [LinkedIn enterprise customer’s] website to a LinkedIn member. If there is a match, LinkedIn states

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<sup>36</sup> Ibid, p6.

<sup>37</sup> Cover letter of 4 August 2021 with LinkedIn’s response to DPC’s draft SOI, p1.

<sup>38</sup> Cover letter of 4 August 2021 with LinkedIn’s response to DPC’s draft SOI, p1.

<sup>39</sup> LinkedIn’s comments dated 4 August 2021 within body of draft SOI, p10.

<sup>40</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, paras. 76, 77, 99 and 100.

that it checks the member's settings to determine the purpose for which it can use that data (i.e. for targeted advertising and/or analytics, which LinkedIn maintains are two separate purposes). If there is no match to a LinkedIn member, LinkedIn processes the data collected via Insight Tags only for service maintenance, and the data is deleted within three days.<sup>41</sup> The types of data collected via the Insight Tag and the purposes for which they are used are set out in **Appendix E**.

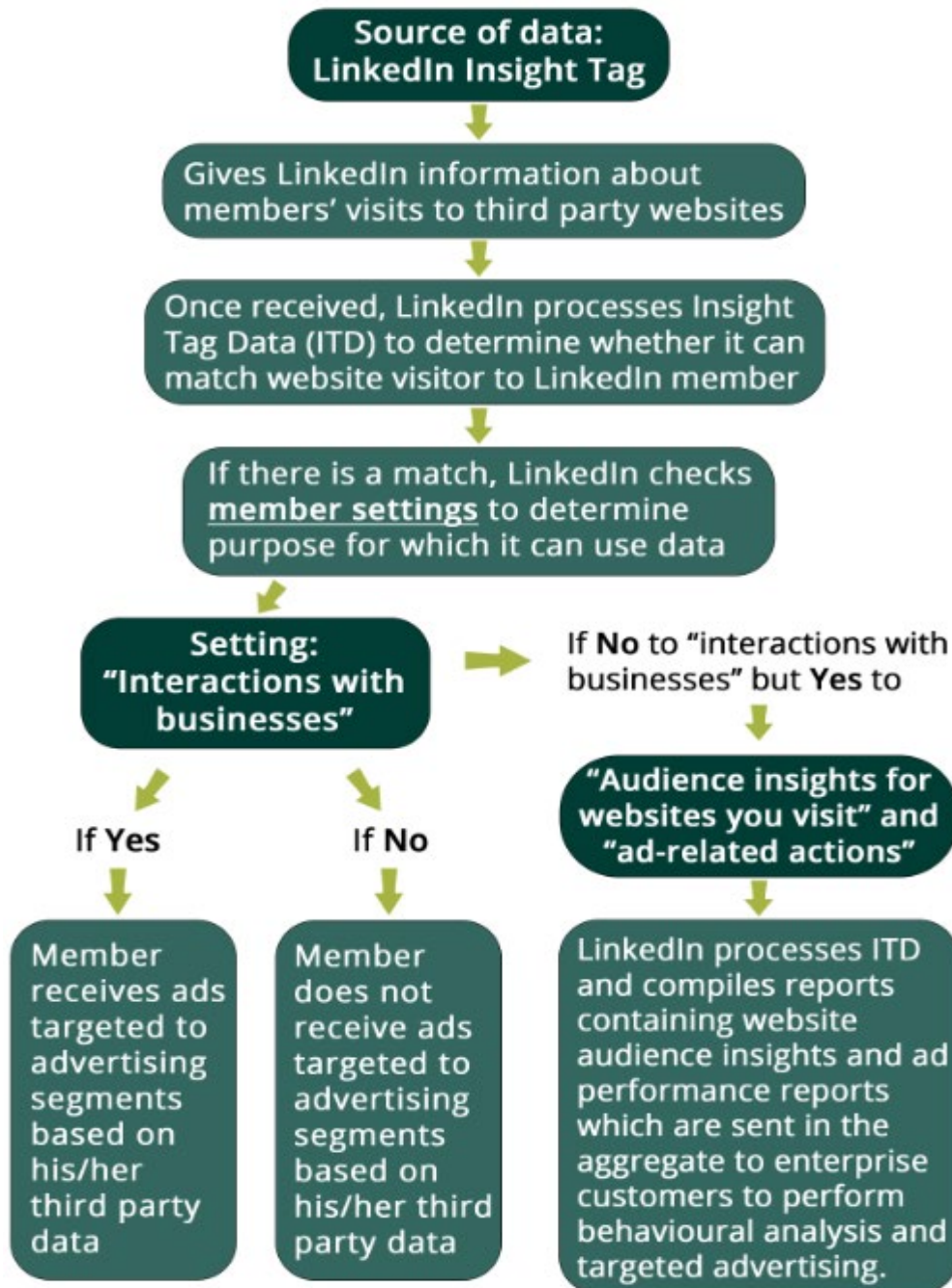
72. LinkedIn states that on receipt of the data from the Insight Tag ('**Insight Tag Data**'), LinkedIn determines whether the Insight Tag Data includes LinkedIn's cookies (i.e. cookies placed during a previous visit to LinkedIn). If LinkedIn cookies are present in the Insight Tag Data, those cookies allow LinkedIn to match the browser to a LinkedIn member. According to LinkedIn, once a match has been made, LinkedIn checks the member's ad settings to ensure that any further processing for ad or analytics related purposes respects the member's choices. If there is no match to a LinkedIn member, LinkedIn processes the data collected via Insight Tags only for "*service maintenance*" and the data is deleted within three days.<sup>42</sup>
73. Figure A below depicts how LinkedIn's processing of third party data takes place in circumstances where a member's "*interactions with businesses*" toggle is set to "*no*" but where a members' analytics related settings are set to "*yes*" (which they are by default).

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<sup>41</sup> LinkedIn submissions of 2 November 2020, p18.

<sup>42</sup> As stated above, the Inquiry is concerned with examining the processing of personal data of members of LinkedIn, as opposed to non-members. Therefore the retention of the data relating to non-members, as described in this paragraph, is outside the scope of the Inquiry.

Figure A



74. Sections of LinkedIn's website that inform potential and actual enterprise customers or advertisers of the manner in which they can set up an advertising campaign and avail of BA & TA, including using analytics, are set out in **Appendix F**.
75. The DPC accepts that LinkedIn's processing of third party data by way of creating analytics reports is technically distinct from its processing of third party data by way of permitting

ad retargeting to specific users. However, the DPC considers that the statements set out at **Appendix F** make it clear that the overall purpose of analytics carried out using the Insight Tag is to allow LinkedIn’s customers to conduct BA & TA based on third party data. As noted at paras 52 to 59 above, on the basis of European guidance, behavioural analysis includes both analysis of specific individuals’ behaviour and aggregating information about more than one individual to conduct targeted advertising. On this basis, the DPC considers that analytics carried out by LinkedIn using the Insight Tag and provided to its customers can be considered to fall under the heading of BA & TA as defined above and, accordingly, the processing of third party data for the purpose of analytics falls within the scope of this Inquiry.

iii. Lawful bases relied upon by LinkedIn

76. Having regard to the facts of BA & TA set out above, the following table sets out the lawful bases relied upon by LinkedIn for processing which falls within the scope of this Inquiry:

No.	Processing operation and purpose	Lawful basis relied on as of 28 May 2018	Lawful basis relied on as of 14 September 2020
1	Processing of <b>first party personal data</b> of members for behavioural analysis and targeted advertising (excluding analytics)	Contractual necessity (Article 6(1)(b) GDPR)  Legitimate interests (Article 6(1)(f) GDPR)	Legitimate interests (Article 6(1)(f) GDPR)
2	Processing of <b>third party personal data</b> of members for behavioural analysis and targeted advertising (excluding analytics)	Consent (Article 6(1)(a) GDPR)	Consent (Article 6(1)(a) GDPR)
3	Processing of <b>third party personal data</b> of members for analytics (website audience insights and ad performance measurement services)	Legitimate interests (Article 6(1)(f) GDPR)	Legitimate interests (Article 6(1)(f) GDPR)

77. As can be seen in the table above, and as noted below at paragraphs 81 to 84, LinkedIn ceased relying on Article 6(1)(b) GDPR as a lawful basis for any processing for the purposes of BA & TA after the commencement of the Inquiry. As noted in those paragraphs, this development has been considered in determining an appropriate temporal scope for the Inquiry.

78. The validity of each of the lawful bases put forward by LinkedIn for the processing in scope is considered in this Decision. However, the analysis will not determine the question of whether a distinct lawful basis should be assigned to a processing operation or set of processing operations for BA & TA depending on the source of the personal data processed.

iv. First party data and third party data

79. First party personal data is defined by LinkedIn as data that is submitted by members or created as a result of their use of the LinkedIn platform.<sup>43</sup> LinkedIn later described first party data as data that encompasses attributes that its members have provided in their profile, such as the member's industry, job function, years of experience or skills, as well as interests it derives from a member's profile, actions taken on LinkedIn and Bing and actions by similar members.<sup>44</sup> With regard to interest category data obtained from Bing, the DPC notes that this constitutes data obtained from a separate data controller and does not accept that LinkedIn has accurately classified this data as first party data.
80. LinkedIn described third party personal data as data that is provided to LinkedIn by its enterprise customers.<sup>45</sup> In other words, third party data is data collected/observed/inferred about members by its enterprise customers (not LinkedIn) through the use of a LinkedIn Insight Tag on that enterprise LMS customer's website.

C. *Temporal scope of the Inquiry*

81. At the date of the Complaint (28 May 2018) LinkedIn relied on contractual necessity pursuant to Article 6(1)(b) GDPR, as well as legitimate interests pursuant to Article 6(1)(f) GDPR, as lawful bases for the processing of first party personal data of its members for the purpose of BA & TA. At the date of the Complaint (28 May 2018), LinkedIn relied on Article 6(1)(a) GDPR as a lawful basis for the processing of third party personal data of its members for the purpose of BA & TA, excluding analytics. At the date of the Complaint (28 May 2018), LinkedIn relied on Article 6(1)(f) GDPR as a lawful basis for the processing of third party personal data of its members for analytics.
82. LinkedIn informed the DPC that, in January 2020, following an internal review of EDPB Guidelines published in October 2019,<sup>46</sup> and consultation with external counsel, LinkedIn ceased relying on contractual necessity as a lawful basis for processing first party personal data for BA & TA. From that point onwards, LinkedIn relied solely on legitimate interests pursuant to Article 6(1)(f) GDPR for the processing of first party personal data for BA & TA.
83. In order to assess the lawfulness of the processing of personal data for the purposes of BA & TA, according to the different lawful bases relied upon by LinkedIn at different points in time, the DPC informed LinkedIn that it would investigate the lawfulness of such processing at two separate dates:

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<sup>43</sup> LinkedIn's 1 October 2018 submissions, p5.

<sup>44</sup> LinkedIn's 2 November 2020 submissions, p3.

<sup>45</sup> LinkedIn's 1 October 2018 submissions, p5.

<sup>46</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, adopted on 16 October 2019 ('Guidelines 2/2019').



- a. 28 May 2018 (the date of the Complaint) when contractual necessity and legitimate interests were jointly relied upon for the processing of first party personal data for the purposes of BA & TA; and
  - b. 14 September 2020 (the date of the DPC’s first correspondence to LinkedIn after its cessation of reliance on the contractual necessity under Article 6(1)(b) GDPR as a lawful basis for processing first party personal data).
84. Accordingly, in this Decision, the DPC considers the validity of LinkedIn’s reliance on the relevant legal bases as at the above dates. Aside from those specific instances, the remaining issues will, unless otherwise stated, be examined for compliance with the provisions of the GDPR at the time of the Complaint (28 May 2018).

D. *E-Privacy Directive*

85. The Complaint included some references to Directive 2002/58/EC of the European Parliament and Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the ‘**e-Privacy Directive**’). Article 5(3) of the e-Privacy Directive specifically governs the storing of information or gaining access to information stored in the terminal equipment of users. Any investigation of this matter would have to be conducted under the national transposition of the e-Privacy Directive rather than under the GDPR – which does not deal with the matters covered specifically under the e-Privacy Directive, such as the setting of or access to cookies.
86. In this regard, it is relevant to highlight the decision of the Court of Justice of the European Union (‘**CJEU**’) in *Facebook Ireland Limited and others v Gegevensbeschermingsautoriteit*.<sup>47</sup> The CJEU made the following observation in relation to the interaction between the e-Privacy Directive and the one stop shop mechanism created by the GDPR (emphasis added):

*In that regard, the Court observes that the European Data Protection Board, in its Opinion 5/2019 of 12 March 2019 on the interplay between the [e-Privacy Directive] and the [GDPR], in particular regarding the competence, tasks and powers of data protection authorities, stated that **storing and obtaining access to personal data by means of cookies fell within the scope of 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) (OJ 2002 L 201, p. 37), and not within the scope of the ‘one-stop shop’ mechanism. On the other hand, all earlier processing operations, and all subsequent processing activities, with respect to that personal data, by means of other technologies, do fall within the scope of Regulation 2016/679, and consequently within the scope of the ‘one-stop shop’ mechanism. Given that its request for mutual assistance concerned subsequent personal data processing***

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<sup>47</sup> Case C-645/19 *Facebook Ireland Ltd and Others v Gegevensbeschermingsautoriteit*, judgment of 15 June 2021.

*operations, the DPA in April 2019 asked the Data Protection Commissioner (Ireland) to respond to its request as expeditiously as possible, but no response was provided.*<sup>48</sup>

87. For the avoidance of doubt, although the placing of cookies or similar technology was not deemed by the DPC to be within the scope of the Inquiry for the above reasons, the DPC considers that the lawfulness, fairness and transparency of the subsequent processing of personal data that may have been collected through cookies or similar technologies does fall for examination under this Inquiry by reference to the provisions of the GDPR.

E. *Conduct of the Inquiry*

i. *Communications with LinkedIn*

88. The Notice specified that the Inquiry was being conducted in order to examine whether LinkedIn had discharged its obligations in connection with the subject matter of the Complaint and determine whether or not any provision(s) of the 2018 Act or GDPR had been contravened by LinkedIn in that context.<sup>49</sup> The Notice included a request for information as to the lawful basis or bases pursuant to which LinkedIn processed personal data for the purposes of BA & TA.
89. LinkedIn sent written submissions to the DPC on 1 October 2018, 10 February 2020 and 2 November 2020 in response to requests for information from the DPC on 20 August 2018, 17 January 2020 and 14 September 2020.
90. On 14 February 2020, LinkedIn raised some procedural queries with the DPC, which the DPC replied to on 2 April 2020.
91. A statement of issues ('**SOI**') was sent to LinkedIn on 22 December 2021, which incorporated submissions received from LinkedIn on 4 August 2021 relating to a version of that document that had been sent to LinkedIn on 14 July 2021. The purpose of the SOI was to outline the central pillars of the Inquiry, by reference to the facts established by the DPC to date and the core questions which fell to be analysed and determined with reference to LinkedIn's obligations under the GDPR and the 2018 Act in the context of the Complaint.
92. On 25 April 2023, the Preliminary Draft Decision was provided to LinkedIn in order to give it a further and final opportunity to make submissions. LinkedIn's submissions on the Preliminary Draft Decision were provided to the DPC on 20 July 2023.
93. Prior to the finalisation and adoption of this Decision, the DPC invited LinkedIn to provide submissions in relation to a number of changes the DPC proposed to make to the Draft Decision to take account of the CSA Comments, as referred to in paragraph 8 above. LinkedIn made submissions by way of its final submission dated 8 October 2024 (the '**Final Submissions**'). The DPC has given full regard to the Final Submissions in preparing this

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<sup>48</sup> Ibid, [74].

<sup>49</sup> The Notice, [6].

Decision, including the assertion that it ought not to have engaged with or made any changes on foot of the CSA's comments, which is dealt with at paras 512- 515 below.

*ii. Communications with the Complainant in relation to the Inquiry materials*

94. On 2 June 2021, the DPC wrote to the CNIL requesting that before the draft SOI was shared with LQdN that it sign a confidentiality undertaking which was attached to the correspondence. The DPC explained that, by means of the confidentiality undertaking, LQdN were being asked to formally agree to keep the draft SOI, and any other Inquiry documents that may be shared, confidential. The DPC explained that this was a step taken in inquiries in order to safeguard against the disclosure to other parties or general publication (e.g. on any internet websites/ platforms) of any such confidential documents while the inquiry process is still ongoing.
95. The CNIL wrote to the DPC on 9 July 2021 stating that it had contacted LQdN and that they had informed the CNIL that they would not sign the confidentiality undertaking. Consequently, LQdN did not receive a copy of the SOI or a preliminary draft of this Draft Decision.

**4. Legal framework of this Decision**

96. In accordance with Section 113 of the 2018 Act, it is for the DPC, having regard to the information obtained during the Inquiry, to decide whether an infringement of the GDPR is occurring or has occurred, and if so to decide whether a corrective power should be exercised, and if so the corrective powers that should be exercised.
97. Given the position expressed above that the DPC is the LSA under Article 56(1) GDPR for the purposes of the data processing operations at issue, the DPC was obliged under Article 60(3) GDPR to complete a draft decision and submit it to any supervisory authorities concerned, as defined in Article 4(22) GDPR.
98. The Draft Decision was submitted by the DPC to the CSAs for their views, in accordance with Article 60(3) GDPR, on 11 July 2024. Three SAs submitted comments on the Draft Decision and the DPC has considered and made some changes to the Draft Decision in order to take 'due account' of the views expressed by the SAs in preparing this Decision.
99. This document is the Decision adopted by the DPC pursuant to section 113(2)(b) of the 2018 Act.

**5. Issues for determination**

100. The DPC considers that the below issues fall for determination in this Decision:
- A. Validity of consent as a lawful basis under Article 6(1)(a) GDPR for the processing of third party data for the purpose of BA & TA, excluding analytics (Row 2 of table in section 3.iii);
  - B. Validity of legitimate interests as a lawful basis under Article 6(1)(f) GDPR for processing of first party and third party data for BA & TA, including analytics (Row 1 and 3 of table in section 3.iii);

- C. Validity of contractual necessity as a lawful basis under Article 6(1)(b) GDPR for the processing of first party data for BA & TA, excluding analytics ((Row 1 of table in section 3.iii));
- D. Whether LinkedIn has complied with its obligations of transparency under Articles 13(1)(c), 13(1)(d), 14(1)(c) and 14(2)(b) GDPR, in respect of the lawful bases relied upon by LinkedIn;
- E. Whether LinkedIn has complied with its obligations to its members of fairness and transparency under Article 5(1)(a) GDPR.

## **6. Issue A – Consent as a lawful basis under Article 6(1)(a) GDPR**

101. This section addresses whether LinkedIn has a valid lawful basis under Article 6(1)(a) GDPR for the processing of third party personal data of LinkedIn members for the purposes of BA & TA and will consider the following matters:

- a. the requirements for valid consent under the GDPR;
- b. the Complaint’s allegations regarding the validity of LinkedIn’s reliance on Article 6(1)(a); and
- c. whether LinkedIn complied with these requirements, having regard to the submissions made by LinkedIn and other information collected by the DPC in the Inquiry.

### *A. The legal requirements for valid consent under Article 6(1)(a) GDPR*

102. Pursuant to Article 8 of the Charter of Fundamental Rights of the European Union (the ‘**Charter**’):

- 1. Everyone has the right to the protection of personal data concerning him or her.*
- 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law.*

103. Consistent with Article 8 of the Charter, Article 5(1)(a) GDPR provides that personal data must be “*processed lawfully, fairly and in a transparent manner in relation to the data subject.*”

104. In this vein, Recital 39 GDPR also states that “[a]ny processing of personal data should be *lawful and fair.*”

105. Recital 40 GDPR states that:

*In order for processing to be lawful, personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law, either in this Regulation or in other Union or Member State law.*

106. Article 6(1) GDPR provides, *inter alia*, that:

*Processing shall be lawful only if and to the extent that at least one of the following applies:*

*(a) The data subject has given consent to the processing of his or her personal data for one or more specific purposes*

[...]

107. The requirements of valid consent are found at Article 4(11) and Article 7 GDPR.

108. Article 4(11) GDPR states that 'consent' of the data subject means:

*any freely given, specific, informed, and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."*

109. In addition, Article 7 GDPR lays down the following conditions for consent:

*(1) Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to the processing of his or her personal data.*

*(2) If the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent shall be presented in a manner which is clearly distinguishable from other matters, in an intelligible and easily accessible form using clear and plain language. Any part of such a declaration which constitutes an infringement of this regulation shall not be binding.*

*(3) The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. Prior to giving consent, the data subject shall be informed thereof. It shall be as easy to withdraw consent as to give consent.*

*(4) When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.*

110. The GDPR provides additional guidance in recitals 32, 33, 42 and 43 as to how the controller must act to comply with the main elements of the consent requirements.

111. It is stated in the EDPB Guidelines on Consent ('**Guidelines 05/2020**') that:

*When asking for consent, a controller has the duty to assess whether it will meet all the requirements to obtain valid consent. If obtained in full compliance with the GDPR, consent is a tool that gives data subjects control over whether or not personal data concerning them will be processed. If not, the data subject's control becomes illusory*

*and consent will be an invalid basis for processing, rendering the processing activity unlawful.*<sup>50</sup>

112. Having regard to the foregoing, the DPC considers that in order for consent to be valid, it must be:

- a. freely given,
- b. specific,
- c. unambiguous,
- d. as easy to give as to withdraw, and
- e. informed.

113. The DPC will consider each of these requirements below in turn.

B. *Overview of Complaint on the validity of consent relied on for the processing of third party data for BA & TA*

114. The Complaint states that LinkedIn cannot rely on Article 6(1)(a) GDPR for BA & TA. It states that any consent that was provided was invalid as it was not freely given, as the consent obtained at the time an individual created a LinkedIn account was in the form of a pre-ticked box. The Complaint asserts,

*it is only later, once their account is created, that the user can access an option page through the menu “You > Preferences and Privacy > Ads” where they can disable the processing of multiple categories of data for advertising purposes. In no way does this subsequent ability to object correct the unfree nature of the consent initially requested. Indeed all of the options to object to processing for advertising are, by default, activated through pre-ticked boxes, rendering all types of ‘consent’ (if so) invalid due to it being based on the user’s silence and not on an affirmative act on their part.*<sup>51</sup>

115. It is also stated in the Complaint that,

*...processing can be neither fair nor transparent (and thus not lawful) if based on the consent given by the data subject when, at the same time, the data controller maintains the ability to base such processing on another legal basis (for example, to anticipate the case in which the data subject withdraws his or her consent). Indeed under such circumstances, the information provided to the data subject relating to the right that he or she has to withdraw his or her consent would be perfectly misleading: this ‘right’ would not have any legal effect, as the processing could be based on another legal basis.*

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<sup>50</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at p5.

<sup>51</sup> The Complaint, [60].

*Thus the processing of personal data cannot be lawful if based both on the consent given by the data subject and another legal basis, as this would necessarily render the information provided to the data subject regarding their right to withdraw consent misleading.*

*This is indeed the conclusion drawn by the WP29, explaining that, ‘if a controller chooses to rely on consent for any part of the processing, they must be prepared to respect that choice and stop that part of the processing if an individual withdraws consent. Sending out the message that data will be processed on the basis of consent, while actually some other lawful basis is relied on, would be fundamentally unfair to individuals. In other words, the controller cannot swap from consent to other lawful bases. For example, it is not allowed to retrospectively utilise the legitimate interest basis in order to justify processing, where problems have been encountered with the validity of consent’ (p.23 of the abovementioned WP259 guidelines).<sup>52</sup>*

116. The Complaint highlights that, pursuant to Recital 32, consent should be an affirmative act and that silence, pre-ticked boxes or inactivity should not constitute consent.<sup>53</sup> The Complaint further highlights that in accordance with Recitals 42 and 43 GDPR, the data subject should not suffer a detriment if consent is not given, nor will consent be assumed to be freely given where the performance of a contract or provision of a service is dependent on consent, despite such consent not being necessary for such performance.<sup>54</sup>
117. The Complaint also referred more generally to the requirements of consent under Articles 4(11) and 7(4) GDPR. Therefore, in considering the validity of the consent relied on by LinkedIn in this regard, an assessment must be conducted of compliance with the requirements of Article 4(11) and Article 7 GDPR in relation to the consent seeking mechanisms that were presented to those new and existing LinkedIn members after 25 May 2018.

C. *Whether LinkedIn met the conditions for valid consent under the GDPR*

i. *Freely given*

118. For consent to be valid, it must be freely given. In this regard, EDPB Guidelines 05/2020 state that “*as a general rule, the GDPR prescribes that if the data subject has no real choice, feels compelled to consent or will endure negative consequences if they do not consent, the consent will not be valid.*”<sup>55</sup>

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<sup>52</sup> Ibid, [18]-[29], citing Article 29 Working Party Guidelines on consent under Regulation 2016/679 (adopted on 28 November 2017, as last revised and adopted on 10 April 2018) (17/EN WP259.rev.01), which have been endorsed by the EDPB.

<sup>53</sup> Complaint, [11].

<sup>54</sup> Ibid, [16]-[21].

<sup>55</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at p7. Guidelines 05/2020 further outline that the assessment of whether consent is freely given can, but does not necessarily, encompass four elements: an imbalance of power; conditionality; granularity; and detriment to the data subject.

119. In its submissions of 1 October 2018, LinkedIn asserted that the consent it gathered for third party BA & TA was freely given because:

*LinkedIn-I members in the EU are by default opted-out of the use of third party data for ad targeting. They are presented with an in-product notification giving them the option to consent to the use of third party data for ad targeting or to remain opted-out. This gives members real choice and full control. As referenced in our response to question 6 below, Section 2.4 of the Privacy Policy provides a link to the account settings so that members can freely exercise their choice with respect to ad targeting.*<sup>56</sup>

120. LinkedIn submitted that the description in the Complaint (set out in paragraph 114 above) as to “*how a member consents to LinkedIn-I’s processing of third party data for ad targeting mis-characterises LinkedIn’s processes and procedures*” as it does not reflect changes made by 25 May 2018. LinkedIn says that the assertions made in the Complaint do not take into account the fact that “*both existing and new members in the EU were opted-out by LinkedIn of third party data processing for ad targeting by 25 May 2018.*” LinkedIn further says that those EU members were then given the opportunity to consent to the use of third party data for ad targeting.<sup>57</sup>
121. LinkedIn further responded to the allegations contained in the Complaint by stating that the settings path described in the Complaint does not match the actual path to LinkedIn’s settings (e.g. as applied from 25 May 2018). LinkedIn states that its members were invited to consent to the processing of third party personal data for ad targeting purposes before it carried out such processing and that no processing occurs for such purposes until this consent is provided.<sup>58</sup>
122. LinkedIn also contends that after members were opted out of the processing of their third party data for BA & TA by default (those creating new accounts with LinkedIn were opted out by default on sign-up), members could choose at any time through their LinkedIn account settings to provide consent via either of the following mechanisms:
- a. Existing LinkedIn members, post-25 May 2018, (who had, according to LinkedIn, been opted out of the processing of their third party data for BA & TA) were presented with an in-product notification through which they could exercise their choice to opt in to the use of their third party data for BA & TA by clicking a box containing the phrase ‘Accept & Continue.’ (The screen shot of this notification box is at Figure 1 in **Appendix C** below); or
  - b. Once signed up, a new member could navigate themselves to the LinkedIn settings hub where they could access a toggle in relation to the use of their third party data for BA & TA by switching the first toggle in the ‘interactions with

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<sup>56</sup> LinkedIn’s submissions of 1 October 2018, at p7.

<sup>57</sup> Ibid, p1.

<sup>58</sup> Ibid, p6.



*businesses'* section to yes. (The screen shot of this notification box is at Figure 3 in **Appendix C** below.)

123. While the DPC accepts that users' access to LinkedIn's services in general were not conditional upon consent being provided, and notes that users were free to refuse or withdraw consent to the processing and continue using the service without a financial charge being imposed, the DPC considers that the consent obtained by LinkedIn was not freely given for the reasons set out below.
124. Recital 42 GDPR states that consent cannot be considered to be freely given if the data subject cannot refuse to provide consent "*without detriment.*" In the Guidelines 05/2020, the EDPB provides a non-exhaustive list of possible detriment to data subjects, including "*any costs to the data subject ... [and] deception, intimidation, coercion or significant negative consequences*".<sup>59</sup> In essence, a data subject should not suffer a disadvantage for refusing – or indeed withdrawing – consent to a particular processing operation.
125. The mechanism by which LinkedIn sought the consent of members to the processing of third party data is set out at **Appendix C**. As appears from that mechanism, LinkedIn Members are requested whether to "*allow LinkedIn to keep showing you relevant jobs and ads*". The consent mechanism further states that "*you can personalize your experiences to see the most relevant ads and job opportunities based on ... Information you've shared with other companies*". The mechanism then states that if the LinkedIn member agrees to its terms, LinkedIn will "*continue to use [third party data] to personalise the ads and promoted jobs we show you. If you opt out, you will still see ads on LinkedIn, but they will not be personalized based on your interactions with other companies. Other data from your LinkedIn profile and activity may be used to personalize ads.*"
126. LinkedIn was requested by the DPC in the course of the Inquiry to explain the term "*relevant jobs and ads*". In its 2 November 2020 submissions, it explained that "*relevant jobs*" and "*ads*" refer to types of targeted advertising (i.e. ads LinkedIn is paid by enterprise customers to display to members who meet certain targeting criteria). LinkedIn explained that the phrase "*relevant jobs*" refers to targeted ads for employment opportunities of relevance to the member.<sup>60</sup> (It should be noted that these paid-for job ads are distinct from job opportunity information that does not comprise paid-for job ads which is also shown to members.)<sup>61</sup> LinkedIn further explained that the term "*ads*", in contrast, refers to targeted ads for products or services (i.e. ads that are not job ads but that are considered appropriate for the professional context in which LinkedIn operates).<sup>62</sup> LinkedIn further explains that both "*relevant jobs*" and "*ads*" are types of paid-for ads and are displayed on the LinkedIn platform in one of its paid-for advertising formats, in other words any of the following: sponsored content, text ads, sponsored

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<sup>59</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at p13.

<sup>60</sup> LinkedIn's submissions of 2 November 2020, p33.

<sup>61</sup> *Ibid*, p36.

<sup>62</sup> *Ibid*, p33.

messaging, or dynamic ads. LinkedIn states that all of its paid-for advertising is labelled “sponsored,” “promoted” or “ad.”

127. It was only after the DPC sought a detailed explanation of this phrasing during the course of the Inquiry that it became clear that the first part of the phrase “*relevant jobs*” in fact refers to paid-for advertising.<sup>63</sup>
128. The information in the consent tool indicated that, if a data subject did not click “*Accept & Continue*”, this would impact their ability to see relevant jobs. The consent tool did not indicate at all that such a limitation related to paid-for advertising only. As can be seen from the screenshot at Figure 1 in **Appendix C**, the first sentence of this consent tool was displayed prominently and invited the user by name to “*allow LinkedIn to keep showing you relevant jobs...*”. This information did not distinguish between relevant jobs in the context of paid-for advertising and relevant jobs generally. Therefore, the manner in which LinkedIn presented this information clearly implied that users would not see “*relevant jobs*” if they did not click “*Accept & Continue*” on the consent tool.
129. The DPC finds that objectively, a reasonable data subject would perceive that a failure to click “*Accept & Continue*” on this consent tool would negatively impact their ability to see relevant jobs on the platform in a way that was not limited to the question of whether or not they see paid-for ads regarding job opportunities. The information presented on “*relevant jobs*” is not limited to paid-for ads. While the smaller text in the consent tool does refer to “*promoted jobs*”, the information presented holistically does not make it clear that, if a data subject chooses not to click “*Accept & Continue*”, they will continue to see relevant job opportunities on LinkedIn that were not paid-for.
130. The DPC has considered a Report submitted by LinkedIn to the DPC with its submissions on the Preliminary Draft Decision, prepared by Professor Andrew Stephen, professor of marketing at Saïd Business School, University of Oxford. Professor Stephen states that:

*...a LinkedIn member, having read the consent interstitial and understood its components as a single statement by LinkedIn, would perceive that if they click “Accept & Continue” they are likely to receive more relevant and useful ads and promoted job opportunities (e.g., LinkedIn uses the phrase “most relevant” prominently towards the top of the interstitial) than if they do not click “Accept & Continue.” There is nothing in the interstitial, however, that suggests to me that a member would reach the conclusion that if they do not click “Accept & Continue” and therefore opt out that they would have zero probability of receiving relevant information and zero probability of receiving job opportunities (promoted or otherwise). The consent is about the use of third party data not all personal data. Indeed, the second part of the interstitial (in figure 2 of Appendix C of the PDD) says clearly and unambiguously that if a member chooses to opt out they will still see personalised ads based on their first-party data (“LinkedIn profile and activity”). Further, there is nothing stated by LinkedIn in the interstitial that suggests to me that*

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<sup>63</sup> Ibid.

*a member would perceive that opting out would result in them facing detrimental consequences of the kind the IDPC assumes. I think a member would see it in a relative sense, that is, if they opt in then the likelihood of them seeing more relevant, more personalised ads and promoted job opportunities is higher than the likelihood of this if they opt out.*

131. The DPC accepts that the consent tool would not lead a reasonable data subject to believe that a failure to click “*Accept & Continue*” would prevent them from receiving messages from recruiters on LinkedIn regarding job opportunities or from seeing posts from other LinkedIn users about jobs. However, the concept of detriment in this context does not require, as Professor Stephen put it, “*zero probability of receiving relevant information and zero probability of receiving job opportunities*”. Furthermore, the heading of the consent tool referred to allowing LinkedIn to show users relevant jobs, rather than other LinkedIn users or recruiters showing relevant jobs. LinkedIn presented job opportunities to its members in a number of ways that does not comprise paid-for job ads, including, for example, job notifications (including job search alerts); jobs in the “*Jobs You May Be Interested In*” feed; and jobs that LinkedIn displays in the “*Jobs*” tab.<sup>64</sup>
132. The information presented in the consent tool did not expressly limit the impact of the data subjects’ choice regarding “*relevant jobs*” and “*job opportunities*” to paid-for advertising regarding jobs. While the consent tool went on to inform data subjects that “*If you opt out, you will still see ads on LinkedIn...*”, at no point did it inform data subjects that they would still see relevant jobs on LinkedIn. This is a significant omission in the circumstances, particularly in light of how the consent tool prominently led with the title inviting the user to allow LinkedIn to keep showing relevant jobs.
133. In those circumstances, the DPC finds that the design of the consent tool objectively implied that failing to click “*Accept & Continue*” would impede data subjects’ ability to see relevant jobs, and it did so in a way that went beyond what its actual impact was in respect of relevant jobs. Having regard to the phrasing of the consent mechanism regarding “*relevant jobs and ads*”, a member could reasonably perceive that they would not be presented with relevant job opportunities by LinkedIn if they did not consent by clicking “*Accept & Continue*”. In light of the function of LinkedIn, this would be perceived as a detriment by data subjects because it would result in a less useful service, impacting upon whether consent is being “*freely given*”. In light of the above phrasing, the DPC finds that a member would reasonably perceive a detriment (of not being presented with job opportunities generally and not simply paid-for advertising) if they did not consent by clicking “*Accept & Continue*”.

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<sup>64</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, at para 114.

Conclusion on the freely given nature of the consent:

134. The EDPB in its Guidelines 05/2020 makes it clear that the element of detriment will prevent consent from being considered to be “freely given” as required by Article 4(11).<sup>65</sup> Those Guidelines also make it clear that:

*In general terms, any element of inappropriate pressure or influence upon the data subject (which may be manifested in many different ways) which prevents a data subject from exercising their free will, shall render the consent invalid).*

135. One of the reasons according to LinkedIn that individuals use the LinkedIn platform, as demonstrated by its statements below:

a. *“LinkedIn enables its members to build their professional network and can help them pursue professional and economic goals in a variety of ways, including: (1) sharing and building trust with colleagues; (2) exposure to new ideas and gaining knowledge; (3) raising their profile and professional brand; (4) **opening doors to new opportunities**; (5) exchanging best practices and knowledge; and (6) accessing resources for support”<sup>66</sup> and “being able to rapidly build a social network has real benefits for LinkedIn members. A strong network enables a member to find a job or a better job.”<sup>67</sup> (emphasis added)*

b. In its 2 November 2020 submissions LinkedIn says *“each member builds their own LinkedIn profile, which they use for multiple purposes, including: to raise their profile and professional brand; **to open doors to new opportunities**; to help them share and build trust with their colleagues; to expose them to new ideas and knowledge; to exchange best practices and knowledge; and to access resources for support.”<sup>68</sup>* (emphasis added)

136. The DPC finds that the perception of detriment created by LinkedIn’s consent tool created an element of inappropriate pressure and influence on data subjects to consent by clicking on the “Accept & Continue” button. The DPC finds that any consent flowing from this tool was not freely given as it would likely appear to data subjects that if they did not provide consent in the manner sought, this would negatively impact their ability to see relevant jobs on the platform beyond simply not seeing paid-for advertisements relating to jobs.

ii. Informed

137. Consent must be informed to be valid. In the Guidelines 05/2020, the EDPB indicates that the requirement that any consent be informed is necessitated by and linked to the principles enumerated in Article 5 GDPR, in particular the requirement that processing

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<sup>65</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at [3] and [13].

<sup>66</sup> LinkedIn’s submissions of 1 October 2018, p1.

<sup>67</sup> Ibid, p12.

<sup>68</sup> LinkedIn’s submissions of 2 November 2020, p14.

be transparent, lawful and fair.<sup>69</sup> Further, the provision of “*accessible information*” to data subjects is necessary for any such data subjects to make an informed decision as to whether to consent to processing.<sup>70</sup>

138. In considering what constitutes “*informed consent*”, the EDPB states in Guidelines 05/2020 that there are two relevant considerations. First, there must be an assessment of the minimum level of information required to be provided and, second, the manner in which the information is provided must be considered.<sup>71</sup> These assessments are independent of each other; this means that, for example, a finding that adequate information was provided does not necessarily mean that the manner in which that information is provided reaches the threshold of informed consent. This reflects the approach taken by the CJEU in *Orange Romania* in which the Court held that the requirement of informed consent meant that:

*the controller is to provide the data subject with information relating to all the circumstances surrounding the data processing, in an intelligible and easily accessible form, using clear and plain language, allowing the data subject to be aware of, inter alia, the type of data to be processed, the identity of the controller, the period and procedures for that processing and the purposes of the processing. Such information must enable the data subject to be able to **determine easily the consequences of any consent he or she might give** and ensure that the consent given is well informed.*<sup>72</sup>  
(emphasis added)

139. In respect of the minimum level of information to be provided, Recital 42 states that data subjects should be aware “*at least of the identity of the controller and the purposes of processing for which the personal data are intended.*” Additional information which may be required, in the view of the EDPB, includes the type of data to be collected and used, the existence of the right to withdraw consent, information about the use of the data for automated decision-making in accordance with Article 22(2)(c) GDPR and on possible risks of international data transfers.<sup>73</sup> This list is non-exhaustive and any assessment is on a case-by-case basis. The assessment is focussed on ascertaining whether a data subject would be able to “*genuinely understand the processing operations at hand.*”<sup>74</sup>
140. In terms of how the information ought to be provided, there is no prescribed form set out in the GDPR. Nonetheless, it is the view of the EDPB that the information should be clear and intelligible to the ordinary user to ensure that the user can easily understand what they are agreeing to.<sup>75</sup> The EDPB considers that a layered approach – which allows a user to access more detailed information in different stages – can be an appropriate

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<sup>69</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at page 15.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid, [15]-[16].

<sup>72</sup> Case C-61/19 *Orange Romania*, Judgment of 11 November 2020, at para. 40.

<sup>73</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), at para 64.

<sup>74</sup> Ibid, [65].

<sup>75</sup> Ibid, [66]-[70].

manner in which to ensure both accessibility and granularity to ensure that users are informed.<sup>76</sup>

141. In its submissions of 1 October 2018, LinkedIn stated that the consent it obtained was informed because:

*LinkedIn-I members are provided with detailed information as to the processing of third party data for ad targeting through the LinkedIn Privacy Policy, together with the in-product notification as is set out in Schedule A.*

142. In this regard, the DPC notes that, as set out above, the consent seeking mechanism states that LinkedIn processes personal data obtained from companies and their websites in relation to a data subject's activity off LinkedIn in order to conduct BA & TA.

143. The consent mechanism further provides a link through the heading "*Learn more about how we use data for ads*" to LinkedIn's Privacy Policy. At section 2.4 of the Privacy Policy it is stated in a section entitled "*Advertising*" in relation to the processing of third party data for BA & TA that:

*We serve you tailored ads both on and off our Services. We offer you choices regarding personalized ads, but you cannot opt-out of seeing other ads.*

*We target (and measure the performance of) ads to Members, Visitors and others both on and off our Services directly or through a variety of partners, using the following data, whether separately or combined:*

- *Data from advertising technologies on and off our Services, like web beacons, pixels, ad tags, cookies, and device identifiers;*
- *Member-provided information (e.g., profile, contact information, title and industry);*
- *Data from your use of our Services (e.g., search history, feed, content you read, who you follow or is following you, connections, groups participation, page visits, videos you watch, clicking on an ad, etc.), including as described in Section 1.3;*
- *Information from advertising partners<sup>77</sup> and publishers [Learn More]; and*
- *Information inferred from data described above (e.g., using job titles from a profile to infer industry, seniority, and compensation bracket; using*

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<sup>76</sup> Ibid, [69].

<sup>77</sup> LinkedIn's Privacy Policy of 11 August 2020 includes 'vendors' between the words 'partners' and publishers.

*graduation dates to infer age or using first names or pronoun usage to infer gender.*<sup>78</sup>

*We will show you ads called sponsored content which look similar to non-sponsored content, except that they are labeled 'ads' or 'sponsored.' If you take an action (such as like, comment or share) on these ads, your action is associated with your name and viewable by others, including the advertiser. Subject to your settings, if you take a social action on the LinkedIn Services, that action may be mentioned with related ads. (emphasis added)*

144. The DPC has also considered the information provided by LinkedIn in its submissions on the Preliminary Draft Decision. By its submissions, LinkedIn has stated that when a reader hovers over the text “*partners*” in the fourth bullet point of section 2.4 of the Privacy Policy set out above, the reader is presented with text stating that “*partners includes ad networks, exchanges and others*”. Further, LinkedIn has stated that the consent mechanism also provides a link to its Help Centre article entitled “*How businesses and websites can use third-party data to target advertising through LinkedIn*”, which states that “*advertisers may collect and use third-party data to better reach their target audiences on and off LinkedIn. This third-party data may be contact information that you share with third parties or collected when you visit third-party websites*”.
145. The Help Centre article further links to LinkedIn’s Cookie policy. In its submissions on the Preliminary Draft Decision, LinkedIn sets out that the relevant provisions of its Cookie policy are as follows:

*“We may use cookies to show you relevant advertising both on and off the LinkedIn site. We may also use a cookie to learn whether someone who saw an ad later visited and took an action (e.g., downloaded a white paper or made a purchase) on the advertiser's site. Similarly, our partners may use a cookie to determine whether we've shown an ad and how it performed, or provide us with information about how you interact with ads. We may also work with a partner to show you an ad on or off LinkedIn, such as after you've visited a partner's site or application”.*

[...]

*“Cookies and other ad technology such as beacons, pixels, and tags help us serve relevant ads to you more effectively. They also help us provide aggregated auditing, research, and reporting for advertisers, understand and improve our service, and know when content has been shown to you”.*

146. Finally, in its submissions on the Preliminary Draft Decision, LinkedIn refers to section 1.4 of its Privacy Policy, which states as follows:

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<sup>78</sup> LinkedIn’s Privacy Policy of 11 August 2020 includes the phrase “*using your feed activity to infer your interests or using device data to recognize you as a member.*”

*“As further described in our Cookie Policy, we use cookies and similar technologies (e.g., web beacons, pixels, ad tags and device identifiers) to recognize you and/or your device(s) on, off and across different Services and devices. We also allow some others to use cookies as described in our Cookie Policy [...] When you visit or leave our Services (including our plugins or cookies or similar technology on the sites of others), we receive the URL of both the site you came from and the one you go to next. We also get information about your IP address, proxy server, operating system, web browser and add-ons, device identifier and features, and/or ISP or your mobile carrier [...]”*

147. In considering the level of detail provided in respect of LinkedIn’s partners, in respect of the processing of third party data, the first and fourth bullet points of section 2.4 of the Privacy Policy are of relevance, as well as the above extracts from the Cookie Policy and section 1.4 of the Privacy Policy. First, the advertising technologies used by LinkedIn are generically described as “*web beacons, pixels, ad tags, and device identifiers*”. The fourth bullet point of section 2.4 of the Privacy Policy generically refers to “*advertising partners and publishers*.” The DPC finds that these descriptions are vague and do not give any meaningful information as to the role played by a) the advertising technologies or b) the specific partners involved. Moreover, the terminology used to generically describe those partners and technologies is not language that would be readily accessible to, or easily understood by individuals who are not familiar with the online advertising industry. In this sense, taking the Privacy Policy alone, the user does not have clear or meaningful information as to the specific processing operation(s) to which he/she is agreeing and the context in which their personal data has originally been collected by third parties, representing the source of the personal data then processed by LinkedIn.
148. The DPC does not consider that this deficiency is remedied by reading the Privacy Policy alongside the other disclosures in the Help Centre and the Cookie Policy, neither of which contain meaningful information concerning the role of advertising technologies, the specific partners involved, the specific processing operations that the user is agreeing to or the context in which their personal data was originally collected. While the DPC accepts the submission of LinkedIn that providing an exhaustive list of its LMS customers/partners at the point of requesting consent may not be necessary to ensure that the consent is informed, particularly in light of its dynamic and variable nature, the DPC finds that the information provided on the role that is played by its various partners in the processing is not sufficiently detailed or granular to allow data subjects to understand the processing operations at hand and consequences of the consent that they may provide. Furthermore, the DPC notes that the asserted impractical nature of providing this information does not apply in respect of the limited number of ad exchanges that LinkedIn works with and from which LinkedIn may also receive data, in this case to show its LMS customers’ ads on third-party sites and apps.<sup>79</sup>

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<sup>79</sup> For example, in its submission of 2 November 2020, LinkedIn confirmed that “[i]n order to show our LMS customers’ ads on third-party sites and apps, LinkedIn also receives some limited personal data about members from ad exchange partners” and that it “works with the following third-party ad exchange publishers: [REDACTED]”





*about what a member has done on third-party websites, to target ads to that member unless they have provided LinkedIn with opt-in consent to that targeting.*<sup>80</sup>

154. LinkedIn states that where members have provided opt in consent, it uses only a narrow set of such third party personal data for targeting ads to that member.<sup>81</sup> According to LinkedIn it uses data it receives from an enterprise customer only to target ads for that enterprise customer (and not for any other customers or for LinkedIn's own advertising). It says that it contractually commits that it will not use such data to create or improve profiles of its members.<sup>82</sup> The DPC has considered the relevant information provided by LinkedIn to data subjects for the purpose of obtaining consent to the processing of third party personal data for the purpose of BA and TA (excluding analytics) above.
155. Second, and by contrast, LinkedIn has confirmed that its members are by default opted in to the processing of their personal data for the purposes of analytics services, for which it relies on the legitimate interests lawful basis (as considered in more detail below) but members have the choice to opt out of such processing.<sup>83</sup>
156. Third, LinkedIn also relies on the legitimate interests lawful basis to process first party data for the purposes of BA & TA.
157. For the reasons outlined in this section of the Decision, the DPC considers that there was a close relationship between these three processing operations. The DPC has considered whether this relationship affected the validity of the consent obtained by LinkedIn, in light of the requirement for the consent to be informed, for the purposes of processing third party data for BA & TA.
158. The following analysis considers whether this reliance on multiple lawful bases was compliant with the GDPR in the circumstances, in light of the requirement for the consent to be informed.
159. *Relationship between the processing purposes*
160. The DPC examined during the Inquiry the potential crossover of purposes in the context of the processing of third party personal data for BA & TA on the one hand and LinkedIn's analytics services on the other. The DPC questioned LinkedIn on whether the processing of personal data in the context of LinkedIn's analytics services could in fact enable LinkedIn's enterprise customers to re-target ads to members by incorporating insight/reports they have received in relation to LinkedIn members' actions in response

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<sup>80</sup> LinkedIn's submissions of 2 November 2020, p2.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Members can opt out of 'audience insights for websites you visit' through their <settings> advertising data> third party data> audience insights for websites you>visit and can opt out of ad performance measurement (the setting called "ad-related actions") through <settings > advertising data > third party data > ad-related actions>.

to ads on their websites into their marketing/re-targeting campaigns in order to re-target ads to LinkedIn members.<sup>84</sup>

161. In LinkedIn's response to the DPC on this point, it submitted that the processing activities for the purposes of BA & TA on the one hand and the analytics services offered by LinkedIn to its enterprise customers on the other are distinct. LinkedIn states in this regard that its use of third party data for BA & TA involves monitoring which specific individuals have visited an enterprise customers' site and displaying ads from that enterprise customer to those specific individuals. It says that, in contrast, its use of third party data for analytics involves aggregating that data so that enterprise customers can understand the sorts of visitors that view their websites and ads. LinkedIn says that its analytics services do not enable ad personalisation or re-targeting and do not enable enterprise customers to target ads to specific members on the basis of their third party data. It also said that it *"does not use third party data to place members into targeting categories."*<sup>85</sup> LinkedIn also submits that its analytics services only provides enterprise customers with information about interactions by data subjects with their own website and/or ads, as opposed to ads of other enterprise customers and do not involve tracking members' behaviour across multiple different websites.
162. Having regard to the foregoing, the DPC accepts that *"analytics"* and processing third party data for (non-analytics) BA & TA involved separate processing operations by LinkedIn.
163. However, the DPC considers that the information provided by LinkedIn to members when obtaining consent for the processing of third party data for the purpose of (non-analytics) BA & TA did not communicate to data subjects that their personal data would be used for the purposes of advertising analytics even if they refused to provide consent to personalised advertising. They would only discover if they later sought to withdraw consent that their personal data were being used for those purposes.
164. The DPC makes this finding for the following reasons:
  - a. As set out above, the mechanism by which LinkedIn sought the consent of members to the processing of third party data for (non-analytics) BA and TA stated that that if the LinkedIn member agrees to its terms, LinkedIn will *"continue to use [third party data] to personalise the ads and promoted jobs we show you. If you opt out, you will still see ads on LinkedIn, but they will not be personalized based on your interactions with other companies. Other data from your LinkedIn profile and activity may be used to personalize ads."*
  - b. In the DPC's view, the only reasonable reading of this text is that, if the member does not select *"Accept & Continue"*, they will no longer see ads on LinkedIn that are personalised based on the member's interactions with other companies

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<sup>84</sup> Draft SOI of 14 July 2021, [1.33].

<sup>85</sup> Email from LinkedIn to DPC, 30 April 2021.

(although it is made clear that LinkedIn may continue to use *first party* data to personalise ads).

- c. However, even where the member does not select “*Accept & Continue*”, LinkedIn continues to process the member’s third party data for the purpose of creating analytics reports as members are by default opted in to such processing (while having the choice to opt out).
- d. In the DPC’s view, the term “*personalize*” as used in the consent mechanism is ambiguous. It could either mean to personalise ads to a specific data subject, or alternatively, to process their data in connection with ad personalisation more broadly, i.e. to perform third party analytics for the primary purpose of BA & TA.
- e. The DPC has considered the submission made by LinkedIn in its response to the Preliminary Draft Decision to the effect that it is not possible for ads to be personalised to a *specific* member on the basis of analytics reports, which do not contain personal data and that, even if an LMS customer uses an analytics report to inform its overall marketing strategy, there is no way for the customer to use that information to target specific members. The DPC notes in this regard that LinkedIn points to various disclosures made in its Privacy Policy regarding its creation of analytics reports.
- f. However, the DPC remains of the view that a reasonable reading of the term “*personalization*” in the consent mechanism could refer also to the use of analytics reports, which are derived from third party data, for the purpose of targeting ads to particular segments of LinkedIn members.
- g. In this regard, the DPC acknowledges that there is a technical difference between the processing operations for which LinkedIn relied on consent and legitimate interests. If a data subject did not provide consent to LinkedIn, then LinkedIn did not process third party data about that data subject directly to show them third party advertising.
- h. However, LinkedIn did process *first party* data for the purpose of enabling enterprise customers to target ads to LinkedIn members, on the basis of its legitimate interests<sup>86</sup> and it did so based on third parties’ segments. There was therefore a direct link between third party data collected by LinkedIn about members and the targeting of ads to those members by LinkedIn – LinkedIn would (a) process third party data about data subjects to (b) provide aggregated reports to third parties which (c) allowed those third parties to determine marketing segments which (d) those third parties provided to LinkedIn to (e) show ads to data subjects by matching the third party segments with profiles of data subjects derived from first party LinkedIn data (see **Appendix F**). The DPC notes that

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<sup>86</sup> See LinkedIn’s Legitimate Interests Assessment provided to the DPC on 2 November 2020, section 1.

LinkedIn has not disputed the process outlined in this paragraph in its submissions on the Preliminary Draft Decision.

- i. From the point of view of the data subject, this meant that their third party data was being used to conduct behavioural profiling (albeit on an aggregated basis), which aggregated profiling was used to serve third party ads to them on the basis of first party personal data.
- j. This key information about LinkedIn's BA & TA practices was not provided to data subjects in the information accompanying the consent mechanism. As a result, data subjects were not fully made aware of the processing of third party data for the purposes of BA & TA. Instead, data subjects were told that if they did not provide consent, that the ads they received would not be personalized based on their interactions with other companies.
- k. The DPC does not consider that this lack of clarity was cured by the disclosures made by LinkedIn in its Privacy Policy and its Help Centre article considered above, as those disclosures do not appear to make clear to the user that processing for analytics purposes will continue to take place even where the user does not select "*Accept & Continue*" on the consent mechanism.
- l. The DPC has also had regard to the submission made by LinkedIn in its submissions on the Preliminary Draft Decision to the effect that LinkedIn is not required to list exhaustively in the consent mechanism everything that would happen if consent was not provided by the member and that, if processing for analytics purposes was referenced in the consent mechanism, this would be confusing for members. The DPC does not agree that the nature of the requirement would be confusing to members. In particular, the DPC notes that the consent mechanism already refers to processing activities for which consent is not being sought (i.e. the processing of first party data for BA and TA). The DPC does not consider that a similar reference to processing of third party data for the purpose of analytics would be misleading or confusing. Rather, the DPC is of the view that a clear explanation that third party data would continue to be processed by LinkedIn for the purpose of analytics reports where the member does not select "*Accept & Continue*" would provide clarity as to the consequence for members in giving or refusing consent.

Conclusion on the informed nature of the consent:

165. In the light of the foregoing, the DPC finds that the information accompanying the consent mechanism relied upon by LinkedIn did not sufficiently enable data subjects to "*determine easily the consequences of any consent*" they were being requested to give, as is required for valid consent in line with CJEU case law.<sup>87</sup> The consent mechanism did not allow data subjects to "*genuinely understand the processing operations at hand*" as

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<sup>87</sup> Case C-61/19 *Orange Romania*, Judgment of 11 November 2020, at para. 40.

required by EDPB Guidelines.<sup>88</sup> As a result, the DPC finds that the consent mechanism was insufficiently clear regarding the processing purposes to which data subjects could be considered to have consented to if they clicked “*Accept & Continue*”. The DPC therefore finds that, having regard to the closeness between the various purposes for which LinkedIn processed first and third party data and the consequent lack of clarity in the consent mechanism relied on by LinkedIn, the consent given by data subjects via that mechanism was not sufficiently informed. The DPC also finds that the information presented to data subjects when providing their consent, in the disclosures described above, was not sufficiently detailed as to the nature of the role played by advertising technologies or the identities and roles of advertising partners.

166. For the reasons set out above, the DPC finds that the consent obtained via the consent seeking mechanism was not sufficiently informed for the purposes of Article 4(11) GDPR.

iii. *Specific*

167. Article 6(1)(a) requires that consent be given in relation to “*one or more specific*” purposes. The concept of specificity of consent requires that data subjects consent to processing for a specific processing purpose. The EDPB is of the view that specificity must be interpreted in line with the requirements for granularity, namely that, where a service involves multiple processing operations for more than one purpose, data subjects should be free to choose which purpose they accept, rather than having to consent to a bundle of processing purposes.<sup>89</sup> As noted by the EDPB, there is also a close nexus between specificity and the requirement that consent be informed.<sup>90</sup> The EDPB considers that controllers should provide specific information with each separate consent request about the data that are processed for each purpose, in order to make data subjects aware of the impact of the different choices they have, so that data subjects may provide specific consent.<sup>91</sup>

168. The CJEU has identified the importance of providing clear and specific information to data subjects in the context of evidencing their consent to processing operations. Indeed, in *Planet 49*, the CJEU considered how consent reflecting a data subject’s wishes could be evidenced.<sup>92</sup> The Court found that consent must be specific “*in the sense that it must relate specifically to the processing of the data in question and cannot be inferred from an indication of the data subject’s wishes for other purposes*”.<sup>93</sup>

169. The CJEU reaffirmed its approach to specificity as a component of consent in *Orange Romania*, taking the view that the GDPR requires “*a ‘specific’ indication of the data subject’s wishes in the sense that it must relate specifically to the processing of the data*”.

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<sup>88</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), [64].

<sup>89</sup> *Ibid*, [42] and [55].

<sup>90</sup> *Ibid*, [55].

<sup>91</sup> *Ibid*, [60]-[61].

<sup>92</sup> Case C-673/17 *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Planet49 GmbH (“Planet 49”)*, Judgment of 1 October 2019.

<sup>93</sup> *Ibid*, [58].

*in question and cannot be inferred from an indication of the data subject's wishes for other purposes". In this context, the CJEU confirmed that "if the data subject's consent is given in the context of a written declaration which also concerns other matters, the request for consent is to be presented in a manner which is clearly distinguishable from the other matters. In particular [...] such a declaration must be presented in an intelligible and easily accessible form, using clear and plain language, in particular where it concerns a declaration of consent which is to be pre-formulated by the controller of personal data."*<sup>94</sup>

170. In its submissions of 1 October 2018, LinkedIn asserted that the consent it gathered for third party BA & TA was specific because:

*The information contained in the in-product notification presented to LinkedIn-I members as set out in Schedule A, relates specifically to the processing of third party data for ad targeting. It is clear that this option is separate and distinct from other information available to LinkedIn-I members in the LinkedIn Privacy Policy.*

171. The DPC agrees that, ultimately, the consent sought by LinkedIn and given by members did not require separate consent requests and, accordingly, the DPC does not consider that the consent given by members was vitiated by lack of specificity for *this* reason.
172. However, as set out above in the analysis of whether consent was freely given, the DPC finds that there was a lack of clarity regarding the purposes of the processing of third party data for which consent was being sought, namely whether members were being presented with job opportunities or paid-for targeted advertisements (including job ads). As set out above, this clarity only occurred after the DPC sought a detailed explanation during the course of the Inquiry, and only then did it become clear that the phrase "*relevant jobs*" in fact refers to paid-for advertising.
173. The DPC also finds that the consent obtained by LinkedIn was not sufficiently informed, including by reason of the insufficient detail as to the nature of the role played by advertising technologies or the identities of advertising partners, as outlined in section ii above.

Conclusion on the specific nature of the consent:

174. The information provided to data subjects by LinkedIn was not sufficiently granular or specific, in particular in relation to the role played by the advertising technologies and partners involved, as well as in relation to the manner in which the data subject will receive targeted advertising (i.e., on or off the LinkedIn platform). Therefore, it cannot be considered that the consent collected as a result of this consent seeking mechanism was sufficiently "specific" within the meaning of the GDPR.

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<sup>94</sup> Case C-61/19 *Orange Romania*, Judgment of 11 November 2020, [36] – [39].

iv. Unambiguous

175. For consent to be valid, it must be unambiguous as to the data subject's intentions. Article 4(11) GDPR refers to an "*unambiguous indication of the data subject's wishes ... by which he or she signifies agreement to the processing of personal data relating to him or her.*"
176. Guidelines 05/2020 emphasise that controllers must develop consent mechanisms that are clear to data subjects, avoid ambiguity and ensure that the action by which consent is given can be distinguished from other actions.<sup>95</sup> In this context, the EDPB notes the possibility of "*click fatigue*" among data subjects, which can diminish the warning effect of consent mechanisms when these messages are encountered too many times.<sup>96</sup> The EDPB further states that consent is ambiguous where there is "*blanket acceptance*" of general terms and conditions and/or consent is obtained through the same means as agreeing to contractual terms.<sup>97</sup>
177. In *Planet 49*, the CJEU found that Article 4(11) GDPR was clear that the giving of consent required active, as opposed to passive behaviour.<sup>98</sup> The Court stated in this respect that "[o]nly active behaviour on the part of the data subject with a view to giving his or her consent may fulfil that requirement."<sup>99</sup> The Court highlighted that passive behaviour, specifically in this instance in the form of a pre-selected tick box, was insufficient to indicate consent on behalf of the data subject.<sup>100</sup> The Court also emphasised the statement in Recital 32 that "*silence*" does not amount to consent.<sup>101</sup>
178. This position was affirmed in *Orange Romania* where the CJEU emphasised that there must be "*active behaviour by that person with a view to giving his or her consent*" for there to be an act of giving consent.<sup>102</sup> In this vein, the Court was clear that a pre-ticked box was not an act of consent on the basis that:

*it would appear impossible in practice to ascertain objectively whether a website user had actually given his or her consent to the processing of his or her personal data by not deselecting a checkbox pre-ticked beforehand nor, in any event, whether that consent had been informed. It is not inconceivable that a user would not have read the information accompanying the preselected checkbox, or even would not have noticed that checkbox, before continuing with his or her activity on the website visited.*<sup>103</sup>

179. In its October 2018 submissions, LinkedIn asserted that the consent it obtained was unambiguous because:

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<sup>95</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), [84].

<sup>96</sup> Ibid, [87].

<sup>97</sup> Ibid, [81].

<sup>98</sup> Case C-673/17 *Planet 49*, Judgment of 1 October 2019, [61]-[62].

<sup>99</sup> Ibid, [54].

<sup>100</sup> Ibid, [52].

<sup>101</sup> Ibid, [62].

<sup>102</sup> Case C-61/19 *Orange Romania*, Judgment of 11 November 2020, [36]-[37].

<sup>103</sup> Ibid, [36]-[37].



*As mentioned above, LinkedIn-I members are by default opted-out of the use of third party data for ad targeting. Said members are presented with an in-product notification which gives them the option to click 'Accept and Continue', effectively consenting to the use of third party data for ad targeting. Alternatively, LinkedIn-I members may navigate to their account settings where they can, under the heading 'Interactions with businesses' switch the toggle to 'On' to also effectively provide consent. Both actions are clear affirmative actions on the part of LinkedIn-I members. If LinkedIn-I members choose to remain opted-out of this processing, they can click on the 'X' in the corner of the in-product notification.*

180. Further, in its submissions on the Preliminary Draft Decision, LinkedIn points out that, in the consent seeking mechanism, the option “*Manage Settings*” is placed next to “*Accept & Continue*” indicating to data subjects that there is an alternative way to continue which does not lead to consent. In this regard, the DPC also notes that the text accompanying the consent mechanism explains to members the consequences of opting out of processing, i.e. that ads will not be personalised based on the member’s interactions with other companies, as an alternative to selecting “*Accept & Continue*”. The DPC has also given consideration in this regard to the opinion of Professor Stephen, provided by LinkedIn along with its submissions on the Preliminary Draft Decision, to the effect that a typical LinkedIn member would understand the consequences of the options presented in the consent seeking mechanism.
181. However, the DPC finds that the consent obtained by LinkedIn was ambiguous. In particular, the DPC considers that the choice of options presented to users on this first screen “*Accept & Continue*” as compared to “*Manage Settings*” to be significant. Notably this articulation of options does not offer as clear a choice as “*accept*” or “*reject*” nor as clear as that of “*Allowed*” or “*Not Allowed*”. The combination of the words “*continue*” and “*accept*” can reasonably be considered to nudge a data subject into accepting in order to continue. Controllers have a certain discretion in determining the form of their consent seeking mechanism; however, it is also recalled that the EDPB emphasises that:

*[c]ontrollers should design consent mechanisms in ways that are clear to data subjects. Controllers must avoid ambiguity and must ensure that the action by which consent is given can be distinguished from other actions<sup>104</sup>*

In this regard, the composite phrase “*Accept & Continue*” is ambiguous as it could be selected because the user merely wishes to continue their use of the LinkedIn service uninterrupted, as opposed to actually wishing to consent to the processing of their third party personal data for BA & TA. While the phrase “*Manage Settings*” may be familiar to data subjects who are regular users of digital services (as it frequently appears in consent flows for the processing of personal data and for the use of cookies), this frequency of usage does not render the overall choice offered between this option and the “*Accept & Continue*” option unambiguous. This is particularly so when considered against the alternative choice of “*Manage Settings*” which implies further steps to be taken by the

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<sup>104</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), [84].

user to exercise their preferences – one of which may be the ‘rejection’ of consent sought.

182. In its submissions on the Preliminary Draft Decision, LinkedIn refers to the DPC’s guidance on cookies and other tracking technologies, which concerns consent in the context of the ePrivacy Directive and notes that *“if you use a button on the banner with an ‘accept’ option, you must give equal prominence to an option which allows the user to ‘reject’ cookies, or to one which allows them to manage cookies and brings them to another layer of information in order to allow them do that.”*<sup>105</sup> However, in addition to the ambiguity of the composite phrase *“Accept & Continue”* as set out above, while placed side-by-side, both options under consideration are not given equal prominence, from a visual perspective. As seen at Figure 1 in **Appendix C** below, while the buttons appear to be equal in size, the *“Accept & Continue”* button is blue and is prominent against the white background of the user engagement flow. Conversely the *“Manage Settings”* button is the same colour as the background of the in-product notification and is more difficult to distinguish by comparison.

Conclusion on the unambiguous nature of the consent:

183. Accordingly, in circumstances where the selection on the in-product notification does not reflect an unambiguous choice on the part of the data subject of either *“accept”* or *“reject”*, where more visual prominence is given to the *“Accept & Continue”* button, where that button includes the ambiguous composite phrase *“Accept & Continue”*, and where the only alternative to accepting directly presented to members is not that of rejecting but in fact further management of settings, the DPC finds that the consent collected by the selection of this option is ambiguous.
184. In addition, and as outlined in detail at paragraphs 124-133 above, the DPC finds that there is ambiguity in the consent seeking mechanism regarding the meaning of the term *“relevant jobs”*. In particular, it was not clear that the phrase ‘relevant jobs’ actually referred to a type of paid for advertising and the manner in which LinkedIn presented information implied that users would not see *“relevant jobs”* if they did not click *“Accept & Continue”*. The positive statement or action of the data subject must bring clarity to the specific purposes in respect of which the data subject is, and is not, actually providing consent. As noted by the EDPB, *“[a] clear affirmative act’ means that the data subject must have taken a deliberate action to consent **to the particular processing**”* (emphasis added).<sup>106</sup> The DPC finds that this was not the case here and the consent collected by LinkedIn was also vitiated by ambiguity for this reason.

v. Withdrawal

185. Article 7(3) GDPR provides that data subjects must be informed of the right to withdraw consent before providing it and that *“it shall be as easy to withdraw as to give consent.”* In elaborating on this principle, the EDPB has expressed the view that it is not necessarily

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<sup>105</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, p35.

<sup>106</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), [77].

the case that the giving of consent and withdrawal of consent must be performed via the same action but that both actions must be capable of being performed on the same interface.<sup>107</sup> That said, the EDPB further states that “*when consent is obtained via electronic means through only one mouse-click, swipe, or keystroke, data subjects must, in practice, be able to withdraw that consent equally as easily.*”<sup>108</sup> In addition, the ability to withdraw consent must be communicated to data subjects prior to the collection of consent<sup>109</sup> and the user must suffer no detriment for withdrawing consent.<sup>110</sup>

186. In its submissions of 1 October 2018, LinkedIn asserts that members are provided with detailed information as to the processing of third party data for ad targeting through LinkedIn’s Privacy Policy, together with the in-product notification, set out in Figures 1 and 2 in **Appendix C**. In relation to new members, LinkedIn states that in signing up to join LinkedIn, data subjects are presented with LinkedIn’s Privacy Policy and it refers specifically to section 2.4 “*Ad choices*” which LinkedIn states provides data subjects with information as to how to withdraw consent to the use of third party data for BA & TA. LinkedIn states that the data subject is informed (of the right to withdraw consent) prior to giving consent. LinkedIn includes what it describes as “*the specific pathways and engagement flows for withdrawing consent*” as an appendix to its submissions of 1 October 2018. That pathway is set out in Figure 3 in **Appendix C**.
187. As stated above, LinkedIn submits that by 25 May 2018 all members were automatically opted out of the processing of third party data about them for the purposes of BA & TA. Members could click “*Accept & Continue*” if they wanted to opt in/consent to the processing of third party data about them for BA & TA and new members/those signing up to LinkedIn post 25 May, 2018, could navigate to the above setting and change the toggle in “*Interactions with businesses*” to “*yes.*” If members subsequently wished to withdraw their consent, it was also through the above “*Interactions with businesses*” toggle that they did so, by switching the toggle to “*no.*”
188. For existing LinkedIn members, who were automatically opted out of the processing of their third party data for BA & TA, they would have had to opt in (via one click of “*Accept & Continue*” through the in-product notification) to consent to the processing of their third party data for BA & TA. To opt out/withdraw their consent to the processing of their third party data for BA & TA four options were available to existing members, as set out by LinkedIn in its submissions on the Preliminary Draft Decision:
- a. Click “*Privacy & Terms*” > “*Privacy Policy*” > “*Opt-out*” under “*Ad Choices*” > Toggle from “*On*” to “*Off*”; or
  - b. Click “*Me*” Icon > “*Settings*” > “*Ads*” > “*Interactions with businesses*” > Toggle from “*On*” to “*Off*”; or

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<sup>107</sup> EDPB Guidelines 05/2020 on consent under Regulation 2016/679 (adopted 4 May 2020), [113]-[114].

<sup>108</sup> *Ibid*, [114].

<sup>109</sup> *Ibid*, [116].

<sup>110</sup> *Ibid*, [114].

- c. Access “Ad choices” directly from the LinkedIn feed > click “Manage your LinkedIn Ads settings” > “LinkedIn Ads Settings” > “Interactions with businesses” > Toggle from “On” to “Off”; or
  - d. Following pathway (c) from the Privacy Policy under “Rights to Access and Control your Personal Data”.
189. In the case of an existing member who provided consent, by clicking “Accept & Continue” (one step) they would have to undertake the steps set out under one of the options above to withdraw consent.
190. However, the DPC considers that in determining whether consent is as easy to withdraw as it is to give, it is not appropriate to engage in a “click counting” exercise, by comparing how many clicks are required to give consent and how many clicks are required to withdraw consent. The DPC does not consider that Article 7(3) GDPR requires that the mechanism for withdrawing consent be identical to the mechanism for giving consent, and consent withdrawal mechanisms in some cases may justifiably take more clicks to implement than the equivalent consent provision mechanisms. In this regard, the DPC notes the submission of LinkedIn that, if this were not the case, LinkedIn would need to present an interstitial each time a Member, who had opted in, visited the site and that this would be inconsistent with how virtually all websites operate.<sup>111</sup> Furthermore, LinkedIn submitted that, rather than place the control for withdrawing consent somewhere that would not be intuitive to Members simply to reduce the number of clicks, LinkedIn prioritised placing the setting where Members could readily find it. The DPC accepts that this setting to withdraw consent was available via a number of pathways where members could readily find it. Having regard to the various pathways available for users to withdraw their consent, as described above, the DPC considers that it was as easy for existing users to withdraw their consent as to give their consent.
191. In the case of new members signing up to LinkedIn who were automatically opted out of the processing of their third party data for BA & TA, it was as easy to withdraw as to give consent as such a data subject had to navigate through the steps set out above to provide and withdraw consent.
192. It must also be assessed whether data subjects signing up to LinkedIn as well as existing members were informed of their right to withdraw consent prior to the collection of consent. A link is provided through a ‘learn more about how we use your data’ hyper link in the case of the in-product notification above and through a hyperlink at the bottom of the sign up page to LinkedIn’s Privacy Policy. It is stated at section 2.4 of the Privacy policy in place at the time of the Complaint under a heading entitled “ad Choices” that “You can also opt-out<sup>112</sup> specifically from our uses of certain categories of data to show you more

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<sup>111</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, para. 153.

<sup>112</sup> Hyperlink to opt out from the processing of third party data about them for behavioural analysis and targeted advertising for members i.e. “Interactions with businesses” setting.

*relevant ads. For Visitors, the setting is here.*"<sup>113</sup> In relation to the requirement that information on the right to withdraw be presented to data subjects prior to consent collection, by presenting a link with that information LinkedIn has satisfied that requirement.

Conclusion on the ease of withdrawing consent:

193. Having regard to the analysis above, the DPC finds that the consent mechanism used by LinkedIn met the requirements of Article 7(3) GDPR that consent be as easy to withdraw as to give.

D. *Finding in relation to LinkedIn's reliance on consent for the processing of third party personal data for BA & TA*

194. For the reasons set out in the preceding analysis, the DPC is of the view that the consent provided by data subjects via LinkedIn's consent seeking mechanism for the processing of their third party personal data for the purposes of BA & TA was not freely given, sufficiently informed or specific, or unambiguous. On this basis, the DPC finds that LinkedIn has not identified a valid lawful basis for the processing of third party data of its members for BA & TA (with the exception of analytics, in respect of which the lawful basis relied upon by LinkedIn is considered below). Consequently, this constitutes an infringement of the requirements in Article 6 GDPR (that processing have a lawful basis) and the requirements in Article 5(1)(a) insofar as it requires such processing to be lawful.

**7. Issue B – Legitimate interests as a lawful basis under Article 6(1)(f) GDPR**

195. This section addresses whether LinkedIn has a valid lawful basis under Article 6(1)(f) GDPR for the processing of first party data for the purpose of BA & TA, and third party personal data of members for analytics, and will consider the following matters:

- a. the legal framework and relevant case law on Article 6(1)(f) GDPR.
- b. the key elements of the Complaint relating to LinkedIn's reliance on Article 6(1)(f) GDPR, and
- c. the validity of LinkedIn's reliance on Article 6(1)(f) GDPR for the processing of the first party data of its members for BA & TA, and third party data for the purposes of analytics.

A. *Legal framework and relevant case law on Article 6(1)(f) GDPR*

196. Article 6(1) GDPR states , *inter alia*, as follows:

*Processing shall be lawful only if and to the extent that at least one of the following applies:*

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<sup>113</sup> Hyperlink to opt out from the processing of third party data about them for behavioural analysis and targeted advertising of visitors.

[...]

*(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject, which require protection of personal data, in particular where the data subject is a child.*

197. Recital 47 GDPR provides that those interests:

*may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller. Such legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller. At any rate the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data are processed in circumstances where data subjects do not reasonably expect further processing. Given that it is for the legislator to provide by law for the legal basis for public authorities to process personal data, that legal basis should not apply to the processing by public authorities in the performance of their tasks. The processing of personal data strictly necessary for the purposes of preventing fraud also constitutes a legitimate interest of the data controller concerned. The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.*

198. Accordingly it is clear that (a) the nature of the relationship between the controller and the data subject and (b) the reasonable expectations of the data subject as to type of processing that will occur for the particular purpose or in relation to any further processing, are important factors in weighing up the legitimate interests pursued against the position (the fundamental rights and freedoms) of the data subject.

199. According to the case-law of the CJEU, such as *Rīgas Police*,<sup>114</sup> *Asociația de Proprietari*<sup>115</sup> and *MICM*<sup>116</sup> three conditions must be satisfied cumulatively, in order for a controller to be able to rely on legitimate interests as a lawful basis for the processing of personal data:

a. the pursuit of a legitimate interest by the controller or by a third party;

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<sup>114</sup> Case C-13/16 *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme,'* Judgment of 4 May 2017. ('Rīgas Police').

<sup>115</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019.

<sup>116</sup> Case C-597/19 *Mircom International Content Management & Consulting (M.I.C.M.) Limited v Telenet BVBA*, Judgment of 17 June 2021.

- b. the need to process personal data for the purposes of the legitimate interests pursued;
  - c. whether the interests or fundamental rights and freedoms of the data subject override the legitimate interest pursued.<sup>117</sup>
200. Article 5(2) GDPR provides that that the controller shall be responsible for, and be able to demonstrate compliance with the principles relating to the processing of personal data, including the lawfulness of processing, as outlined in Article 5(1) GDPR.

B. *Summary of Complaint relating to Article 6(1)(f) GDPR*

201. The Complaint highlighted the key aspects of Article 6(1)(f) GDPR. It stated that targeted advertising cannot be carried out in reliance on the Article 6(1)(f) lawful basis. In support of this, the Complaint draws a comparison between targeted advertising on the one hand and direct marketing and cookies on the other. Broadly speaking, the e-Privacy Directive requires consent to be obtained in order to legitimise direct marketing and the setting of or access to cookies (subject to exceptions in both cases). The Complaint argues that *“it appears clear that no other form of behavioural analysis for advertising purposes can meet a different fate than that met by ‘cookies’: to only be lawful with the prior consent of data subjects.”*<sup>118</sup> In support of this argument the Complaint cites an A29WP Opinion from 2013 which states that consent would *“almost always”* be required when an *“organisation specifically wants to analyse or predict the personal preferences, behaviour and attitudes of individual customers, which will subsequently inform ‘measures or decisions’ that are taken with regard to those customers.”*<sup>119</sup>
202. As noted above, the e-Privacy Directive contains a different enforcement regime to the GDPR, and is thus outside the scope of this Inquiry. Also, unlike the e-Privacy Directive, which mandates consent for specific types of processing operations, the GDPR does not mandate consent for the purposes of any specific form of processing. The recitals to the GDPR also specifically mention that *“direct marketing”* can be a *“legitimate interest,”*<sup>120</sup> further differentiating it from the e-Privacy Directive, which explicitly requires consent for direct marketing in some circumstances. For these reasons, it is necessary to analyse the lawfulness of any particular processing operations on a case-by-case basis. Therefore,

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<sup>117</sup> Although those decisions of the CJEU refer to Article 7(f) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (“Directive 95/46”), which was repealed by the GDPR, they are still relevant under the regime of the GDPR, since Article 6(1)(f) GDPR did not make any major changes as to the concept of legitimate interest or the conditions required in order to rely on it as lawful basis. Only one modification was incorporated into the text of the GDPR in the sense that Directive 95/46 took into consideration only the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, whereas the GDPR refers more generally to the legitimate interests pursued by the controller or by a third party.

<sup>118</sup> Complaint, [46], citing A29WP Opinion 03/2013 on Big Data and Open Data, WP203.

<sup>119</sup> Ibid, [47].

<sup>120</sup> GDPR, Recital 47. As set out in the case law of the CJEU, the first step that needs to be considered when relying on Article 6(1)(f) as a legal basis for processing is the question whether the interest pursued is legitimate.

it is necessary to establish whether LinkedIn lawfully relied on legitimate interests for the purposes of BA & TA on the basis of the test set out in the GDPR.

C. *Assessment as to LinkedIn's reliance on Article 6(1)(f) GDPR for processing first party and third party data for BA & TA, including analytics*

i. *The first condition: whether there is pursuit of a legitimate interest*

203. As set out in the case law of the CJEU, the first step that needs to be considered when relying on Article 6(1)(f) as a legal basis for processing is the question whether the interest pursued is legitimate.

204. In its 1 October 2018 and 10 February 2020 submissions, LinkedIn states that its mission is to connect the world's professionals and to make them more productive and successful. It states that fulfilling LinkedIn's mission is in LinkedIn's legitimate interests and it states that its targeting services generate an income which enables LinkedIn to provide its services for free to members, which in turn enables LinkedIn to continue to operate its business, including to communicate with, inform and educate its members and to help job seekers and companies seeking employees to match themselves to one another, which is in the interests of LinkedIn and its members and third parties. It also states that exercising its freedom to conduct a business (pursuant to Article 16 of the Charter) is a legitimate interest of LinkedIn. LinkedIn further says that the exercise of its freedom to provide a service is in the legitimate interests of LinkedIn and that processing is in the interests of its members and third parties.<sup>121</sup>

205. LinkedIn states that targeting is integral to the conduct of LinkedIn's business because it, *inter alia*, generates an income which funds the service and helps employees and employers match with one another. LinkedIn states that its targeting services are in the company's legitimate interests and those of third parties including its customers and members.<sup>122</sup>

206. LinkedIn's legitimate interests assessment ('LIA') identifies its legitimate interests as follows:

- a. the establishment and conduct of LinkedIn's business;
- b. provision of LinkedIn's services;
- c. enabling and assisting LinkedIn members, guests, other subjects and customers to:
  - i. access and provide services;
  - ii. assemble and associate;

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<sup>121</sup> LinkedIn submissions of 1 October 2018, pp10-13; LinkedIn submissions of 10 February, 2020, pp20-25.

<sup>122</sup> *Ibid*, p12.



- iii. express themselves, including imparting and receiving information;
- iv. educate themselves;
- v. choose an occupation, engage in and move for work; and
- vi. establish and conduct business.

207. Article 6(1)(f) GDPR makes clear that the legitimate interest in question must be either that of the controller or that of a third party, i.e. not the data subject. This is reflected in LinkedIn's submissions, i.e. it relies on its own legitimate interests and the interests of its members generally when processing the personal data of any specific data subject. For reference in the analysis below, the interests outlined above will be categorised as '**LinkedIn's interests**' (those at paragraphs 206.a and 206.b) and '**Members' and third party interests**' (those at paragraph 206.c).

208. Turning to whether LinkedIn's interests and Members' and third party interests are legitimate, the GDPR<sup>123</sup> and CJEU<sup>124</sup> provide some examples of processing which may be grounded upon Article 6(1)(f) GDPR. As noted above, these processing operations can include "*direct marketing*" pursuant to the recitals to the GDPR. There is, however, no definitive list and a case by case assessment must be conducted in each instance where a controller relies on Article 6(1)(f) GDPR in order to firstly determine whether the interest pursued can be considered legitimate.

209. As regards the first condition, the CJEU recalled that

*the controller responsible for the processing of personal data or the third party to whom those data are disclosed must pursue legitimate interests justifying that processing, those interests must be present and effective as at the date of the data processing and must not be hypothetical at that date.*<sup>125</sup>

210. It should be noted that the A29WP considered, in Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC ('**Opinion 6/2014**') that:

*the notion of legitimate interest could include a broad range of interests, whether trivial or very compelling, straightforward or more controversial. It will then be in a second step, when it comes to balancing these interests against the interests and*

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<sup>123</sup> Recital 47 GDPR: "*Such a legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller.....The processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest.*"

<sup>124</sup> Protection of property was held to be a legitimate interest in *Asociația de Proprietari*; The protection of the property, health and life of his family/oneself was held to be a legitimate interest in Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů*, Judgment of 11 December 2014 ("*Rynes*"); Obtaining the personal information of a person who damaged their property in order to sue that person for damages was considered to be a legitimate interest in *Rīgas Police*.

<sup>125</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, at [44].

*fundamental rights of the data subjects, that a more restricted approach and more substantive analysis should be taken.*<sup>126</sup>

211. The A29WP further states that:

*In order to be relevant under Article 7(f), a 'legitimate interest' must therefore: be lawful (i.e. in accordance with applicable EU and national law); be sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject (i.e. sufficiently specific); represent a real and present interest (i.e. not be speculative).*<sup>127</sup>

212. The A29WP also states that the pursuit of a fundamental right (by a controller pursuing its legitimate interests) may come into conflict with the right to privacy and data protection.<sup>128</sup>

213. The DPC considers that LinkedIn's interests and Members' and third party interests relied upon by LinkedIn are lawful. There is nothing unlawful in the establishment, conduct, and provision of LinkedIn's (free) business/services, which enable and assist LinkedIn's members, guests, other data subjects, and customers to access/provide services, assemble and associate, express themselves, and access educational and business opportunities. (For these purposes, the DPC considers the assessment of lawfulness to be distinct from the analysis of whether its processing was lawful under the GDPR).

214. Second, the legitimate interest pursued must be sufficiently clear. In a decision by the EDPB in the matter of Meta Platforms Ireland Limited, formerly Facebook Ireland Limited, and the Instagram social media network<sup>129</sup> (hereafter the '**Instagram Decision**'), it was found that the relevant interests the subject of that inquiry were identified and described in a vague fashion, and that "*due to the lack of specificity, the EDPB cannot assess whether the interests argued are real and lawful.*"<sup>130</sup> The interests in question in that inquiry were:

*the legitimate interest of the controller of "creating, providing, supporting, and maintaining innovative products and features that enable people under the age of majority to express themselves, communicate, and engage with information and communities relevant to their interests and build community; and*

*the legitimate interest of a third party (i.e., other Instagram users) to be able to engage with Business Account owners.*<sup>131</sup>

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<sup>126</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), p24. ('Opinion 06/2014').

<sup>127</sup> Ibid, p25.

<sup>128</sup> Ibid, p34.

<sup>129</sup> EDPB Binding Decision 2/2022 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Meta Platforms Ireland Limited (Instagram) under Article 65(1)(a) GDPR, adopted on 28 July 2022.

<sup>130</sup> Ibid, [110].

<sup>131</sup> Ibid, [109].

215. The DPC considers that in this Inquiry LinkedIn has provided more detailed information about the legitimate interests pursued by it in relation to BA & TA by comparison with the information provided by Meta IE as outlined above in the Instagram Decision. It is clear that LinkedIn's business is a professional networking social media service and that LinkedIn's purported legitimate interest is in conducting that business in the manner outlined in the preceding paragraph. The DPC is satisfied that this is a sufficiently clear interest. The DPC finds that LinkedIn has explained that BA & TA allows it to provide its services for free, and that its members could benefit from obtaining more relevant information based on BA & TA. The DPC finds that it is clear what is envisaged by these interests, and that these interests are not vague or non-specific.
216. Thirdly, the interest must be real and present (i.e. not speculative or hypothetical). The DPC considers that LinkedIn providing the services outlined above is something tangible in that millions of people are availing of these services on a daily basis, so LinkedIn is without doubt actually providing these services. The DPC therefore considers that LinkedIn's interests and Members' and third party interests are real and present.
217. In conclusion, the DPC considers that that the establishment, conduct and provision of LinkedIn's business/services, which enable and assist LinkedIn's members, guests, other subjects and customers to access/provide services, assemble and associate, express themselves and access educational and business opportunities are legitimate interests. BA & TA carried out by LinkedIn helps its customers to target individuals which in turn generates an income by helping to ensure that the advertisements on its services reach the most appropriate audience. Both LinkedIn's interests and Members' and third party interests thus meet the first stage of the test, i.e. they meet the definition of legitimate interests for the purposes of the GDPR.
- ii. *The second condition: the need to process personal data for the purposes of the legitimate interests pursued*
218. In this limb of the test, it must be considered whether the processing in question is necessary for the purposes of the pursuit of the legitimate interests identified at the first stage of the analysis.
219. In relation to LinkedIn's interests, LinkedIn states in its 1 October 2018 submissions that targeting services generate an income which enables it to provide its services for free. It further asserts that BA & TA helps LinkedIn to advance its legitimate interests in conducting its business/performing its services by ensuring that the advertisements on its services reach the most appropriate audience. In LinkedIn's submissions of 10 February 2020, it is stated that "*ultimately LinkedIn is intended to be accessible for everyone, and thus provides a level of service to members free of charge.*"<sup>132</sup> It asserts that the processing operations it conducts in connection with BA & TA are a necessary

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<sup>132</sup> LinkedIn submissions of 10 February 2020, at p22.

aspect of displaying targeted ads and are therefore necessary to meet LinkedIn's legitimate interests.<sup>133</sup>

220. The concept of necessity is generally interpreted strictly by the CJEU, given that derogations or limitations on data rights are to be interpreted strictly.<sup>134</sup> Any interference with the right to protection of personal data must be capable of achieving its stated objective.<sup>135</sup>
221. Two of the key principles of necessity enunciated by the CJEU are that the objective sought to be achieved by the processing cannot be achieved by less restrictive means, and that there is no equally effective available alternative.<sup>136</sup> The CJEU has stated that it is necessary:

*to ascertain that the legitimate interest pursued [...] cannot reasonably be as effectively achieved by other means less restrictive of the fundamental rights and freedoms of data subjects, in particular the rights to respect for private life and to the protection of personal data guaranteed by Articles 7 and 8 of the Charter. In addition*

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<sup>133</sup> Ibid, p23.

<sup>134</sup> See, for example, *Rīgas Police*, where the CJEU stated that at [30]: “As regards the condition relating to the necessity of processing personal data, it should be borne in mind that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary...”

<sup>135</sup> In AG Bobek's *Rīgas Police*, it was observed at [71] that: “The examination of proportionality is an assessment of the relationship between aims and chosen means. The chosen means cannot go beyond what is needed. That logic, however, also works in the opposite direction: the means must be capable of achieving the stated aim.”

<sup>136</sup> In Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk*, Judgment of 20 May 2003, the impugned provisions of national law required public bodies to communicate the names, together with the salaries and pensions exceeding a certain level paid by them to their employees for the purpose of drawing up an annual report to be made available to the general public. The CJEU accepted that the legislation had the legitimate objective of exerting pressure on public bodies to keep salaries within reasonable limits and of ensuring the thrifty and appropriate use of public funds. The CJEU ultimately held at [88] that the assessment of the necessity and proportionality of such publication was a matter for the national court. However in doing so, the CJEU stated that the national court should consider “whether such an objective could not have been attained equally effectively by transmitting the information as to names to the monitoring bodies alone. Similarly, the question arises whether it would not have been sufficient to inform the general public only of the remuneration and other financial benefits to which persons employed by the public bodies concerned have a contractual or statutory right, but not of the sums which each of them actually received during the year in question, which may depend to a varying extent on their personal and family situation.” (Emphasis added). Separately, in Case C-291/12 *Michael Shwartz v Stadt Bochum*, Judgment of 17 October 2013, the CJEU again considered whether there was any alternative to the measure challenged (the requirement under a Council Regulation regarding security features and biometrics in passports and travel documents, which required passport applicants to submit to having their fingerprints taken as a precondition to being granted a passport) which would interfere less with the rights under Articles 7 and 8 of the Charter but still contribute effectively to the objectives of the EU in question. Here the CJEU stated that the only real alternative to the taking of fingerprints was an iris scan. However, the CJEU noted that iris-recognition technology was not yet as advanced as, and was considerably more expensive than, fingerprint recognition technology and was therefore less suitable for general use. On the basis of these factors, the CJEU concluded that there were no measures which would be both sufficiently effective in achieving the aim of the law and less of a threat to the rights protected by Articles 7 and 8 of the Charter than the taking of fingerprints.

[...] *the condition relating to the need for processing must be examined in conjunction with the 'data minimisation' principle enshrined in Article 6(1)(c) of Directive 95/46, in accordance with which personal data must be 'adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed.'*<sup>137</sup>

222. Relatedly, the principle of data minimisation in Article 5(1)(c) GDPR requires that only data that are adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed may be collected and used.
223. In relation to Members' and third party interests, LinkedIn states that the purpose of these processing operations is to infer interests and characteristics that enable LinkedIn to show its members relevant ads that match such interests and characteristics. LinkedIn states that as such the processing operations are integral to its mission of helping members build their professional network and pursue other professional and economic goals.<sup>138</sup> LinkedIn also submits that such processing operations help ensure that the advertisements on LinkedIn's service reach the most appropriate audience and enable LinkedIn to provide efficient, effective, and accurate services.
224. In relation to LinkedIn's interests, LinkedIn states that if LinkedIn were not able to carry out these operations, there would be a material and substantive impact on the conduct of LinkedIn's business. LinkedIn accepts that there are forms of advertising that do not require behavioural analysis, but submits that other types of advertising would not enable LinkedIn to meet its legitimate interests as effectively as conducting behavioural analysis.
225. One of the key questions to address, when assessing necessity of processing, is whether the objective sought or the interest pursued can be achieved by less restrictive/intrusive means.
226. In relation to Members' and third party interests, those interests include accessing and providing services, assembly, association, expression, imparting and receiving information, education, choosing an occupation, engaging in and moving for work, and establishing and conducting a business. These interests relate to rights protected under the Charter, including freedom to choose an occupation and the right to engage in work, which is protected by Article 15 of the Charter, and the right to freedom of expression and information protected by Article 11 of the Charter.
227. Of relevance to the assessment as to whether these interests can reasonably be as effectively achieved by other (less restrictive) means is the nature of the content displayed to members on the LinkedIn platform.
228. As set out above, members are presented with job opportunities that are not ads (separate to the display of promoted job ads) which enable LinkedIn members to, amongst other things, "*choose an occupation, engage in and move for work*" in the words

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<sup>137</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, [47]-[48].

<sup>138</sup> LinkedIn submissions of 10 February 2020, p6.

of the legitimate interest assessment (“LIA”).<sup>139</sup> In addition, the personalisation of content that occurs on LinkedIn members’ newsfeed contains posts, events, and other items, displayed to a large extent arising out of a data subject’s connections. This enables data subjects to “assemble and associate” in the words of LinkedIn’s LIA, e.g. by connecting with others, “access and provide services” through engaging with contacts on LinkedIn, “express themselves through imparting and receiving information”, through posting and reading others’ posts, and “educate themselves” again through content on LinkedIn which are all legitimate interests set out in the LIA.<sup>140</sup>

229. The DPC does not consider that the processing operations are the only way to effectively pursue of the right to choose an occupation and engage in work in this context. Seeing the most relevant ads on LinkedIn is not the only or least intrusive way in which data subjects’ right to choose an occupation and engage in work can be protected. This right could also be protected by seeing other, slightly less relevant ads. It could also be protected by using the other services offered by LinkedIn, including creating and developing a professional network. The right to freedom of expression and information can, similarly, be vindicated through alternative less intrusive means. There is no evidence that members and other third parties would be prevented from expressing themselves or accessing information if they were shown different ads.
230. In relation to LinkedIn’s interests, LinkedIn could display ads on the basis of the content of the page being viewed, rather than on the profile and inferred interests and characteristics of a member.
231. Therefore, there appear to be less intrusive alternative ways for LinkedIn to pursue both its own interests and those of members and other third parties than to conduct BA & TA using the processing operations outlined above.
232. However, the DPC considers that these less intrusive alternatives would not be an equally effective means of pursuing the legitimate interests in question. In relation to Members’ and third party interests, LinkedIn submits that alternative forms of advertising that do not require behavioural analysis of each member do not allow LinkedIn to meet its legitimate interests as effectively as BA & TA. LinkedIn submits that advertising which is targeted on the basis of behavioural analysis is a more effective way to ensure that ads relevant to a member’s job interests, career needs, and professional aspirations are displayed.
233. In relation to LinkedIn’s interests, the DPC finds, as demonstrated in the submissions of LinkedIn,<sup>141</sup> that it would not be possible to provide these services in exactly the same way by using less personal data and that there is no evidence that LinkedIn’s objective of

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<sup>139</sup> LinkedIn’s Legitimate Interests Assessment provided to the DPC on 2 November 2020, at pg6.

<sup>140</sup> Ibid.

<sup>141</sup> LinkedIn submissions of 1 October 2018, at pages 10-13; LinkedIn submissions of 10 February 2020, at pages 20-23; LinkedIn submissions of 20 July 2023 on Preliminary Draft Decision, at paras 7, 51, 177(ii), 182, 183; LinkedIn submissions of 20 July 2023 on Preliminary Draft Decision, Appendix 2, Expert Opinion of Professor Andrew Stephen, paras 46-47.

providing a free service could have been attained as easily through any other means, or that its economic interests would have been as effectively pursued if it did not use BA & TA.

234. Therefore, the DPC considers that there were no less restrictive means of achieving the interests in question that could equally effectively achieve the aim pursued.

235. For the reasons outlined in this section, the DPC therefore finds that BA & TA were necessary for the pursuit of certain of LinkedIn's legitimate interests outlined above.

iii. *The third condition: the balancing of the interests, fundamental rights and freedoms of the data subject and the legitimate interests pursued by the controller*

236. The DPC accepts that the establishment, conduct, and provision of LinkedIn's business/services, which enable and assist LinkedIn's members, guests, other subjects and customers to access/provide services, assemble and associate, express themselves and access educational and business opportunities is a legitimate interest. The DPC also considers that there were less intrusive ways in which LinkedIn could pursue both LinkedIn's interests and Members' and third party interests but that there is no evidence that these less intrusive means of processing would deliver results that were equally effective for the interests pursued. The DPC therefore determines that the processing carried out by LinkedIn for the purposes of BA & TA was necessary for the legitimate interests pursued. Thus LinkedIn has passed the first two out of three relevant steps for reliance on Article 6(1)(f) GDPR. This section considers the third step: the balancing of those interests against the fundamental rights and freedoms of data subjects.

237. Article 6(1)(f) provides that in assessing the different components to be balanced against each other, the controller must take into account its legitimate interests, on the one hand, and the interests and the fundamental rights and freedoms of the data subject on the other. It should conduct an assessment as to whether the legitimate interests of the controller are overridden by the interests or fundamental rights and freedoms of data subjects.

238. It is clear from *Asociația de Proprietari* that in conducting the assessment of this third condition, a case-by-case approach must be taken, balancing the opposing rights and interests concerned and account must be taken of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter.<sup>142</sup>

LinkedIn's submissions:

239. According to LinkedIn, BA & TA benefits individuals (data subjects) by making it easier for them to identify areas of opportunity and connect with employers.<sup>143</sup> LinkedIn submits that the interests or fundamental rights and freedoms of data subjects do not override

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<sup>142</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, at [52].

<sup>143</sup> LinkedIn submissions 1 October 2018, p11.

its legitimate interests.<sup>144</sup> However, LinkedIn acknowledges that processing of personal data for BA & TA has an impact on the data protection rights of data subjects.<sup>145</sup> It states that processing for the purposes of targeting meets the reasonable expectations of data subjects.<sup>146</sup> LinkedIn also lists the safeguards it has in place to ensure the data protection rights of data subjects including transparency, facilitating data subjects in the exercise of their rights, the appointment of a DPO, ensuring data security, applying principles of data protection by default and design and providing members with granular choices over how their personal data will be used for ad targeting via easy to use settings.<sup>147</sup>

240. LinkedIn, in its 1 October 2018 submissions, states that the impact on data subjects (of BA & TA) must be balanced against LinkedIn’s own legitimate interests and asserts that the options LinkedIn makes available to data subjects, as well as the safeguards it puts in place, and the fact that the personal data processed about members relates to data subjects’ professional, not private life, ensures that an appropriate balance is struck.<sup>148</sup>
241. The DPC, in its 17 January 2020 correspondence to LinkedIn, requested that LinkedIn demonstrate how, in LinkedIn’s assessment, each processing operation in question is necessary and proportionate. The DPC further requested that LinkedIn demonstrate that it had reached a conclusion, after an assessment of whether the interests and fundamental rights of the data subject outweigh LinkedIn’s asserted legitimate interests, and demonstrate that LinkedIn’s legitimate interests are not overridden by the data subjects’ interests or fundamental rights.
242. In relation to the balancing assessment, LinkedIn acknowledges, in its 10 February 2020 submissions, that BA & TA can also negatively affect the interests, rights and freedoms of data subjects—particularly when LinkedIn draws inferences about them, such as their age or professional interests.<sup>149</sup> However, LinkedIn states that processing for BA & TA benefits itself and its members through personalisation including promoted content i.e. targeted advertising.<sup>150</sup> It mentions again the settings available to members to allow them to control the use of first party personal data about them for BA & TA.<sup>151</sup> LinkedIn states that as its service is a “freemium” professional network, it considers that a certain level of BA & TA to be in the reasonable expectations of users.<sup>152</sup> It points to its provision of information to members through its Privacy Policy which it states helps members ensure

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<sup>144</sup> Ibid, p12.

<sup>145</sup> Ibid, p13.

<sup>146</sup> Ibid, p13.

<sup>147</sup> Ibid, p13.

<sup>148</sup> Ibid, p13.

<sup>149</sup> LinkedIn submissions of 10 February 2020, at p23. LinkedIn provided its legitimate interest assessment to the DPC subsequently in its 2 November 2020 submissions, which included details on: the circumstances of the processing; the legitimate interests relied upon; the impact to the data subject’s interests and rights; the privacy protections and safeguards in place; and the outcome of its balancing test.

<sup>150</sup> LinkedIn submissions of 10 February 2020, at p6.

<sup>151</sup> Ibid, at p24.

<sup>152</sup> Ibid, at p24.



they are not surprised.<sup>153</sup> It considers that the impact of the processing in question is not particularly severe and submits that it has “*robust safeguards*” in place as set out in its 1 October 2018 submissions. LinkedIn provides further details on its technical and organisational methods to keep data secure and safe and says that it complies with standards of various advertising bodies.<sup>154</sup> Another measure it lists to ensure data subject rights is that enterprise customers cannot target a small audience (a number of members of less than 300), so cannot target individual members.<sup>155</sup> It further asserts that it does not inform enterprise customers which members saw their ads, nor does it share members’ personal data with enterprise customers.<sup>156</sup> LinkedIn concludes by saying that it considers that these safeguards “*significantly mitigate the effects on data subjects’ interests, rights and freedoms and LinkedIn considers that it is able to rely on its legitimate interests to display targeted advertising on the basis of behavioural analysis.*”<sup>157</sup>

Law relevant to the balancing test:

243. In *Asociația de Proprietari*, the CJEU stated as follows:

*The criterion relating to the seriousness of the infringement of the data subject’s rights and freedoms is an essential component of the weighing or balancing exercise on a case-by-case basis, required by Article 7(f) of Directive 95/46. In this respect, account must be taken, inter alia, of the nature of the personal data at issue, in particular of the potentially sensitive nature of those data, and of the nature and specific methods of processing the data at issue, in particular of the number of persons having access to those data and the methods of accessing them. The data subject’s reasonable expectations that his or her personal data will not be processed when, in the circumstance of the case, that person cannot reasonably expect further processing of those data, are also relevant for the purposes of the balancing exercise. Lastly, those factors must be balanced against the importance, for all the co-owners of the building concerned, of the legitimate interests pursued in the instant case by the video surveillance system at issue, inasmuch as it seeks essentially to ensure that the property, health and life of those co-owners are protected. (emphasis added)<sup>158</sup>*

244. It further appears from the case law of the CJEU that the pursuit of, or justification of processing by an economic interest of a controller, would rarely pass the necessity/proportionality test when weighed against the right to privacy or protection of personal data:

*As the data subject may, in the light of his [or her] fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made*

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<sup>153</sup> Ibid, at p24.

<sup>154</sup> Digital Advertising Alliance, European Interactive Digital Advertising Alliance, Digital Advertising Alliance of Canada.

<sup>155</sup> LinkedIn submissions of 10 February 2020, p25.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, [56]-[59].

*available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question. (emphasis added)<sup>159</sup>*

245. The A29WP recommended that when conducting an assessment as to whether the data subjects' interests or fundamental rights and freedoms outweigh the legitimate interests of the controller, the following approach should be taken:

- a. assess the controller's legitimate interest,
- b. assess the impact on the data subjects,
- c. arrive at a provisional balance; and
- d. consider any additional safeguards applied by the controller to prevent any undue impact on the data subjects, which might help "tip the balance" on the scale.<sup>160</sup>

246. In establishing the provisional balance, the A29WP recommends doing the following:<sup>161</sup>

- a. Consider the nature of the interests of the controller (fundamental right, other type of interest, public interest);
- b. Evaluate the possible prejudice suffered by the controller, by third parties or the broader community if the data processing does not take place;
- c. Take into account the nature of the data (sensitive in a strict or broader sense);
- d. Consider the status of the data subject (minor, employee, etc.) and of the controller (e.g. whether a business organisation is in a dominant market position);
- e. Take into account the way data are processed (large scale, data mining, profiling, disclosure to a large number of people or publication);
- f. Identify the fundamental rights and/or interests of the data subject that could be impacted;
- g. Consider data subjects' reasonable expectations;

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<sup>159</sup> Case C-131/12, *Google Spain and Google*, Judgment of 13 May 2014, [99].

<sup>160</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), p33.

<sup>161</sup> *Ibid*, pp55-56.

- h. Evaluate impacts on the data subject and compare with the benefit expected from the processing by the controller.
247. In establishing the final balance, the A29WP recommends that controllers “*identify and implement appropriate additional safeguards resulting from the duty of care and diligence.*”<sup>162</sup> These include:<sup>163</sup>
- a. data minimisation (e.g. strict limitations on the collection of data, or immediate deletion of data after use);
  - b. technical and organisational measures to ensure that the data cannot be used to take decisions or other actions with respect to individuals (‘functional separation’);
  - c. wide use of anonymization techniques, aggregation of data, privacy-enhancing technologies, privacy by design, privacy and data protection impact assessments;
  - d. increased transparency, general and unconditional right to object (opt-out), data portability & related measures to empower data subjects.

*Assessment of the nature of legitimate interests and possible prejudice if processing does not occur:*

248. LinkedIn’s interests relate to its right to conduct a business. However, as noted above, such interests will generally be outweighed by intrusions into the privacy of data subjects. The DPC considers the nature of LinkedIn’s legitimate interest to be a relevant factor in the ultimate balance that will be reached in relation to Article 6(1)(f).
249. However, the DPC also acknowledges that Members’ and third party legitimate interests are relied on by LinkedIn and accepts that these interests further the pursuit of certain fundamental rights. In this respect, the DPC has had regard to the Report of Professor J. Peter Clinch, submitted by LinkedIn along with its submissions on the Preliminary Draft Decision. The DPC notes that, in his Report, Professor Clinch sets out a number of positive public interests contributed to by the LinkedIn platform, including:
- a. Assisting geographical labour mobility.
  - b. Facilitating matching of transferable labour market skills between employers and job seekers.
  - c. Allowing employees and job seekers to advertise their skills to a large employer audience.
  - d. Providing opportunities for up-skilling and re-skilling.

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<sup>162</sup> Ibid, p56.

<sup>163</sup> Ibid.

250. The DPC also notes that the Report of Professor Clinch sets out that the interests pursued by LinkedIn support the policy aim of the European Union to allow for improvements in the allocations of resources across firms and sectors in the Single Market, including in respect of labour mobility.
251. The DPC agrees with the opinion of Professor Clinch that, in general terms, the LinkedIn platform contributes to a number of positive public interests, including interests which are consistent with the policy aims of the European Union, and considers that some weight ought to be given to the nature of these interests when carrying out the balancing assessment. The DPC also accepts that LinkedIn's targeted advertising may potentially contribute to the benefits outlined by Professor Clinch, for example by matching job seekers to job opportunities that best fit their interests and reducing search costs (including time). However, the Report of Professor Clinch does not amount to evidence that the processing of personal data for the purpose of BA & TA produces the benefits identified in the report and such benefits do not appear to be contingent on this processing. Indeed, the DPC notes the caveat contained in the Report of Professor Clinch that there is still relatively little empirical research on targeted advertising and that drawing robust inferences as to the utility of targeted advertising is difficult.
252. The DPC is therefore of the view that the nature of the interests being pursued by LinkedIn must be given moderate weight in the legitimate interests balancing tests, as a relevant factor.

Impact on data subjects:

253. The A29WP states that:

*both positive and negative consequences should be taken into account. These may include potential future decisions or actions by third parties, and situations where the processing may lead to the exclusion of, or discrimination against, individuals, defamation, or more broadly, situations where there is a risk of damaging the reputation, negotiating power, or autonomy of the data subject. In addition to adverse outcomes that can be specifically foreseen, broader emotional impacts also need to be taken into account, such as the irritation, fear and distress that may result from a data subject losing control over personal information, or realising that it has been or may be misused or compromised, – for example through exposure on the internet.*<sup>164</sup>

254. Opinion 06/2014 emphasises that this assessment should encompass potential as well as actual consequences of the data subject and should be a broad assessment.<sup>165</sup> This section will consider the impact on data subjects of BA & TA generally, and will not separate the analysis by LinkedIn's or Members' and third party interests.

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<sup>164</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), p29.

<sup>165</sup> Ibid, p37.

255. The DPC accepts that BA & TA can potentially have positive effects in presenting data subjects with the products or services they may want. However, in the Preliminary Draft Decision, the DPC also identified the concerning likelihood that a data subject would be incorrectly segmented on the basis of erroneously inferred data and would then be presented with advertising that is of no relevance and may constitute an annoyance or an intrusion. In this regard, the DPC has considered the submission of LinkedIn in its submissions on the Preliminary Draft Decision, and the position taken in the Report of Professor Stephen to the effect that, where no segmentation or ad personalisation is carried out at all, it is also highly likely that users will see completely irrelevant ads, which will also constitute an annoyance or an intrusion. The DPC therefore does not consider that the risk of seeing irrelevant ads as a result of incorrect segmentation is any greater, in terms of its *outcome*, on data subjects than the effect of not carrying BA & TA at all.
256. However, the *extent* of the processing which may be carried out of potentially inaccurate personal data is also a factor that must be taken into account. The DPC considers that a distinction must be drawn between users being shown irrelevant ads as a result of advertising being displayed on a random basis, and users being shown irrelevant ads as a result of extensive processing of potentially inaccurate personal data, which impacts negatively on data subjects' fundamental rights to protection of their personal data. The DPC is therefore of the view that the risk of incorrect segmentation is a factor that weighs in the balance *against* LinkedIn's reliance on the legitimate interests lawful basis. However, having regard to the submissions of LinkedIn on the Preliminary Draft Decision, the DPC considers that this is a factor of moderate weight in the balancing in the specific circumstances. In particular, the DPC concludes that this is a factor of only moderate weight in light of a number of measures taken by LinkedIn to reduce the risk of incorrect segmentation, such as: (i) placing almost all Members into segments only on the basis of the data that they provided directly to LinkedIn or through their activity on LinkedIn; (ii) limiting the extent of inferences to reduce the likelihood and severity of inaccurate segmentation (e.g. only inferring demographic data, such as age and gender, to the extent it was closely linked to information on a member's profile); and (iii) re-segmenting members on a daily basis (e.g. if a Member removed a particular job title from their profile, they would no longer see targeted advertising on the basis of that job title).<sup>166</sup>
257. In terms of assessing the impact on data subjects, as well as the nature and specific methods of processing, the DPC notes the fact that LinkedIn has stated that it combines information that Members input into their profiles and information about members' activities on LinkedIn and also infers Members' interests and characteristics from their profile and activity on LinkedIn as well as combining these inferred interests and characteristics with member profile and activity information.<sup>167</sup> However, the DPC accepts that LinkedIn's segments were not primarily based on combined data and that rather LinkedIn primarily placed members into segments based on individual data points,

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<sup>166</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, pp 52-53.

<sup>167</sup> LinkedIn submissions of 10 February 2020, p21.

such as company or job title. The DPC therefore considers that this is a factor of low weight in the balance in terms of the impact of processing on data subjects.

258. The DPC also notes that a data subject may be added to a large number of segments and that a large number of inferences may be drawn about them. However, the DPC accepts that LinkedIn has a finite number of first party data segments to which a Member can be added. The DPC also accepts that the majority of these segments relate to job title or field of study, and that accordingly it is not likely that a LinkedIn member would be placed into a significant number of such segments.<sup>168</sup> The DPC also accepts that LinkedIn places members into a finite amount of interest categories.<sup>169</sup> In the light of this information, the DPC considers that the amount of segments or interest categories into which a member can be placed is a factor of moderate weight in the balance in terms of the impact of processing on data subjects.
259. Additionally, the DPC accepts that Members have the possibility of reviewing each interest category into which they have been placed by LinkedIn, can check the accuracy of such interest categories, and can opt out of seeing ads based on these interest categories.<sup>170</sup>
260. In the Preliminary Draft Decision, the DPC identified the particularly concerning possibility that in a professional context a data subject could be targeted, or perhaps more problematically, excluded, from job advertisements based on inferred data which would be inappropriate factors to consider in a professional context, such as gender or age. The DPC accepts that, as set out in the Report of Professor Stephen, there are instances where age or gender may be relevant for ad targeting in a professional context and accepts the examples given by Professor Stephen of, for instance, ads for a “*women in technology*” conference and a “*single mothers*” programme. However, the DPC also notes, and agrees with, the view of Professor Stephen that gender and age would not normally be considered as relevant characteristics for ad targeting in a professional context and notes the view of Professor Stephen that in digital marketing and social media advertising practice it is not clear that gender and age characteristics are all that useful, and that targeting ads based on age and gender is “*generally considered to be an unsophisticated, inferior approach when compared to targeting ads using audience-relevant interests and behaviours*”. The DPC considers that the Report of Professor Stephen is generally consistent with the provisional conclusion, in the Preliminary Draft Decision, that gender and age are usually inappropriate factors to consider in a professional context, and that the risk arising to data subjects out of such processing is a factor that weighs heavily against LinkedIn’s reliance on the legitimate interests legal basis.

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<sup>168</sup>As noted in LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, at p54: “*approximately 24,000 of 27,000 non-location segments related to job titles. Over 1,600 further segments related to fields of study, which Members again provided directly to LinkedIn.*”

<sup>169</sup> In its November 2020 submission, LinkedIn provided the DPC with an exhaustive list of the 272 interest categories that Members could have been placed into on or between the Relevant Dates.

<sup>170</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, p57.

261. The DPC accepts LinkedIn's submission that its creation of analytics reports did not involve placing Members into segments or drawing inferences about them, and so any negative impact on data subject flowing from incorrect segmentation is not a relevant factor in respect of the reliance on the legitimate interest legal basis for the purpose of analytics.
262. Finally, the DPC considers that LinkedIn's processing of first party personal data of its Members for BA & TA, which relates to the profile information and activities of individuals on the LinkedIn platform (and inferences drawn from this information) should be distinguished from BA & TA based on monitoring of data subjects' behaviour when using LinkedIn and the targeting of ads to them based on that behaviour. The DPC considers the former has a less severe impact on data subjects. It is useful in this regard to consider the data categories that LinkedIn processed for the purposes of BA & TA, as outlined in its LIA.<sup>171</sup> These were as follows:
- a. Profile provided by members
  - b. Connections of members
  - c. **IP Address**
  - d. MemberID (MID)
  - e. Follow (members choose to follow a company)
  - f. Groups (Groups on LinkedIn that members join)
  - g. **Member engagement with content on LinkedIn (e.g., interests determined by clicks on content), including ads**
  - h. **Member job seeking activity on LinkedIn**
  - i. **Other actions taken by the member on LinkedIn**
263. The segments used by LinkedIn were described as follows:
- a. **Location (required field): LinkedIn calculates a location based on member-entered profile information or the IP address location.**
  - b. Company Name: LinkedIn determines Company Name based on member-entered profile information.
  - c. Company Industry: The primary industry of the company where the member is employed.
  - d. Company Size: LinkedIn calculates a company size based on the number of employees listed on the organization's Company Page.

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<sup>171</sup> LinkedIn's Legitimate Interests Assessment provided to the DPC on 2 November 2020.

- e. Company Connections: LinkedIn determines Company Connections based on the 1<sup>st</sup>-degree connections of employees (where there are more than 500 employees in such company).
- f. Followers: LinkedIn determines followers of a Company, based on the member-entered “follow” actions, as reflected on a Company Page.
- g. Job Title: LinkedIn calculates titles based on member-entered profiles and organizes them into standardized segments.
- h. Job Function: LinkedIn calculates job functions based on member-entered profiles and organizes them into standardized segments.
- i. Job Seniority: LinkedIn calculates job seniority based on member-entered profiles and organizes them into standardized segments.
- j. Schools: LinkedIn determines schools based on member-entered profile information.
- k. Fields of Study: LinkedIn calculates fields of study based on member-entered profiles and organizes them into standardized segments.
- l. Degrees: LinkedIn calculates degrees based on member-entered profiles and organizes them into standardized segments.
- m. Skills: LinkedIn calculates skills based on member-entered profiles (and associated endorsements by other members) and organizes them into standardized segments, including inferring additional skills based on member-entered skills.
- n. Groups: LinkedIn determines groups based on member action to join a group.
- o. **Gender: LinkedIn infers a gender based on member-entered profile information.**
- p. **Age: LinkedIn infers an age range based on member-entered profile information.**
- q. Years of Experience: LinkedIn calculates years of experience based on member-entered profile information.
- r. **Member Personas: LinkedIn calculates a number of member personas based on actions taken by members on LinkedIn and includes, among others: business travellers, career changers, IT decision makers, ex-pats, mass affluent, job seekers.**

264. In bold above, the categories of personal data processed by LinkedIn that are inferred or derived from member activity are highlighted. The DPC considers this processing to be more intrusive than the processing of information that Members have proactively provided to LinkedIn when creating their profile, or by creating connections on LinkedIn. The DPC also considers that the processing of certain inferred categories such as gender and age related data is particularly intrusive (although the DPC acknowledges that, as set



out at paragraph 286 of LinkedIn's submissions on the Preliminary Draft Decision, its inferred age categories were based on brackets rather than precise age). Additionally, this processing involves profiling, which is flagged as being a relevant factor in determining the provisional balance by the A29WP. Monitoring and profiling of data subjects are identified by the A29 WP as being likely to present a significant intrusion into the privacy of the data subject.<sup>172</sup> The DPC therefore considers that the nature of the data being processed weighs heavily in the balance *against* reliance on the legitimate interests lawful basis.

265. Finally, the DPC notes that LinkedIn has stated that first party data processed for the purposes of BA & TA includes *"attributes that our members have provided to us in their profile such as the member's industry, job function, years of experience or skills, as well as interests we derive from a member's profile, actions taken on LinkedIn and Bing and actions by similar members"* (emphasis added). According to LinkedIn, it began using interest categories derived from Members' activities on Bing for the purposes of targeting advertising in March 2019.<sup>173</sup> Bing is a search engine, and a separate data controller, where a data subject may browse according to any category or topic (compared to the more confined nature of on-platform activity as described above). In so doing, their behaviour can be monitored and analysed for the purposes of targeting advertising based on the individual's browsing. However, the DPC accepts that LinkedIn did not receive information about specific searches that Members made on Bing and did not use Bing data to create any new interest categories. Rather, LinkedIn received information from Bing about the interest categories into which Bing had placed members (processing by Bing is not the subject of this Decision) and then mapped those Bing interest categories onto the existing, limited list of LinkedIn interest categories.<sup>174</sup> The DPC also accepts that that the processing of Bing data related to ██████████ of members and acknowledges that the amount of users potentially affected is therefore low in *relative* terms (although is nevertheless a large number in absolute terms, potentially up to ██████████ Members). The DPC considers that data which is ultimately derived from search engine use is an intrusive category of data which accordingly weighs heavily against reliance on the legitimate interests lawful basis when considering the impact upon data subjects.

*Nature of personal data and the manner in which they are processed:*

266. As noted above, in *Asociația de Proprietari* the CJEU held that *"account must be taken, inter alia, of the nature of the personal data at issue, in particular of the potentially sensitive nature of those data, and of the nature and specific methods of processing the data at issue, in particular of the number of persons having access to those data and the methods of accessing them."*<sup>175</sup>

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<sup>172</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), [26].

<sup>173</sup> LinkedIn submissions of 2 November 2020, p2.

<sup>174</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, p60.

<sup>175</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, [57].

267. The DPC has considered the nature of the personal data at issue in more detail under the heading “*Impact on data subjects*”, above. Additionally, however, the DPC accepts that the interest categories into which members are placed relate primarily to the professional situation of LinkedIn Members which lessens the severity of the intrusion into data protection rights.

Reasonable expectations:

268. Recital 47 GDPR provides that “[t]he legitimate interests of a controller, including those of a controller to which the personal data may be disclosed, or of a third party, may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, taking into consideration the reasonable expectations of data subjects based on their relationship with the controller.” It further notes that “the existence of a legitimate interest would need careful assessment including whether a data subject can reasonably expect at the time and in the context of the collection of the personal data that processing for that purpose may take place. The interests and fundamental rights of the data subject could in particular override the interest of the data controller where personal data is processed in circumstances where data subjects do not reasonably expect further processing”.

269. The CJEU has also affirmed that controllers are required to assess “the data subject’s reasonable expectations that his or her personal data will not be processed when, in the circumstance of the case, that person cannot reasonably expect further processing of those data.”<sup>176</sup>

270. In Guidelines 8/2020 on the targeting of social media users, the EDPB states as follows:

*targeting of social media users may involve uses of personal data that go against or beyond individuals’ reasonable expectations and thereby infringes applicable data protection principles and rules. For example, where a social media platform combines personal data from third-party sources with data disclosed by the users of its platform, this may result in personal data being used beyond their initial purpose and in ways the individual could not reasonably anticipate. **The profiling activities that are connected to targeting might involve an inference of interests or other characteristics, which the individual had not actively disclosed, thereby undermining the individual’s ability to exercise control over his or her personal data.** (emphasis added)*<sup>177</sup>

271. On this point, LinkedIn considers that a certain level of BA & TA is within the reasonable expectations of its Members.<sup>178</sup> It says that, for example, job-seeking Members often want and expect targeted, relevant job ads.<sup>179</sup> LinkedIn states that Members agree to the

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<sup>176</sup> Case C-708/18 *TK v Asociația de Proprietari bloc M5A-ScaraA*, Judgment of 11 December 2019, [58].

<sup>177</sup> EDPB Guidelines 8/2020 on the targeting of social media users, version 2.0 (adopted 13 April 2021), [10].

<sup>178</sup> LinkedIn submissions of 1 October 2018, p13.

<sup>179</sup> LinkedIn submissions 10 February 2020, p24.

Privacy Policy at the point that they sign up to LinkedIn, which LinkedIn says helps ensure that Members are not surprised.

272. LinkedIn Members are informed via section 2.4 of its Privacy Policy that they will be served with *“tailored ads both on and off our Services”*. They are provided with the data types that are used to ground targeted advertising which includes information inferred from the categories set out (data from advertising technologies, Member provided information, data from Members’ use of LinkedIn services, information from advertising partners).
273. Members are also informed in the consent collection mechanism that *“Other data from your LinkedIn profile and activity may be used to personalize ads”*, even if the Member opted out from the use of third party data for targeted ads.
274. At the date of the Complaint, with respect to the processing of first party personal data for BA & TA, the DPC considered, in the Preliminary Draft Decision, that most data subjects using a social media platform would expect some form of targeted ads. The DPC also considered that the processing of first party personal data for BA & TA (which is not inferred or derived data) may be of a less intrusive nature, as compared to the use of inferred/derived data or third party data for this purpose.
275. However, the DPC provisionally considered that the use of inferred data categories (from first party data) was more intrusive and that it would not be within the reasonable expectations of data subjects using a free or paid for professional networking service that this amount of information would be inferred about them for targeting purposes. The DPC provisionally considered the use of inferred data such as age and gender as a basis for targeting, where such factors are impermissible considerations in most employment contexts, would be surprising to data subjects. The DPC also noted that LinkedIn combines this information with third party segments (understood to be aggregated data) to target ads.
276. In the Preliminary Draft Decision, the DPC further expressed the provisional finding that with regard to the processing of third party data for BA & TA, most data subjects would not expect or even be aware of the large ecosystem of advertising technology (‘adtech’) working behind the scenes matching up and analysing their first party personal data and conducting analytics on their third party data for the purposes of BA & TA. As noted above, LinkedIn processes third party data to provide aggregated reports to third parties which allows those third parties to determine marketing segments. Those third parties provided the marketing segments to LinkedIn to show ads to data subjects by matching the third party segments with profiles of data subjects derived from first party LinkedIn data.
277. The DPC has considered the submissions made by LinkedIn on the Preliminary Draft Decision and notes that LinkedIn refers to a study carried out by *Which?*, in 2018, which found that *“consumers recognise that they are being shown certain products or services because an organisation has assumed that they will be of interest to them”* and that they

expect this “to be based on fairly high-level factors such as their sex or age bracket”.<sup>180</sup> However, the DPC also notes that the *Which?* study concludes that most consumers “are operating with an incomplete picture of what data is being collected about them and what happens to this information, and are basing their view of what is and isn’t ‘acceptable’ in relation to data collection on relatively limited knowledge”.<sup>181</sup> The DPC thus considers that the *Which?* study does not fully support LinkedIn’s contention that the processing of age and gender-related inferred data for BA & TA purposes would be in the reasonable expectation of users, and any support for this contention is limited. Furthermore, the DPC notes that the study does not concern the use of this data in a professional context and is thus of limited utility from this perspective.

278. The DPC has also taken account of LinkedIn’s submission as to the educational and demographic profile of its members and, in this regard, has considered the Report of Professor Stephen and the Statement of Elizabeth Cawthorne, Business Operations and Analytics Associate at LinkedIn. Given the nature of the LinkedIn platform, the DPC accepts, as stated in the Report of Professor Stephen, that it is likely that LinkedIn members demographically differ from typical members of other social media platforms and that LinkedIn members are more likely to be classed as “professionals”. This is consistent with the Statement of Elizabeth Cawthorne to the effect that approximately 93% of LinkedIn’s UK and EEA members who have listed educational degree information have listed a third level qualification on their profile and that approximately 48% have listed a degree beyond undergraduate education (although the DPC notes that, as appears from the Statement of Elizabeth Cawthorne, only approximately 26% of UK and EEA users had listed degree-related information on their profile). However, the DPC does not consider that it is possible to draw any clear conclusion from the demographic profile of LinkedIn users as to whether the processing of inferred data relating to age and gender for BA & TA purposes is within the reasonable expectations of those users. The DPC is also of the view that the fact that age and gender are not characteristics which would normally be relevant in a professional context, as considered above, supports a finding that the processing of age and gender-related data is not within the reasonable expectations of LinkedIn users.
279. The DPC accepts the submission made by LinkedIn that, in respect of the relevant processing activities, it did not share bid requests with third-party advertising technology companies, did not receive personal data from third party data brokers and did not typically share members’ first party data with third parties to enable LMS customers to target ads to specific members.
280. The DPC further accepts the submission made by LinkedIn that its use of inferred data such as age and gender and inferred interest categories is disclosed in LinkedIn’s Privacy

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<sup>180</sup> *Which?, Control, Alt or Delete? Consumer research on attitudes to data collection and use* [June 2018], available at <https://about-which.s3.amazonaws.com/policy/media/documents/5b5f085479cd5-Control,%20Alt%20or%20Delete%20Consumer%20research%20on%20attitudes%20to%20data%20collection%20and%20use.pdf>, p58.

<sup>181</sup> *Ibid*, p 26.

Policy and that LinkedIn does not draw inferences about members by combining first party data with analytics reports.

281. The DPC considers that the disclosures made in LinkedIn's Privacy Policy are relevant to the assessment of whether particular processing activities are within the reasonable expectations of users. However, in line with EDPB Guidelines,<sup>182</sup> the mere fulfilment of information duties according to Articles 13 and 14 GDPR is not a transparency measure to be taken into consideration for the weighing of interests according to Article 6 (1)(f) of GDPR. Accordingly, the disclosures made by LinkedIn in its Privacy Policy cannot be determinative of whether the processing of inferred age and gender-related data for the purposes of BA & TA is within the reasonable expectations of users.
282. Finally, with regard to Bing data, the DPC notes that in LinkedIn's advertising settings, under the heading of "*Interest categories*", it states: "*Can LinkedIn use interest categories derived from your profile, actions you have taken on LinkedIn and Bing, and actions by similar members to show you relevant ads such as job ads?*" The DPC also notes that LinkedIn's Privacy Policy states, at section 2.1, that it receives data from its affiliates including Microsoft, which is the controller of Bing data. However, the DPC does not consider that these disclosures are sufficient to bring the processing of Bing data within the reasonable expectations of users. With regard to the statement contained in LinkedIn's advertising settings, this setting enabled users to opt-out of being targeted on the basis of Bing interest categories, which is not sufficient to justify the processing of personal data *ex ante*. With regard to the disclosure made in LinkedIn's privacy Policy, the DPC does not consider that the general reference to affiliates including Microsoft is sufficient to bring the processing of Bing data within the reasonable expectation of users.
283. Having regard to the foregoing, on balance, while the DPC is of the view that some processing activities for the purpose of BA & TA were within the reasonable expectations of data subjects, the DPC does not consider that LinkedIn users would reasonably expect that third party data or inferred or derived data (including data relating to their age or gender) would be used for the purpose of BA & TA, nor would users reasonably expect that LinkedIn would process Bing data for these purposes.

*Provisional balance:*

284. At this stage of the analysis, considering the factors identified above and all of the processing in the round, the DPC does not consider that the provisional balance favours LinkedIn's processing of personal data for LinkedIn's interests or Members' and third party's interests. While the DPC agrees that the LinkedIn platform contributed to certain positive public interests, these interests are outweighed by the impact on data subjects of the risk of incorrect segmentation on the basis of erroneously inferred data, and the risk arising out of the processing of third party data, inferred age and gender-related data and Bing data. The processing had an impact on the rights and freedoms of data subjects, was intrusive in nature, and given the volume of information collected about individuals

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<sup>182</sup> EDPB Guidelines 8/2020 on the targeting of social media users, para. 66.

which went beyond data solely relating to an individual's professional life, such as age and gender, was not within the reasonable expectations of data subjects within a professional context.

iv. Additional measures and safeguards

285. The A29WP states that *"the controller may consider whether it is possible to introduce additional measures, going beyond compliance with horizontal provisions of the Directive, to help reduce the undue impact of the processing on the data subjects (emphasis added)."*<sup>183</sup>
286. LinkedIn sets out in its 1 October 2018 submissions the measures and safeguards it states it has in place to lessen the impact on data subjects of the processing of their personal data for BA & TA as follows:
- a. Ensuring transparency of its services via Terms of Service, Privacy Policy, User agreement, Help Centre articles and FAQ pages explaining processing of personal data for targeted advertising;<sup>184</sup>
  - b. Facilitating data subjects in the exercise of their subject rights such as enabling them to download their data directly from LinkedIn's site;<sup>185</sup>
  - c. Appointment of a DPO;<sup>186</sup>
  - d. Ensuring data security by implementing its data security policy by means of its data security program;<sup>187</sup>
  - e. Applying principles of data protection by default and design,<sup>188</sup> using what it terms its JIRA ticketing system to identify those products that require a Privacy Impact Assessment and a Data Protection Impact Assessment in turn.

Transparency

287. The DPC has considered the disclosures made by LinkedIn in relation to its reliance on the legitimate interests legal basis in the section of this Decision concerning LinkedIn's transparency obligations.

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<sup>183</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), [41].

<sup>184</sup> Transparency requirements under the GDPR are set out at Articles 12, 13, 14 with the general principle of transparency referred to at Article 5(1)(a).

<sup>185</sup> Data subject rights are set out at Articles 15-22 GDPR.

<sup>186</sup> The requirement, in certain circumstances, to designate a DPO is set out at Article 37 GDPR.

<sup>187</sup> The security requirements relating to the processing of personal data are set out at Article 32 GDPR. The security measures implemented by LinkedIn are set out at page 24 of its 10 February 2020 submissions such as storing members' personal data on servers controlled by LinkedIn, implementing state of the art technical and organisational measures to keep data secure and safe from unauthorised access or disclosure.

<sup>188</sup> The requirements of data protection by default and design are set out at Article 25 GDPR.

288. In the section of this Decision relating to LinkedIn’s reliance on the consent lawful basis, the DPC found that the information provided by LinkedIn to members when obtaining consent for the processing of third party data for the purpose of (non-analytics) BA & TA did not communicate to data subjects that their personal data would be used for the purposes of advertising analytics even if they refused to provide consent to personalised advertising. The DPC also considered disclosures made by LinkedIn when finding that the processing of third party and inferred or derived personal data for BA & TA purposes was not within the reasonable expectations of its members.
289. LinkedIn included information about its processing in its Privacy Policy. Section 5.3 states: *“We will only collect and process personal data about you where we have lawful bases. Lawful bases include... legitimate interests.”* When a member clicked *“Learn more”*, they were brought to a page with more detailed information about LinkedIn’s legitimate interests.<sup>189</sup> This provided members with the below information:

***LinkedIn and Your Personal Data***

*We may process your personal data for the purposes of our legitimate interests or for the legitimate interests of third parties (e.g. your employer or company), provided that such processing shall not outweigh your rights and freedoms. For example, we may process your personal data to:*

- *Protect you, us, or others from threats (such as security threats or fraud)*
- *Comply with laws that apply to us*
- *Enable or administer our business, such as for quality control, consolidated reporting, and customer service*
- *Manage corporate transactions, such as mergers or acquisitions*
- *Understand and improve our business or customer relationships generally*
- *Enable us, Members, and Visitors to connect with each other, find jobs and economic opportunity, express opinions, exchange information and conduct business.*

290. Additionally, section 2.4 of the Privacy Policy states that LinkedIn targets (and measures the performance of) ads to users both on and off its services using data including inferred data (such as inferred industry, seniority, compensation bracket, age or gender). These categories of data are given by way of example in the Privacy Policy, and the Privacy Policy does not provide the full list of inferred data categories.

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<sup>189</sup> LinkedIn’s submission of 2 November 2020, p47.

### Enabling opt-outs:

291. As described above, LinkedIn provided members with granular choices over how their personal data would be used for ad targeting via opt-outs from the processing of first party personal data for BA & TA.<sup>190</sup> The A29WP identified the existence of unconditional opt-outs as being relevant to the assessment of a final balance between the legitimate interests pursued and the rights and freedoms of data subjects. Therefore, this factor can be taken into consideration in conducting the legitimate interests balancing exercise. The DPC finds that the ability to opt out would have gone some way towards remedying the defects with legitimate interests outlined above. As data subjects were ultimately enabled to opt out from all processing for BA & TA, this would ensure that they could avoid all processing for those purposes, regardless of which lawful basis was relied upon by LinkedIn.
292. However, the DPC considers that the effects of the opt-out toggles provided to members was unclear. For data subjects who selected some toggles and not others, there was no clarity about which processing operations would actually be carried out. The information provided beside each toggle in **Appendix G and H** was vague and generalised, and would not allow data subjects to understand with specificity the types of processing being carried out if they selected each toggle. In particular, it was not made clear to data subjects that they needed to opt out in order to avoid inferences being drawn about their location from their IP address, or about their age or gender from their profile information. This processing was not described specifically in the opt-outs outlined in **Appendix H**. These settings said that “*location*” would be based on “*postal code or city,*” not IP address. There is no reference to IP address in that section, or in the further detail about location provided subsequently (see **Appendix I**). There is a reference to “*demographic data*” in the first layer, without a further explanation that this includes gender and age, nor that those categories are inferred. The fact that those categories are collected is only referenced if a data subject clicks on the option to change their settings (see **Appendix I**). Any data subjects who did not click through to find out further details may be unaware of inferences being drawn about gender and age. Consequently, there was no way for LinkedIn to give effect to members’ exercise of their right to object as there was no way for LinkedIn to actually determine to which processing operations they were objecting. Furthermore, given the invasive nature of the processing, in particular of inferred or derived data of members, third party data and Bing data, the DPC does not consider that the existence of unconditional opt-outs alone *ex-post* remedies the defects identified with LinkedIn’s reliance on Article 6(1)(f) GDPR identified above.

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<sup>190</sup> The choice LinkedIn refers to here is the ability of its members to opt out, on a granular level to the processing of their first party personal data for behavioural analysis and targeted advertising. Where processing is based on legitimate interests of the controller under Article 6(1)(f) GDPR, it is a requirement under Article 21 GDPR that a data subject shall have the right to object to the processing of personal data concerning him or her. Article 21(1) states that “*the controller shall no longer process the personal data unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.*”



### Security and data protection by design and default:

293. In addition to the above, later in the Inquiry, LinkedIn also identified pseudonymisation measures employed by it in relation to third-party data it received from LMS customers' insight tags as an additional measure. This measure, in LinkedIn's view, helped minimise the risk that that data would be combined – deliberately or accidentally – with members' first-party data.<sup>191</sup> On this point, in its 2 November 2020 submissions, LinkedIn explained that these measures taken to pseudonymise Insight Tag Data include removing the member ID (MID) and replacing it with a pseudonymous identifier; truncating IP addresses; and encrypting URL and user agent within 7 days. It also states that the pseudonymised Insight Tag Data is deleted within 180 days.<sup>192</sup> The DPC notes that pseudonymisation is a security measure expressly referred to in Article 32 GDPR and that in view of the high number of affected data subjects, as well as the risks associated with LinkedIn's processing activities, pseudonymisation appears to be an appropriate technical measure to ensure a level of security appropriate to the risk. It, therefore, should be applied with processing of the scale engaged in by LinkedIn as a matter of course and should not be considered an 'additional measure' for the purposes of weighing whether the fundamental rights and freedoms of data subjects outweigh LinkedIn's legitimate interests.
294. LinkedIn has also stated that it requires advertisers to target groups of no less than 300 members. The DPC accepts the submission made by LinkedIn that the purpose of this requirement is to prevent microtargeting of ads at very small groups of individuals. The DPC also accepts LinkedIn's submission that the analytics reports that it creates for LMS customers contain aggregated data, and cannot be used to identify individual members. This appears to be a measure that protects the interests of data subjects and can be considered to constitute an additional measure weighing in the data subject's favour, for the purposes of assessing whether the legitimate interests of LinkedIn are outweighed by the interests or fundamental rights and freedoms of data subjects.

### LinkedIn's advertising policies

295. The DPC accepts LinkedIn's submission that its advertising policies prohibit ads which promote or contain discriminatory hiring practices based, *inter alia*, on age and gender and the safeguards that LinkedIn has in place in this regard. LinkedIn has stated in its submissions on the Preliminary Draft Decision that LinkedIn's advertising policies, which LMS customers must agree to comply with, state that LinkedIn does not allow

*ads that advocate, promote or contain discriminatory hiring practices or denial of education, housing or economic opportunity based on age, gender, religion, ethnicity, race or sexual preference. Ads that promote the denial or restriction of fair and equal access to education, housing, or credit or career opportunities are prohibited.*

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<sup>191</sup> LinkedIn submissions of 20 July 2023 on the Preliminary Draft Decision, p69.

<sup>192</sup> LinkedIn submissions of 2 November 2020, p22.

296. LinkedIn further requires customers to certify that if an ad relates to employment, housing, education or credit, they would not use LMS to discriminate on the basis of protected characteristics, and the option to target by age or gender was only available once advertisers had checked this box.
297. However, the DPC notes that LinkedIn's safeguards in this regard were not all in place at the time of the relevant processing the subject matter of this complaint. For example, the checkbox certification was expanded to include gender as a protected category in September 2018, and the option to target by age was removed for ads stated to be for talent leads and recruitment from April 2019.

Final balance:

298. To summarise the analysis above, the following factors are of relevance in determining whether LinkedIn can rely on Article 6(1)(f) GDPR, and the final balance between LinkedIn's interests and Members' and third party interests and the fundamental rights and freedoms of data subjects:
- a. LinkedIn's interests and Members' and third party interests are legitimate;
  - b. Processing for the purposes of BA & TA is not the least intrusive way in which LinkedIn's interests and Members' and third party interests can be protected;
  - c. However, there is no evidence that these less intrusive alternatives would equally effectively achieve LinkedIn's interests and Members' and third party interests;
  - d. For the reasons outlined at (a) to (c), LinkedIn passes the first two steps of the analysis of Article 6(1)(f) GDPR;
  - e. Both LinkedIn's interests and Members' and third party interests contribute to the pursuit of fundamental rights. However:
    - i. LinkedIn's interests are in pursuit of an economic interest, which is generally outweighed by other fundamental rights;
    - ii. It is not clear that processing for the purposes of BA & TA produces the benefits for Members and third parties identified by LinkedIn;
  - f. LinkedIn infers sensitive information about data subjects, including location data and data relating to gender and age;
  - g. There was a lack of transparency about the parameters of LinkedIn's reliance on consent and legitimate interests;
  - h. Between March 2019 and March 2023, LinkedIn targeted some members based on inferences from Bing data;
  - i. LinkedIn users would not reasonably expect that third party data or inferred or derived data (including data relating to their age or gender) would be used for the

purpose of BA & TA, nor would users reasonably expect that LinkedIn would process Bing data for these purposes.

299. In LinkedIn's favour, this processing facilitated the provision of a free service for many members that chose to use it. It also put in place safeguards including:
- a. The appointment of a DPO,
  - b. Data security measures;
  - c. Applying principles of data protection by design and default;
  - d. Ensuring opt-outs were available, to the extent outlined above;
  - e. Providing certain disclosures about the type of processing activities being carried out, to the extent outlined above;
  - f. Applying policies to restrict discriminatory practices in advertising.
300. While the DPC considers that the disclosures made by LinkedIn, opt-outs, security measures and advertising policies, described above, must be factored in when considering the final balance, given the weaknesses and caveats identified, the DPC does not consider that these measures are sufficient to tip the balance in favour of LinkedIn's reliance on the legitimate interests legal basis. Moreover, from March 2019, the DPC considers that this interference with fundamental rights and freedoms of the data subject was more severe, given the fact that included in the definition of 'first party data' was the monitoring of data subjects' activities on Bing. This will be taken into consideration in the assessment of severity at the second date in the Temporal Scope, i.e. 14 September 2020.
301. The DPC notes that individuals can decide not to use a service at all if they determine that the impact on their fundamental rights will be too great. However, users who are seeking employment opportunities may not feel that they have a genuinely free choice about whether they use the self-described "*world's largest professional network.*" Moreover, in light of the lack of transparency in relation to the processing for BA & TA, the DPC considers that these individuals were not provided with enough information at the outset to enable them to determine whether they could accept the encroachment on their right to privacy and data protection through their use of the free service. This is because, in the view of the DPC, the processing by LinkedIn went beyond that which data subjects using a free service in a professional context would have expected.
302. The DPC therefore does not consider that the balance lies in LinkedIn's favour. At the date of the Complaint, the DPC considers that the interests and fundamental rights and freedoms of the data subject outweighed the legitimate interests of LinkedIn in conducting its business and providing services due to the negative impact on data subjects and the risks to the data subject due to the manner in which personal data is processed, having regard to the extent of profiles or inferences drawn about individual data subjects. While LinkedIn put in place additional measures to protect data subjects

rights and freedoms, these did not have the effect of preventing intrusive processing of inferred data categories.

*D. Finding in relation to LinkedIn's reliance on Article 6(1)(f) GDPR*

303. Having regard to the factors that must be assessed as set out in *Rīgas Police, Asociația de Proprietari* and *MICM*, the DPC finds as follows:
- a. LinkedIn's processing of first party data of its members for BA & TA and third party data for analytics is in the legitimate interests of LinkedIn, its members and third parties;
  - b. The relevant processing activities were necessary for the purpose of the legitimate interests identified by LinkedIn; and
  - c. The legitimate interests identified by LinkedIn were overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, with respect of the processing of the first party data of its members for BA & TA and third party data for analytics.
304. On this basis, the DPC finds that LinkedIn has not identified a valid lawful basis for its processing of the first party personal data of its members for BA & TA, or third party data for analytics.
305. In the Preliminary Draft Decision, the DPC did not refer to the CJEU Judgment in *Bundeskartellamt*,<sup>193</sup> which was delivered in 4 July 2023, after the Preliminary Draft Decision was provided to LinkedIn for submissions. However, the DPC notes that the views of the CJEU in that case, concerning reliance on the legitimate interest lawful basis for processing of personal data at a large scale for the purposes of personalised advertising, is consonant with the overall assessment above.

**8. Issue C – Contractual necessity as a lawful basis under Article 6(1)(b) GDPR**

306. At the date of the Complaint (28 May 2018) LinkedIn relied on the lawful basis pursuant to Article 6(1)(b) GDPR (referred to as contractual necessity) and legitimate interests pursuant to Article 6(1)(f) GDPR as the lawful bases for the processing of first party personal data for BA & TA.
307. As set out above, in January 2020 LinkedIn ceased its reliance on Article 6(1)(b) as a lawful basis for processing first party personal data for targeted advertising and from that point relied on Article 6(1)(f) as a lawful basis for such processing. Notwithstanding such cessation, under this Issue (C), the DPC will consider whether, as at the date of the Complaint on 28 May 2018, LinkedIn was validly relying on Article 6(1)(b) as the legal basis for processing first party personal data of members for the purposes of conducting BA & TA.

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<sup>193</sup> Case C-252/21 Meta Platforms Inc. and others v Bundeskartellamt, Judgment of 04 July 2023.

308. This section will outline the requirements of the GDPR as regards reliance on Article 6(1)(b) GDPR. It will then outline elements of the Complaint that deal with LinkedIn's reliance on Article 6(1)(b), and then carry out an analysis as to validity of LinkedIn's reliance on Article 6(1)(b) GDPR by reference to LinkedIn's submissions.

A. *Requirements for valid reliance on Article 6(1)(b) GDPR*

309. Article 6(1) GDPR provides that:

*Processing shall be lawful only if and to the extent that at least one of the following applies:*

[...]

*(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.*

310. Recital 44 states that "*processing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract.*"

i. *Contractual validity*

311. In the Instagram Decision<sup>194</sup> the EDPB found that,

*one of the prerequisites for a controller to be able to rely on Article 6(1)(b) GDPR as a legal basis for the processing of personal data is that the processing takes place in the context of the performance of a contract. As previously stated by the EDPB, this condition more specifically implies that a controller, in line with its accountability obligations under Article 5(2) GDPR, has to be able to demonstrate that (a) a contract exists and (b) the contract is valid pursuant to applicable national contract laws.*<sup>195</sup>

312. After making that observation, the Instagram Decision went on to assess whether Instagram could rely on Article 6(1)(b) GDPR solely by reference to whether the processing in question in that case was "*necessary*" for the performance of a contract. It reached the conclusion that the processing in question was not necessary for the performance of the contract, and "*[a]s a consequence... Meta IE could not have relied on Article 6(1)(b) GDPR as a legal basis for the contact information processing.*"<sup>196</sup>

313. Therefore, in the Instagram Decision, it was concluded that Meta IE could not rely on the performance of a contract ground in Article 6(1)(b) GDPR because the processing was not necessary for the contract between Meta IE and its members without separately considering the validity of the contract as a matter of law, or considering whether Meta IE had demonstrated that validity. Therefore, following the approach in the Instagram

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<sup>194</sup> EDPB Binding Decision 2/2022 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Meta Platforms Ireland Limited (Instagram) under Article 65(1)(a) GDPR.

<sup>195</sup> EDPB Binding Decision 2/2022 *Instagram Decision*, adopted on 28 July 2022 at [84].

<sup>196</sup> *Ibid*, at [100].

Decision, the DPC will consider the matter of necessity first, and will not engage with the issue of contractual validity unless the DPC determines that the processing was necessary for the performance of the relevant contract.

314. In this Inquiry, LinkedIn has maintained that processing first party data for the purposes of BA & TA was necessary for the performance of the User Agreement in place between it and its members. LinkedIn suggests this User Agreement can be characterised as a contract and that it contains all the elements required under Irish contract law.<sup>197</sup> The User Agreement states, “[Y]ou agree that by clicking *Join Now*, *Join LinkedIn*’ *Sign Up*’ or similar, registering, accessing or using our services (described below), you are agreeing to enter into a legally binding contract with LinkedIn (even if you are using our Services on behalf of a company). If you do not agree to this contract (*Contract*’ or *User Agreement*’) do not click *Join Now*’ (or similar) and do not access or otherwise use any of our Services. If you wish to terminate this contract, at any time you can do so by closing your account and no longer using our Services.”<sup>198</sup> As noted above, the issue of contractual validity will only be considered further if the relevant processing can be considered to be necessary for the performance of the contract between LinkedIn and its members.

ii. Whether the processing forms part of “core bargain”

315. In Guidelines 02/2019, the EDPB stated that it endorsed previous guidance from the A29WP adopted in relation to Directive 95/46 that the “*necessary for the performance of a contract*” ground:

*must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract, but rather unilaterally imposed on the data subject by the controller. Also the fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance. [...] Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them ‘necessary’ for the performance of the contract.*<sup>199</sup>

316. Guidelines 02/2019 further state as follows:

*The controller should be able to justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose. This depends not just on the controller’s perspective, but also a reasonable data subject’s perspective when entering into the contract, and whether the contract can still be considered to be*

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<sup>197</sup> LinkedIn, in its 1 October 2018 submissions asserted that its Terms of Service that it enters into with members can be characterised as a contract and that it contains all the elements required under Irish contract law. LinkedIn confirmed by email to the DPC, on foot of a request for clarification, that the Terms of Service refers to LinkedIn’s User Agreement.

<sup>198</sup> LinkedIn User Agreement section 1.1.

<sup>199</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, adopted on 16 October 2019, at [28] quoting A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217), adopted 9 April 2014, at pp16-17.

*‘performed’ without the processing in question. Although the controller may consider that the processing is necessary for the contractual purpose, it is important that they examine carefully the perspective of an average data subject in order to ensure that there is a genuine mutual understanding on the contractual purpose.*<sup>200</sup>

317. In the Instagram Decision, the EDPB stated that in assessing “necessity,” “it is important to determine the exact rationale of the contract, i.e. its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance.”<sup>201</sup> The EDPB Guidelines further states that:

*the assessment of what is necessary involves a combined, fact-based assessment of the processing for the objective pursued. If there are realistic, less intrusive alternatives, the processing is not necessary. In this respect, the principle of proportionality should also be taken into account.*<sup>202</sup>

318. As an aid to deciding whether Article 6(1)(b) GDPR is an appropriate lawful basis, and in particular in considering the scope of the relevant contract, the EDPB suggests asking the following questions:<sup>203</sup>

- *What is the nature of the service being provided to the data subject?*
- *What are its distinguishing characteristics? What is the exact rationale of the contract (i.e. its substance and fundamental object)?*
- *What are the essential elements of the contract?*
- *What are the mutual perspectives and expectations of the parties to the contract?*
- *How is the service promoted or advertised to the data subject? Would an ordinary user of the service reasonably expect?*

319. Guidelines 02/2019 thus set out a restrictive view on when processing should be deemed to be “necessary” for the performance of a contract, and explicitly refers to personalised advertising as an example of processing that will usually not be necessary. This is, however, a general rule, and not an absolute rule. The DPC notes that the EDPB has also acknowledged that “personalisation of content may (but does not always) constitute an intrinsic and expected element of certain online services.”<sup>204</sup>

320. Consistent with this guidance, the CJEU has recently found, with regard to reliance on the contractual necessity lawful basis, as follows:

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<sup>200</sup> Ibid, [32].

<sup>201</sup> Instagram Decision at [84] footnoting A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), at p17.

<sup>202</sup> Ibid, [94].

<sup>203</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, adopted on 16 October 2019, [33].

<sup>204</sup> Ibid, [57].

*99 The fact that such processing may be referred to in the contract or may be merely useful for the performance of the contract is, in itself, irrelevant in that regard. The decisive factor for the purposes of applying the justification set out in point (b) of the first subparagraph of Article 6(1) of the GDPR is rather that the processing of personal data by the controller must be essential for the proper performance of the contract concluded between the controller and the data subject and, therefore, that there are no workable, less intrusive alternatives.*

*100 In that regard, as the Advocate General observed in point 54 of his Opinion, where the contract consists of several separate services or elements of a service that can be performed independently of one another, the applicability of point (b) of the first subparagraph of Article 6(1) of the GDPR should be assessed in the context of each of those services separately.*

*101 In the present case, in the context of the justifications that are capable of falling within the scope of that provision, the referring court mentions, as elements intended to ensure the proper performance of the contract concluded between Meta Platforms Ireland and its users, personalised content and the consistent and seamless use of the Meta group's own services.*

*102 As regards, first, the justification based on personalised content, it is important to note that, although such a personalisation is useful to the user, in so far as it enables the user, inter alia, to view content corresponding to a large extent to his or her interests, the fact remains that, subject to verification by the referring court, personalised content does not appear to be necessary in order to offer that user the services of the online social network. Those services may, where appropriate, be provided to the user in the form of an equivalent alternative which does not involve such a personalisation, such that the latter is not objectively indispensable for a purpose that is integral to those services.<sup>205</sup>*

321. In the light of the foregoing, the DPC considers that the 'core' function of the contract must be identified, that is to say having regard to the specific terms of the contract and the nature of the service offered by LinkedIn, it must be determined whether BA & TA could be said to constitute a core function of the User Agreement, or a part of the core bargain between LinkedIn and its members. This assessment must be conducted, and a finding reached in order to move on to the analysis contained in the next section i.e. to determine whether processing of personal data for BA & TA is necessary to fulfil that core function.
322. The DPC has therefore considered the terms of the specific User Agreement between LinkedIn and its members, having regard to this checklist set out by the EDPB.

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<sup>205</sup> C-252/21 *Meta Platforms Inc. and others v Bundeskartellamt*, Judgment of 04 July 2023.



## B. *The Complaint*

323. The Complaint states that LinkedIn cannot base its processing for advertising purposes on contractual necessity under Article 6(1)(b) GDPR because the main purpose of such a contract is not BA & TA. In support of this position, the Complaint cites Opinion 06/2014. That opinion states that reliance upon Article 6(1)(b) GDPR must be interpreted strictly and asserts that Article 6(1)(b) is not a suitable lawful ground for building a profile of the user's tastes and lifestyle choices. It says that even if such processing activities are mentioned in the small print of a contract, that fact alone does not make them 'necessary' for the performance of the contract. It is further asserts that "*there needs to be a direct and objective link between the processing of the data and the purpose of the execution of the contract.*"<sup>206</sup> A decision of the Commission Nationale de l'Informatique et des Libertés ('CNIL') is cited by the Complainant where infringements of the GDPR were found against Facebook wherein the CNIL decided that "*the combination of users' data for the purposes of targeted advertising is not compatible with the main purpose of the contract nor with the reasonable expectations of users.*"<sup>207</sup>
324. As can be seen from the above, the Complainant's position is premised on the idea that there is an identifiable 'purpose' or 'core' of any contract which is discernible by reference to the contract as a whole and the intention of the parties (as opposed to being strictly limited to the text of the contract). The Complainant is therefore implying that an assessment of the contract should be carried out to determine what the 'core' purpose of the contract is. It would follow from the Complainant's position that any processing that is not strictly necessary to fulfil these 'core' purposes or objectives, cannot be carried out upon reliance on Article 6(1)(b) GDPR.

## C. *Assessment of validity of LinkedIn's reliance on Article 6(1)(b)*

### i. *Whether BA & TA forms part of the "core bargain" between LinkedIn and its members*

325. LinkedIn's User Agreement was provided to the DPC with LinkedIn's first submissions of 1 October 2018. LinkedIn considers that its User Agreement (also referred to as 'terms of service' but herein referred to as 'User Agreement') constitutes the contract between LinkedIn and its members.
326. The introduction to the User Agreement states, "*Our mission is to connect the world's professionals to allow them to be more productive and successful. Our services are designed to promote economic opportunity for our members by enabling you and millions of other professionals to meet, exchange ideas, learn, and find opportunities or employees, work, and make decisions in a network of trusted relationships.*"

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<sup>206</sup> A29WP Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (adopted 9 April 2014), p10.

<sup>207</sup> Deliberation of the Restricted Committee SAN-2017-006 of 27 April 2017 pronouncing a financial sanction against FACEBOOK INC. and FACEBOOK IRELAND.

327. Section 3.1 of LinkedIn’s User Agreement incorporates the Privacy Policy into the User Agreement. Once a member clicks on the hyperlink in the User Agreement they are brought directly to the Privacy Policy (version under consideration is that in force at the time of the Complaint - 28 May 2018). The Privacy Policy, in section 1, sets out under a section entitled ‘Introduction’:

*We are a social network and online platform for professionals. People use our Services to find and be found for business opportunities and to connect with others and information. Our Privacy Policy applies to any Member or Visitor to our Services. Our registered users (**‘Members’**) share their professional identities, engage with their network, exchange knowledge and professional insights, post and view relevant content, learn and find business and career opportunities. Content and data on some of our Services is viewable to non-members (**‘Visitors’**).*

328. With regard to advertising and personalisation, at section 3.1, sub-paragraph 2, the User Agreement states as follows:

*We will not include your content in advertisements for the products and services of third parties to others without your separate consent (including sponsored content). However, we have the right, without payment to you or others, to serve ads near your content and information, and your social actions may be visible and included with ads, as noted in the Privacy Policy.*

329. The Privacy Policy describes “social actions” as: “e.g. likes, follows, comments, shares.”<sup>208</sup>

330. At section 3.6 of the User Agreement (entitled ‘Automated Processing’) it is stated:

*We use data and information about you to make relevant suggestions to you and others.*

*We will use the information and data that you provide and that we have about Members to make recommendations for connections, content and features that may be useful to you. For example, we use data and information about you to recommend jobs to you and you to recruiters. Keeping your profile accurate and up-to-date helps us to make these recommendations more accurate and relevant.*

331. Section 3.1 of the User Agreement states:

*You and LinkedIn agree that if content includes personal data, it is subject to our Privacy Policy. You and LinkedIn agree that we may access, store, process, and use any information and personal data that you provide in accordance with the terms of the Privacy Policy and your choices (including settings).*

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<sup>208</sup> Privacy Policy, Section 3.1 under “Our Services”.

332. It also states, “[W]hen you use our Services you agree to all of these terms. Your use of our Services is also subject to our Cookie Policy and our Privacy Policy, which covers how we collect, use, share, and store your personal information.”<sup>209</sup>

333. A hyperlink was provided in the first section 1.1 of the User Agreement to the Privacy Policy and Cookie Policy.

334. The first mention of the use of members’ personal data for advertising is contained at section 2 of the Privacy Policy (page 7 of 18) which states as follows:

*How we use your personal data will depend on which Services you use, how you use those Services and the choices you make in your settings. We use the data that we have about you to provide and personalize, including with the help of automated systems and inferences we make, our Services (including ads) so that they can be more relevant and useful to you and others.*

335. Section 2.4 of LinkedIn’s Privacy Policy states that:

*We target (and measure the performance of) ads to Members, Visitors and others both on and off our Services directly or through a variety of partners using the following data, whether separately or combined:*

- *Data from advertising technologies on and off our Services, like web beacons, pixels, ad tags, cookies, and device identifiers;*
- *Member-provided information (e.g., profile, contact information, title and industry);*
- *Data from your use of our Services (e.g., search history, feed, content you read, who you follow or is following you, connections, groups participation, page visits, videos you watch, clicking on an ad, etc.), including as described in Section 1.3;*
- *Information from advertising partners and publishers [Learn More]; and*
- *Information inferred from data described above (e.g., using job titles from a profile to infer industry, seniority, and compensation bracket; using graduation dates to infer age or using first names or pronoun usage to infer gender).*

*We will show you ads called sponsored content which look similar to non-sponsored content, except that they are labeled ‘ads’ or ‘sponsored.’ If you take an action (such as like, comment or share) on these ads, your action is associated with your name and viewable by others, including the advertiser.*

*Subject to your settings, if you take a social action on the LinkedIn Services, that action may be mentioned with related ads.*

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<sup>209</sup> LinkedIn User Agreement, section 1.1.

336. The DPC requested that LinkedIn provide details, including the settings and controls available to LinkedIn members which would enable them to opt in/out of the processing of their first party data for BA & TA as they were at the time of the Complaint, i.e. 28 May 2018.<sup>210</sup> LinkedIn provided screenshots of the toggles containing opt-outs available to members in relation to the processing of their first party data for BA & TA. LinkedIn stated that the screenshots it provided related to the toggles available at the date of the Commission’s letter (i.e. 14 September 2020) and it stated that it did not have screenshots available of the relevant toggles from the date of the Complaint (i.e. 28 May 2018). However, LinkedIn stated that while the order of the toggles had changed, the toggles depicted in the screenshots were otherwise broadly the same as those used at the date of the Complaint (with the exception of the reference to Bing in the explanation of “*interest categories*”).<sup>211</sup>
337. LinkedIn provided screenshots relating to the categories of first party data that a member could opt out of in respect of the processing of such personal data for BA & TA as follows:<sup>212</sup> Interest category setting; the “*connections*” setting; the “*location*” setting; the “*demographics*” setting; the “*companies you follow*” setting; the “*groups*” setting; the “*education*” setting; the “*job information*” setting; the “*employer*” setting.<sup>213</sup>
338. It is apparent from the screenshots in LinkedIn’s submissions relating to the above settings that those settings are by default set to allow processing of the first party data obtained via each subheading for the purposes of BA & TA. As described below, LinkedIn submits that such processing remains subject to a members’ settings i.e. if a member opts-out of the processing of any or all of the above categories of first party data for BA & TA, LinkedIn respects that choice and ceases processing such data for BA & TA.
339. LinkedIn submits that,

*within 48 hours of the opt out, LinkedIn no longer processes the relevant category of first-party data for purposes of serving targeted advertising to the relevant member. If the member has remained opted in to other categories of first-party data and/or has opted in to the use of third-party data about them to target ads, they will continue to receive targeted ads, but these will not be targeted based on the opted-out category of first-party data. If the member has opted out of all categories of first-party data, and has not opted in to ad targeting on the basis of third-party data about them, they will still see ads, but the ads they see will not be targeted. That was the case at the time of the Complaint and it remains the case as of today. To be clear, if a member used the settings shown in Question 1(i) above at the time of the Complaint to opt out,*

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<sup>210</sup> Request for information sent by DPC to LinkedIn, 14 September 2020, p3.

<sup>211</sup> LinkedIn submissions of 2 November 2020, p9. LinkedIn stated that at the time of the Complaint “*advertising preferences*” was named “*general advertising preferences*”.

<sup>212</sup> These settings were in place at the time of the Commission’s request for information of 14 September 2020. However, LinkedIn submitted that such opt-out settings were broadly the same as those at the time of the Complaint.

<sup>213</sup> LinkedIn submissions of 2 November 2020, pp9-12.

*LinkedIn honoured that request, regardless of our reliance at that time on both Article 6(1)(b) and Article 6(1)(f) as legal bases for the relevant processing.*<sup>214</sup>

340. In other words, LinkedIn states that it is possible for members to entirely opt out of having their first party personal data processed for BA & TA through members' exercise of the granular controls available to them in the settings hub.
341. LinkedIn takes the position that as it cannot negotiate and tailor each User Agreement to each LinkedIn member, it provides members with settings options to allow each member to adjust the substance of their arrangement with LinkedIn, within a range of contractual bargains offered by LinkedIn. Accordingly, LinkedIn submits that where a member opts out of receiving targeted advertising, the substance of the contract is that LinkedIn will provide the services and, in return, the member will receive ads which are not tailored. Likewise, if a member opts in to receiving targeted advertising, the substance of their contract with LinkedIn is that they will receive the services, including ads that are tailored to their interests. LinkedIn submits that targeted advertising is an essential element of the service and is essential to the delivery of a relevant, personalised service to members.

Analysis of core purpose:

342. The nature of the service offered is described in the first paragraph of the User Agreement where LinkedIn sets out its mission to connect the world's professionals to allow them to be more productive and successful. It states that its services are designed to promote economic opportunity by enabling millions of professionals to meet, exchange ideas, learn and find opportunities, work and make decisions in a network of trusted relationships. One of the distinguishing characteristics of LinkedIn's service offering is that its members can use the platform to search for jobs.
343. As to the mutual perspectives and expectations of parties to the contract and what processing an ordinary user of the service could reasonably expect, having carefully considered the terms of both the User Agreement and the Privacy Policy, the DPC considers that the processing of members' first party data for BA & TA on balance, cannot be considered to be a core part of the contract. The DPC considers that the core of the contract relates to the creation of a social network and the interaction between users and user-generated content such as posts and profile information.
344. On the other hand, advertising and the collection of data for personalisation purposes are, as appears from the extracts from the User Agreement and Privacy Policy and LinkedIn's submissions as set out above, subject to the user's settings, which allowed a user to opt out from any use of their personal data for the purposes of personalisation or advertising. In the DPC's view, this is a recognition by LinkedIn that the core purposes of the contract can be fulfilled without processing personal data for BA & TA. While targeted advertising is mentioned in section 2.4 of the Privacy Policy, there is no indication that this is fundamental to the provision of Services by LinkedIn to its members.

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<sup>214</sup> Ibid, pp12-13.

345. The DPC considers that this position is in line with the judgment of the CJEU in *Bundeskartellamt*, as set out above, in that personalised advertisements do not appear to be necessary in order to offer members the services of an online social network. The DPC is of the view that, as in *Bundeskartellamt*, LinkedIn’s services can be provided to members in the form of an equivalent alternative which does not involve ad personalisation, as occurs when members opt out of receiving personalised ads. Accordingly, the DPC considers that there was a “*workable, less intrusive alternative*” to processing personal data for the purpose of BA and TA, within the meaning of the *Bundeskartellamt* judgment.<sup>215</sup> The DPC therefore concludes that BA and TA is not objectively indispensable for a purpose that is integral to the social network services offered by LinkedIn.

346. In conclusion, the DPC does not consider that BA & TA could be considered to form part of the core bargain between LinkedIn and its members.

ii. *Whether processing is necessary for the performance of the User Agreement*

347. With regard to the concept of necessity, EDPB Guidelines 2/2019 state that “*the processing in question must be objectively necessary for the performance of a contract with a data subject.*”<sup>216</sup>

348. The EDPB further states that:

*when assessing whether Article 6(1)(b) is an appropriate legal basis for processing in the context of an online contractual service, regard should be given to the particular aim, purpose, or objective of the service... The controller should be able to demonstrate how the main subject-matter of the specific contract with the data subject cannot, as a matter of fact, be performed if the specific processing of the personal data in question does not occur.* (emphasis added)<sup>217</sup>

349. The EDPB goes on to state that:

*as a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services. Normally, it would be hard to argue that the contract had not been performed because there were no behavioural ads. This is all the more supported by the fact that data subjects have the absolute right under Article 21 to object to processing of their data for direct marketing purposes.*<sup>218</sup>

350. While these Guidelines are not strictly binding, the DPC considers that they are nonetheless instructive in considering this issue. The DPC also considers that the Guidelines are consistent with the position of the CJEU in *Bundeskartellamt*, as set out

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<sup>215</sup> C-252/21 *Meta Platforms Inc. and others v Bundeskartellamt*, Judgment of 04 July 2023, at para 99.

<sup>216</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, adopted on 16 October 2019, [22].

<sup>217</sup> *Ibid*, at [30].

<sup>218</sup> *Ibid*, [52].

above, that “the processing of personal data by the controller must be essential for the proper performance of the contract concluded between the controller and the data subject and, therefore, that there are no workable, less intrusive alternatives”.<sup>219</sup>

351. Having regard to the above guidance, the DPC does not consider that processing of first party data for BA & TA could be considered necessary for the performance of the User Agreement.
352. In this regard, the DPC notes that the Privacy Policy described processing for the purposes of ads and personalisation in terms that fall short of necessity. It stated, “We use the data that we have about you to provide and personalize, including with the help of automated systems and inferences we make, our Services (including ads) so that they can be more relevant and useful to you and others.”<sup>220</sup> It also states that, “We offer you choices regarding personalized ads, but you cannot opt-out of seeing other ads”<sup>221</sup> and “Subject to your settings, if you take a social action on the LinkedIn Services, that action may be mentioned with related ads.”<sup>222</sup>
353. The DPC further notes that, as set out above, LinkedIn made it clear that any processing of personal data for the purposes of BA & TA was subject to a member’s personal settings. In its submissions of 2 November 2020, LinkedIn states that its default “is to not use a member’s third-party data to target ads to them” and that “we also make it easy for members to opt out of our use of first-party data for ad targeting.”<sup>223</sup>
354. The DPC considers that this demonstrates that the processing of personal data for BA and TA purposes was not strictly necessary for the performance of a contract with LinkedIn’s members. As accepted by LinkedIn, it can provide and does provide its services to members who have opted out of processing for BA and TA purposes. The DPC considers that this demonstrates that there was a “workable, less intrusive alternative” to processing personal data for the purpose of BA and TA, within the meaning of the *Bundeskartellamt* judgment.
355. Accordingly, the DPC finds that the processing of first party data for BA & TA was not the least intrusive way that LinkedIn could have provided services to its members. That processing was not necessary in order to provide the specific service in question to LinkedIn’s members.

D. *Finding in relation to LinkedIn’s reliance on Article 6(1)(b)*

356. The DPC finds that as of the time of the Complaint, LinkedIn could not validly rely on Article 6(1)(b) as a lawful basis for the processing of first party data for the purposes of BA and TA.

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<sup>219</sup> Case C-252/21 *Meta Platforms Inc. and others v Bundeskartellamt*, Judgment of 04 July 2023, at [99].

<sup>220</sup> Privacy Policy, Section 2.

<sup>221</sup> Privacy Policy, Section 2.4.

<sup>222</sup> *Ibid.*

<sup>223</sup> LinkedIn submissions of 2 November 2022, p4.

**9. Issue D – Compliance with the requirements of transparency (insofar as it concerns information on lawful bases) under Articles 13(1)(c), 13(1)(d), 14(1)(c) and 14(2)(b) GDPR**

*A. Transparency requirements under the GDPR*

357. In this section, the DPC will consider LinkedIn's compliance with the transparency requirements under Article 13 and 14 GDPR insofar as they concern information on the lawful bases relied on by LinkedIn for its processing of members' personal data for BA & TA. In relation to the temporal scope of the Complaint, the DPC considers it appropriate to examine LinkedIn's compliance at the later date (14 September 2020) as that will represent a more up to date appraisal of LinkedIn's transparency compliance. It should be noted that LinkedIn's Privacy Policy at the time of the Complaint: 28 May 2018 (Privacy Policy dated 8 May 2018) and the Privacy Policy in force on 14 September 2020 (dated 11 August 2020) contain only a small number of differences (which have been flagged where they are referenced). Where it has been appropriate to refer to the earlier point in time the DPC has made this clear.

358. Transparency is not defined in the GDPR. Recital 39 GDPR is informative as to the meaning and effect of the principle of transparency in the context of data processing:

*It should be transparent to natural persons that personal data concerning them are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. That principle concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed [...]*

359. Recital 58 GDPR, which serves as an aid to interpretation of the principle of transparency generally, states:

*The principle of transparency requires that any information addressed to the public or to the data subject be concise, easily accessible and easy to understand, and that clear and plain language and, additionally, where appropriate, visualisation be used. Such information could be provided in electronic form, for example, when addressed to the public, through a website.*

360. This is of particular relevance in situations where the proliferation of actors and the technological complexity of practice make it difficult for the data subject to know and understand whether, by whom and for what purpose personal data relating to him or her are being collected, such as in the case of online advertising.



361. Recital 60 provides that:

*The principles of fair and transparent processing require that the data subject be informed of the existence of the processing operation and its purposes. The controller should provide the data subject with any further information necessary to ensure fair and transparent processing taking into account the specific circumstances and context in which the personal data are processed. Furthermore, the data subject should be informed of the existence of profiling and the consequences of such profiling.*

362. As recalled in the A29WP Transparency Guidelines, the concept of transparency under the GDPR is user-centric rather than legalistic and is realised by way of specific practical requirements on data controllers and processors in a number of articles.<sup>224</sup> The A29WP remarks that the quality, accessibility and comprehensibility of the information is as important as the actual content of the transparency information, which must be provided to data subjects.<sup>225</sup>

B. *Articles 13(1)(c) and 14(1)(c)*

363. Article 13(1)(c) states, inter alia, that:

*Where personal data relating to a data subject are collected from the data subject, the controller shall, at the time when personal data are obtained, provide the data subject with all of the following information:*

[...]

*(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing*

364. Article 14(1)(c) GDPR states as follows:

*Where personal data have not been obtained from the data subject, the controller shall provide the data subject with the following information:*

[...]

*(c) the purposes of the processing for which the personal data are intended as well as the legal basis for the processing.*

365. As Article 13 refers in its title to “*information to be provided where personal data are collected from the data subject*”, the DPC considers that it refers in this case to first party personal data processed by LinkedIn. According to LinkedIn, first party personal data is data that is submitted by members or created as a result of their use of the LinkedIn platform.<sup>226</sup> LinkedIn later describes first party data as data that encompasses attributes

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<sup>224</sup> A29WP Guidelines on transparency under Regulation 2016/679 (last revised and adopted on 11 April 2018), [5].

<sup>225</sup> Ibid.

<sup>226</sup> LinkedIn submissions of 1 October 2018, p5.

that its members have provided in their profile, such as the member's industry, job function, years of experience or skills, as well as interests it derives from a member's profile, actions taken on LinkedIn and actions by similar members.

366. The DPC considers that the personal data under consideration in respect of Article 14(1)(c) comprises what LinkedIn defines as its members' third party personal data (data provided to LinkedIn by its enterprise customers) and, in addition, members' personal data obtained through the use of Bing.<sup>227</sup>
367. As these provisions set out identical requirements as regards the provision of information to data subjects, the DPC will consider them together in this section of the Decision.

C. *Manner in which information must be provided*

368. Article 12(1) GDPR sets out the manner in which a controller must provide information referred to in Articles 13 and 14 i.e. *"in a concise, transparent, intelligible and easily accessible form, using clear and plain language"*. Under the heading *"(c)lear and plain language,"* the A29WP Transparency Guidelines state that,

*(t)he information should be concrete and definitive; it should not be phrased in abstract or ambivalent terms or leave room for different interpretations. In particular the purposes of, and the legal basis for, processing the personal data should be clear.*<sup>228</sup>

D. *Analysis of LinkedIn's information provision in respect of purposes and lawful bases and finding on Article 13(1)(c) and 14(1)(c) GDPR*

369. In order to comply with the provisions of Article 13(1)(c) and 14(1)(c), the DPC considers that a data controller must provide the following information, and in the following way:
- a. the purpose(s) of the specified processing operation/set of processing operations for which the specified category/specified categories of personal data are intended, and
  - b. the lawful basis being relied upon to support the processing operation/set of operations.
370. The information should be provided in such a way that there is a clear link from:
- a. a specified category/specified categories of personal data, to
  - b. the purpose(s) of the specified processing operation/set of operations, and to

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<sup>227</sup> LinkedIn submissions of 2 November 2020 stated it included in its definition of first party personal data interests derived from actions taken by LinkedIn members on Bing at p3.

<sup>228</sup> A29WP Guidelines on transparency under Regulation 2016/679 (last revised and adopted on 11 April 2018), at pp8-9.

- c. the lawful basis being relied upon to support that processing operation/set of operations.
371. It is only when the data subject has been provided with all of this information, that he/she is afforded a sufficient state of knowledge such that he/she can meaningfully:
- a. exercise choice as to whether or not he/she might wish to exercise any of his/her data subject rights and, if so, which one(s);
  - b. assess whether or not he/she satisfies any conditionality associated with the entitlement to exercise a particular right;
  - c. assess whether or not he/she is entitled to have a particular right enforced by the data controller concerned; and
  - d. assess whether or not he/she has a ground of complaint such as to be able to meaningfully assess whether or not he/she wishes to exercise his/her right to lodge a complaint with a supervisory authority.
372. The requirement that information is provided to data subjects in this manner is, in the DPC's view, consistent with the language of Article 13(1)(c) and 14(1)(c) GDPR and all of the elements that feed into, and flow from, the principle of transparency, including:
- a. the definition of "*processing*" set out in Article 4(2);
  - b. the Article 13(1)(c) requirement for a data controller to provide information in relation to "*the purposes of the processing for which the personal data are intended*";
  - c. the role of the purpose limitation principle as set out at Article 5(1)(b) and the fact that the assessment required by this principle will determine what personal data will be collected for the particular purpose(s);
  - d. the fact that Article 5(1)(a) clearly envisages a user-centric approach, i.e. "*(p)ersonal data shall be ... processed lawfully, fairly and in a transparent manner in relation to the data subject*" [emphasis added];
  - e. the role of transparency in the context of accountability; and
  - f. the requirement, set out in Article 5(2), for the controller to "*be responsible for, and be able to demonstrate compliance with*" all of the principles set out in Article 5(1), including the transparency and purpose limitation principles.
373. The DPC notes that LinkedIn takes the view that Article 13(1)(c) and 14(1)(c) do not require a "clear link" between the relevant categories of personal data, the purpose of processing and the lawful basis. For the reasons set out above, the DPC does not agree with this submission. In particular, the DPC considers that, without such a clear link being shown, the information provided would not be meaningful for a data subject and would not enable the data subject to know the purpose of a given processing operation or the

legal basis being relied upon for the said operation, which information is necessary for a data subject to be able to meaningfully exercise their rights with respect to the data.

374. As can be seen from the wording contained at section 5.3 of its Privacy Policy, LinkedIn states that it will *“only collect and process personal data about you where we have lawful bases. Lawful bases include consent (where you have given consent), contract (where processing is necessary for the performance of a contract with you (e.g., to deliver the LinkedIn services you have requested)) and ‘legitimate interests’”*.
375. Paragraph 5.3 of LinkedIn’s Privacy Policy of 8 May 2018 is entitled *“Lawful Bases for Processing”* and states as follows:

*We have lawful bases to collect, use and share data about you. You have choices about our use of your data. At any time, you can withdraw consent you have provided by going to settings.*

*We will only collect and process personal data about you where we have lawful bases. Lawful bases include consent (where you have given consent), contract (where processing is necessary for the performance of a contract with you (e.g. to deliver LinkedIn Services you have requested) and “legitimate interests”. [Learn more.](#)*

*Where we rely on your consent to process personal data, you have the right to withdraw or decline your consent at any time and where we rely on legitimate interests, you have the right to object. [Learn more.](#) If you have any questions about the lawful bases upon which we collect and use your personal data, please contact our Data Protection Officer [here](#).*

376. The relevant provisions of LinkedIn’s Privacy Policy and other disclosures regarding the processing activities carried out in reliance on each lawful basis have been examined in detail at Issues A, B and C above, when considering the validity of LinkedIn’s reliance on the respective legal bases.
377. The reference to each lawful basis relied on by LinkedIn must be examined individually to assess whether it meets the requirements of Articles 13(1)(c) and 14(1)(c) as set out above.

Consent:

378. Other than the quote above at section 5.3 of the Privacy Policy, the only other reference to the lawful basis of consent in the Privacy Policy is the statement (still in section 5.3) that *“Where we rely on your consent to process personal data, you have the right to withdraw or decline your consent at any time.”*
379. Additionally, however, and as referred to by LinkedIn in its submissions on the Preliminary Draft Decision, LinkedIn provided data subjects with additional information by way of its consent mechanism, its “Help Centre” and its “Interactions with Businesses” settings page. The DPC has considered the relevant information set out therein in more detail, in considering LinkedIn’s reliance on the consent lawful basis at Issue A above.

380. In this regard, the DPC accepts that, as set out in the A29WP Guidelines on Transparency, a “layered” approach to privacy statements/notices is appropriate.
381. For the reasons set out under Issue A, above, the DPC considers that the descriptions of LinkedIn’s partners in the relevant disclosures, from whom it obtains personal data, is vague and does not give meaningful information as to the role played by advertising technologies or the specific partners involved, and the language used is not language which would be readily accessible to or easily understood by laypersons. The DPC also does not consider that LinkedIn set out to users sufficiently clearly the processing activities in respect of which it relies on the consent lawful basis as distinct from the processing activities in respect of which it relies on the legitimate interests lawful basis, such that data subjects were not enabled to easily determine the consequences of the consent they were being asked to give. Accordingly, the DPC finds that LinkedIn has not, in its disclosures to users, set out the required information in a way that shows a clear link between the categories of personal data being processed, the purpose of the processing operations and the lawful basis being relied on for same.

Contract:

382. Other than section 5.3 of LinkedIn’s Privacy Policy, where reliance on the lawful basis of contractual necessity under Article 6(1)(b) GDPR is referred to (wherein it is stated that “*We will only collect and process personal data about you where we have lawful bases. Lawful bases include [...] contract (where processing is necessary for the performance of a contract with you (e.g., to deliver the LinkedIn Services you have requested)*”), there is no other reference to reliance on contractual necessity under Article 6(1)(b) GDPR as a lawful basis for processing of personal data.
383. The DPC notes that, in its submissions on the Preliminary Draft Decision, LinkedIn also refers to its User Agreement, which states that LinkedIn would “*use the information and data that you provide and that we have about Members to make recommendations for connections, content and features that may be useful to you*”, and to sections in its Privacy Policy, where it sets out that it processes first party data for the purpose of targeted advertising.
384. However, the DPC considers that in relation to the information on contractual necessity under Article 6(1)(b) GDPR as a lawful basis for processing personal data, there is no attempt made in the above information, nor anywhere else in the information provided by LinkedIn to its members, to identify the specific personal data processing or processing operations which are carried out in reliance upon contractual necessity as a lawful basis. As a result, the data subject is unable, as a very first step, to understand from this information which processing operation and for which purpose the contractual necessity legal basis is relied upon. The references in section 2.4 of the Privacy Policy to targeted advertising (which refers to “*tailored ads*” and “*personalised ads*”) are in no way linked to the individual lawful basis (contractual necessity) referred to in section 5.3 of the Privacy Policy. Given that this Inquiry is concerned with the lawful basis for processing for the purposes of BA & TA, it is notable that there is no reference to such purposes of processing in the context of LinkedIn’s attempts to state what lawful bases it relies on for

the processing it carries out as a data controller. A data subject therefore has no way of understanding which processing operations or sets of processing operations will be conducted in reliance on contractual necessity as a lawful basis. In other words, they cannot link the categories of personal data processed and the purposes for which they are processed to the relevant lawful basis of contractual necessity.

Legitimate interests:

385. With regard to the lawful basis of legitimate interests under Article 6(1)(f) GDPR, LinkedIn included information about its processing in its Privacy Policy. Section 5.3 states: *“We will only collect and process personal data about you where we have lawful bases. Lawful bases include [...] legitimate interests.”* A hyperlink was provided in section 5.3 (Lawful Bases for Processing) after the reference to legitimate interests as a lawful basis for processing members’ personal data. The following information on legitimate interests was provided via the hyperlink:

***LinkedIn and Your Personal Data***

*We may process your personal data for the purposes of our legitimate interests or for the legitimate interests of third parties (e.g. your employer or company), provided that such processing shall not outweigh your rights and freedoms. For example, we may process your personal data to:*

- *Protect you, us, or others from threats (such as security threats or fraud)*
- *Comply with laws that apply to us*
- *Enable or administer our business, such as for quality control, consolidated reporting, and customer service*
- *Manage corporate transactions, such as mergers or acquisitions*
- *Understand and improve our business or customer relationships generally*
- *Enable us, Members, and Visitors to connect with each other, find jobs and economic opportunity, express opinions, exchange information and conduct business.*

386. The DPC notes that, in its submission on the Preliminary Draft Decision, LinkedIn stated that its Privacy Policy further confirmed that it processes *“Member-provided information”* and *“[d]ata from your use of our Services”* to serve advertising.<sup>229</sup> The Privacy Policy additionally, it was submitted, referred to the use of inferred data to target ads, such as *“using job titles from a profile to infer industry, seniority and compensation bracket; using graduation dates to infer age or using first names or pronoun usage to infer gender”*.<sup>230</sup> At section 2.8 of the Privacy Policy, LinkedIn further informed members that it will “use

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<sup>229</sup> LinkedIn Privacy Policy of 11 August 2020, section 2.4.

<sup>230</sup> Ibid.

*your data to produce and share insights that do not identify you.*<sup>231</sup> The DPC has additionally considered the information contained in the settings for first-party advertising and processing for analytics as well as the hyperlinked webpage titled “*LinkedIn Ads and Marketing Solutions Overview*”.

387. For the reasons set out in relation to Issue B, the DPC finds that the above information does not sufficiently clearly set out: all of the categories of personal data which LinkedIn processes on the basis of its legitimate interests; the purposes of those processing operations; and the lawful basis being relied upon. Furthermore, the DPC does not consider that a sufficient link between these elements is shown, insofar as it does not clearly set out that LinkedIn relies on the legitimate interests lawful basis to process sensitive categories of inferred data such as age and gender-related data. The DPC further does not consider that the reference to LinkedIn’s use of data obtained by “*affiliates, including Microsoft*” is sufficient to inform users that it processes data obtained from users’ use of Bing and finds that the information about which personal data would be processed on the basis of legitimate interests versus consent was not made clear by LinkedIn, as has already been outlined in detail in the analysis of Issues A and B above. The DPC therefore finds that LinkedIn contravened Articles 13(1)(c) and 14(1)(c) GDPR in respect of its reliance on the legitimate interests lawful basis.

*E. Finding in respect of LinkedIn’s compliance with Articles 13(1)(c) and 14(1)(c)*

388. For the reasons set out above, the DPC finds that LinkedIn contravened Articles 13(1)(c) and 14(1)(c) in respect of the information it provided to data subjects regarding its reliance on Article 6(1)(a), Article 6(1)(b) and Article 6(1)(f) GDPR as lawful bases.

*F. Articles 13(1)(d) and 14(2)(b)*

389. With regard to the information that should be provided to data subjects where personal data is collected from them, Article 13(1)(d) states: “*where the processing is based on point (f) of Article 6(1), the legitimate interests pursued by the controller or by a third party.*” Article 14(2)(b) repeats the requirement of Article 13(1)(d) in the context where information is received from third parties.
390. As referred to above, a hyperlink is provided in section 5.3 (Lawful Bases for Processing) after the reference to legitimate interests as a lawful basis for processing members’ personal data. The following information on legitimate interests is provided via the hyperlink:

***LinkedIn and Your Personal Data***

*We may process your personal data for the purposes of our legitimate interests or for the legitimate interests of third parties (e.g. your employer or company), provided that*

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<sup>231</sup> Ibid, section 2.8.

*such processing shall not outweigh your rights and freedoms. For example, we may process your personal data to:*

- *Protect you, us, or others from threats (such as security threats or fraud)*
- *Comply with laws that apply to us*
- *Enable or administer our business, such as for quality control, consolidated reporting, and customer service*
- *Manage corporate transactions, such as mergers or acquisitions*
- *Understand and improve our business or customer relationships generally*
- *Enable us, Members, and Visitors to connect with each other, find jobs and economic opportunity, express opinions, exchange information and conduct business.*

391. The DPC notes that the primary requirement in Article 13(1)(d) and 14(2)(b) GDPR is to outline the legitimate interests pursued. On the basis of the foregoing, the DPC finds that LinkedIn has outlined in its Privacy Policy the interests upon which it sought to base its processing.

392. On that basis, the DPC finds that LinkedIn has provided information about the legitimate interests pursued, and does not find any infringement of Articles 13(1)(d) or 14(2)(b) GDPR.

#### **10. Issue E - Fairness and transparency under Article 5(1)(a) GDPR**

393. Article 5(1)(a) GDPR requires that personal data be “*processed lawfully, fairly and in a transparent manner in relation to the data subject (‘lawfulness, fairness and transparency’)*”.

394. The DPC considers that fairness is a broad principle, which requires that any processing of personal data must be fair towards the individual whose personal data are concerned, and avoid being unduly detrimental, unexpected, misleading, or deceptive.<sup>232</sup> Transparency is a cornerstone of data protection, and gives data subjects control over the processing of their personal data. As highlighted by the EDPB, the principles of fairness, lawfulness, and transparency - all three enshrined in Article 5(1)(a) GDPR - are three distinct but intrinsically linked and interdependent principles that every controller should respect when processing personal data.<sup>233</sup>

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<sup>232</sup> EDPB, Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, [69].

<sup>233</sup> Binding Decision 4/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Instagram service (Art. 65 GDPR), p59.



## A. *The Complaint*

395. In the Complaint it is alleged under a heading entitled “*Fairness of the request for consent*” that processing cannot be fair or transparent if based on the consent given by a data subject when the controller relies on another lawful basis for the same processing. The argument put forward in the Complaint is that there could not be valid reliance on consent as a lawful basis if a controller relied on it concurrently with another lawful basis under Article 6 for the same processing, given that the right to withdraw consent would essentially be meaningless if the controller could still continue to process the personal data despite a data subject withdrawing their consent to the processing thus rendering the lawful basis of consent invalid.
396. The allegation in the Complaint that the processing infringes the principles of fairness and transparency under Article 5(1)(a) GDPR centres upon the contention that LinkedIn continued to process members’ personal data for the purposes of BA & TA in circumstances where a member may have withdrawn consent to such processing and that the information provided to data subjects was misleading. This will be examined below in light of the findings on the processing by LinkedIn of its members third party data for BA & TA above.

## B. Whether LinkedIn infringed the principle of transparency in Article 5(1)(a) GDPR

397. It is relevant to the current analysis to set out, in summary form i) LinkedIn’s submissions on consent as a lawful basis under Article 6(1)(a) GDPR for the processing of its members third party personal data for BA & TA as well as ii) the findings around the processing of third party personal data by LinkedIn.
398. LinkedIn states that the consent seeking mechanisms (as set out in Figures 1 and 2 in **Appendix C**) ensure that members’ consent is freely given, specific, informed and unambiguous as required by Article 4(11) GDPR. LinkedIn stated in its submissions of 2 November 2020 that its “*default is not to target ads to our members on the basis of their third party data. In other words, we do not use third-party data about a member, including information about what a member has done on third-party websites, to target ads to that member unless they have provided LinkedIn with opt-in consent to that targeting.*”<sup>234</sup>
399. LinkedIn has consistently stated that when a person is opted out of the “*Interactions with Businesses*” setting, their third party personal data is no longer processed for BA & TA. LinkedIn has also stated that if one or both of a member’s analytics settings (“*audience insights for websites you visit*” and “*ad related actions*”) is switched to ‘yes’ - which notably it is by default for all members – such that they actively have to take steps to switch one or both of these settings off - then LinkedIn will continue to process a member’s third party personal data for the purpose of providing its analytics services.

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<sup>234</sup> LinkedIn submissions of 2 November 2020, p2.

400. As set out in detail in Issue A above, the DPC considers that there is an interrelationship between the processing of members' third party personal data by LinkedIn for i) BA & TA ii) analytics, and iii) its processing of first party personal data to serve third party ads to members. As set out in the analysis of LinkedIn's reliance on consent and legitimate interests above, LinkedIn could not rely on these different lawful bases in circumstances where the lack of transparency surrounding the parameters between processing conducted on the basis of each of those lawful bases, among other things, invalidated the consent LinkedIn obtained from data subjects. The lack of transparency also contributed to the conclusion that LinkedIn could not validly rely on legitimate interests as a lawful basis for processing.
401. The DPC notes the submission of LinkedIn on the Preliminary Draft Decision that the transparency principle requires controllers to provide information to data subjects that allows them to understand the processing of their personal data, and, if they wish, to exercise their rights. In this respect, LinkedIn submits that it opted all members out of the processing of third party data for targeted ads and that when a Member visited LinkedIn after that date, LinkedIn disclosed to them information about its advertising practices through a consent interstitial, with links to additional information. LinkedIn further refers to its disclosures to Members which, in its view, *"clearly described its uses of first-party data for targeted advertising and its uses of personal data to generate analytics reports, and that Members could exercise their rights, including their rights to see all the interest categories LinkedIn placed them into and their rights to object to this processing, through easily -accessible controls information"*.<sup>235</sup>
402. However, by this Decision, the DPC has found that, with respect to the processing by LinkedIn of third party data of members for the purpose of BA & TA, excluding analytics, LinkedIn (a) processed personal data without a lawful basis pursuant to Article 6(1) GDPR and (b) failed to comply with the requirement of Article 14(1)(c) GDPR. The reasons for the findings in this regard are set out under Issues A and D in this Decision. The DPC has also found that the processing by LinkedIn of first party personal data of its members for BA & TA and third party data for analytics did not have a valid lawful basis under Article 6(1)(f) GDPR and did not comply with the requirements of Articles 13(1)(c) and Article 14(1)(c) GDPR. The reasons for the findings in this regard are set out under Issues B and D of this Decision.
403. As highlighted above, Article 5(1)(a) GDPR concerns the broader principle of transparency. The DPC agrees with the submission of LinkedIn that a finding of non-compliance with the GDPR's prescriptive transparency obligations does not automatically lead to an infringement of the transparency principle in Article 5(1)(a) GDPR. The principle of transparency is an *"overarching obligation under the GDPR"*<sup>236</sup> and is a broader expression of transparency than the specific obligations provided for in Article 12 – 14 GDPR. Accordingly, while non-compliance with Articles 13 and 14 GDPR (or parts thereof)

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<sup>235</sup> LinkedIn's submissions on the Preliminary Draft Decision of 20 July 2023, p93.

<sup>236</sup> A29WP 'Guidelines on transparency under Regulation 2016/679' WP 260 rev.01 (Revised 11 April 2018), at [1].

do not necessitate a finding of non-compliance with Article 5(1)(a) GDPR, in certain circumstances it is appropriate to find that there has been an infringement of both the specific transparency obligations and the broader principle of transparency where the extent of non-compliance with the former is sufficiently extensive to amount to an overarching infringement of the transparency principle.<sup>237</sup>

404. In this regard, the DPC notes the EDPB's interpretation of this matter which arose following the EDPB's adoption of a binding decision<sup>238</sup> relating to IN 18-12-2, an inquiry conducted by the DPC into WhatsApp Ireland Limited's compliance with Articles 12, 13 and 14 GDPR. The EDPB Decision states as follows:

*188. The EDPB notes that the concept of transparency is not defined as such in the GDPR. However, Recital 39 GDPR provides some elements as to its meaning and effect in the context of processing personal data. As stated in the Transparency Guidelines, this concept in the GDPR "is user-centric rather than legalistic and is realised by way of specific practical requirements on data controllers and processors in a number of articles". The key provisions concretising the specific practical requirements of transparency are in Chapter III GDPR. However, there are other provisions that also realise the transparency principle, for example, Article 35 (data protection impact assessment) and Article 25 GDPR (data protection by design and by default), to ensure that data subjects are aware of the risks, rules and safeguards in relation to the processing, as stated in Recital 39 GDPR.*

*189. The EDPB also notes that transparency is an expression of the principle of fairness in relation to the processing of personal data and is also intrinsically linked to the principle of accountability under the GDPR. In fact, as noted in the Transparency Guidelines, a central consideration of the principles of transparency and fairness is that "the data subject should be able to determine in advance what the scope and consequences of the processing entails" and should not be taken by surprise about the ways in which their personal data has been used.*

*190. Thus, it is apparent that, under the GDPR, transparency is envisaged as an overarching concept that governs several provisions and specific obligations. As stated in the Transparency Guidelines, "[t]ransparency is an overarching obligation under the GDPR applying to three central areas: (1) the provision of information to data subjects related to fair processing; (2) how data controllers communicate with data subjects in relation to their rights under the GDPR; and (3) how data controllers facilitate the exercise by data subjects of their rights".*

*191. This being said, it is important to differentiate between obligations stemming from the principle of transparency and the principle itself. The text of the GDPR makes this distinction, by enshrining transparency as one of the core principles under Article*

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<sup>237</sup> EDPB Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR (Adopted 28 July 2021).

<sup>238</sup> EDPB Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR (Adopted 28 July 2021).

*5(1)(a) GDPR on the one hand, and assigning specific and concrete obligations linked to this principle, on the other one. The concretisation of a broad principle in specific rights and obligations is not a novelty in EU law. For example, with regard to the principle of effective judicial protection, that CJEU has stated that it is reaffirmed in the right to an effective remedy and to a fair hearing, enshrined in Article 47 of the Charter. Nonetheless, that does not imply that principles as such cannot be infringed. In fact, under the GDPR the infringement of the basic principles for processing is subject to the highest fines of up to 20.000.000€ or 4% of the annual turnover, as per Article 83(5)(a) GDPR.*

*192. On the basis of the above considerations, the EDPB underlines that the principle of transparency is not circumscribed by the obligations under Articles 12-14 GDPR, although the latter are a concretisation of the former. Indeed, the principle of transparency is an overarching principle that not only reinforces other principles (i.e. fairness, accountability), but from which many other provisions of the GDPR derive. In addition, as stated above, Article 83(5) GDPR includes the possibility to find an infringement of transparency obligations independently from the infringement of transparency principle. Thus, the GDPR distinguishes the broader dimension of the principle from the more specific obligations. In other words, the transparency obligations do not define the full scope of the transparency principle.*

*193. That being said, the EDPB is of the view that an infringement of the transparency obligations under Articles 12-14 GDPR can, depending on the circumstances of the case, amount to an infringement of the transparency principle.*

405. In the particular circumstances, the DPC finds that LinkedIn's informational deficits do not constitute an infringement of the principle of transparency in Article 5(1)(a) GDPR. While the infringements of Articles 13(1)(c) and 14(1)(c) GDPR are serious in nature, they are not sufficiently extensive to amount to an overarching infringement of the transparency principle. The DPC also accepts the submission of LinkedIn regarding the information that it did provide to members in a layered manner, and that there must be a distinction drawn between a case where a controller does not provide any or very limited transparency information (which would be an extremely serious infringement and may amount to an overarching infringement of the principle of transparency) and a situation (as in this case) where the transparency information provided was deficient and involves infringements of a limited number of the obligations of transparency in Articles 13 and 14 GDPR.

C. Whether LinkedIn infringed the principle of fairness in Article 5(1)(a) GDPR

406. The DPC notes that aspects of the fairness principle have been further articulated by the EDPB in its Guidelines on Article 25 Data Protection by Design and by Default.<sup>239</sup> While these aspects were being considered by the EDPB in the context of privacy by design and default under Article 25 GDPR, they are useful to review in the context of considering the

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<sup>239</sup> EDPB, Guidelines 4/2019 on Article 25 Data Protection by Design and by Default.

key elements of the fairness principle. Below, five criteria – autonomy, interaction, expectation, respect for rights and truthfulness – are listed and analysed by reference to LinkedIn’s processing operations:

- a. *Autonomy – Data subjects should be granted the highest degree of autonomy possible to determine the use made of their personal data, as well as over the scope and conditions of that use or processing.*
  - i. LinkedIn’s practices removed autonomy from their personal data, in circumstances where data subjects were not in a position to fully understand the uses that would be made of their personal data if they did or did not consent to its processing. They consequently were not in a position to determine the uses that would be made of their data.
- b. *Interaction - Data subjects must be able to communicate and exercise their rights in respect of the personal data processed by the controller.*
  - i. As the text of the consent mechanism provided to data subjects by LinkedIn did not communicate to data subjects the uses that would be made of their data depending on whether they provided consent, data subjects would be impacted in the exercise of their rights. They would not be aware, for example, which data was being processed subject to consent or legitimate interests, and would consequently not know whether the right to object or to withdraw consent was exercisable in respect of that data.
- c. *Expectation – Processing should correspond with data subjects reasonable expectations.*
  - i. It was outlined above how data subjects would not expect third party data or inferred data and Bing data to be processed on the basis of legitimate interests for the purposes of BA & TA.
- d. *Respect rights - The controller must respect the fundamental rights of data subjects and implement appropriate measures and safeguards and not impinge on those rights unless expressly justified by law*
  - i. The rights to privacy and data protection are protected by the EU Charter for Fundamental Rights. Article 8(2) states that such data must be processed “on the basis of the consent of the person concerned or some other legitimate basis laid down by law.” The absence of a lawful basis for processing amounts to an infringement of this fundamental right.
- e. *Truthful – The controller must make available information about how they process personal data, they should act as they declare they will and not mislead the data subjects.*

- i. As outlined above in relation to the examination of LinkedIn's consent mechanism, the wording in that mechanism was misleading to data subjects about the processing carried out in reliance on consent.
407. Therefore, LinkedIn's processing practices affected at least five aspects of the fairness principle as articulated by the EDPB.
408. In its submissions on the Preliminary Draft Decision, LinkedIn has submitted that the DPC has not demonstrated that LinkedIn's processing did not meet the above criteria and that its processing was not unexpected, misleading or detrimental. In particular, LinkedIn refers to: (i) its decision to opt all Members out of the use of targeted advertising based on third party data in May 2018 ensuring their autonomy to consent to the processing and its respect of their rights; (ii) the detailed information and controls it provided to users on the processing allowing them to exercise their rights; (iii) the reasonable expectations of users with regard to the use of inferred data (as considered under Issue B above). Furthermore, LinkedIn submits that that processing was truthful, in light of the extensive information and granular controls provided, and asserts that *"[h]ere again ... the DPC reaches its provisional conclusion on the basis of a flawed interpretation of a single sentence in the consent interstitial."*
409. The DPC does not accept the submissions of LinkedIn that the processing was carried out in compliance with the fairness principle. With regard to the decision to opt all members out of the processing of third party data for BA & TA, and obtain consent by way of the consent interstitial, the DPC has found in Issue A that the information provided to users was misleading. In particular, it was insufficiently clear regarding the processing purposes to which data subjects could be considered to have consented to if they clicked *"Accept & Continue"*, having regard to the closeness between the various purposes for which LinkedIn processed first and third party data and the consequent lack of clarity in the consent mechanism relied on by LinkedIn.
410. Furthermore, and contrary to the submissions of LinkedIn, the conclusions of the DPC regarding the lack of fairness, autonomy, and truthfulness are not based on a single sentence in the consent tool. In this regard, the DPC notes that it has found in this Decision that the combination of the words *"continue"* and *"accept"* would reasonably be considered to nudge a data subject into accepting in order to continue. The DPC has also found in this Decision that the information which LinkedIn provided in the consent interstitial was framed in such a manner as to imply that users would not see *"relevant jobs"* if they did not consent, and did so in a way that went beyond what its actual impact was in respect of users being shown relevant jobs. Additionally, the exclusive references to ads *"on LinkedIn"* on the first layer of the consent interstitial may have deceived data subjects as to the scope of the processing carried out on the basis of their consent. As highlighted by the EDPB, in its consideration of the fairness principle, the options to provide consent or abstain should be equally visible, and accurately represent the

ramifications of each choice to the data subject.<sup>240</sup> In addition, the information and options should be provided in an objective and neutral way, avoiding any deceptive or manipulative language or design, and should not nudge a data subject in the direction of allowing the controller to collect more personal data than if the options were presented in an equal and neutral way.<sup>241</sup> The DPC considers that this was clearly not the case here for the reasons set out above.

411. The DPC has additionally set out in detail above (at paras 268 to 283) its conclusions as to how LinkedIn users would not reasonably have expected that third party data or inferred or derived data (including data relating to their age or gender) would be used for the purpose of BA & TA. Similarly, users would not reasonably expect that LinkedIn would process Bing data for such purposes. Furthermore, the DPC does not consider that the information provided by LinkedIn adequately informed members on the lawful bases relied on by LinkedIn for its processing of members' personal data for BA & TA. This negatively impacted the autonomy of data subjects and their knowledge of their rights, which varied depending on the particular lawful basis relied on for the particular processing of the data in question.
412. Therefore, the DPC finds that LinkedIn contravened the principle of fairness in Article 5(1)(a) GDPR.

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<sup>240</sup> EDPB Binding Decision 2/2023 on the dispute submitted by the Irish SA regarding TikTok Technology Limited (Art. 65 GDPR) (adopted 2 August 2023), pp22-23.

<sup>241</sup> *Ibid.*

## 11. Summary of Conclusions in this Decision

	Issue	Summary of findings
<b>A</b>	Whether LinkedIn is entitled to rely on Article 6(1)(a) GDPR to process third party data of its members for the purpose of BA & TA, excluding analytics.	LinkedIn did not validly rely on Article 6(1)(a) GDPR to process third party data of its members for the purpose of BA & TA, excluding analytics, on the basis that the consent obtained by LinkedIn was not freely given, sufficiently informed or specific, or unambiguous. Accordingly, LinkedIn contravened Article 6 GDPR and Article 5(1)(a) GDPR insofar as it requires the processing of personal data to be lawful.
<b>B</b>	Whether LinkedIn is entitled to rely on Article 6(1)(f) GDPR to process first party data of its members for the purpose of BA & TA and third party data for the purpose of analytics.	LinkedIn did not validly rely on Article 6(1)(f) GDPR for its processing of first party personal data of its members for BA & TA, or third party data for analytics. Accordingly, LinkedIn contravened Article 6 GDPR and Article 5(1)(a) GDPR insofar as it requires the processing of personal data to be lawful.
<b>C</b>	Whether LinkedIn is entitled to rely on Article 6(1)(b) GDPR to process first party data of its members for the purpose of BA & TA.	LinkedIn did not validly rely on Article 6(1)(b) GDPR to process first party data of its members for the purpose of BA & TA.  Accordingly, LinkedIn contravened Article 6 GDPR and Article 5(1)(a) GDPR insofar as it requires the processing of personal data to be lawful.
<b>D</b>	Whether LinkedIn complied with Articles 13(1)(c), 13(1)(d), 14(1)(c) and 14(2)(b) GDPR.	LinkedIn contravened Articles 13(1)(c) and 14(1)(c) GDPR in respect of the information it provided to data subjects regarding its reliance on Article 6(1)(a), Article 6(1)(b) and Article 6(1)(f) GDPR as lawful bases.  LinkedIn did not contravene Article 13(1)(d) or Article 14(2)(b) GDPR.
<b>E</b>	Whether LinkedIn complied with the fairness and transparency principles under Article 5(1)(a) GDPR.	LinkedIn contravened the principle of fairness in Article 5(1)(a) GDPR.



## 12. Exercise of Corrective Powers

413. As detailed above, the DPC has found that LinkedIn has infringed Article 5(1)(a) and various provisions of Article 6, 13 and 14 GDPR in relation to the following five issues in relation to the Complaint:

- a. **Issue A:** Having not met the requirements for valid consent under Article 4(11) GDPR, LinkedIn did not validly rely on Article 6(1)(a) for the processing of third party data of its members for BA & TA. Consequently, LinkedIn has not identified a valid lawful basis for this processing, resulting in an infringement of the requirements of Article 6 GDPR (that processing has a lawful basis) and the requirements in Article 5(1)(a) GDPR (that processing must be lawful);
- b. **Issue B:** LinkedIn did not validly rely on Article 6(1)(f) for the processing of first party personal data of its members for BA & TA, or third party data for analytics, consequently, LinkedIn has not identified a valid lawful basis for this processing, resulting in an infringement of the requirements of Article 6 GDPR (that processing has a lawful basis) and the requirements in Article 5(1)(a) GDPR (that processing must be lawful);
- c. **Issue C:** LinkedIn did not validly rely on Article 6(1)(b) GDPR for the processing of first party personal data for the purposes of BA & TA, consequently, LinkedIn has not identified a valid lawful basis for this processing, resulting in an infringement of the requirements of Article 6 GDPR (that processing has a lawful basis) and the requirements in Article 5(1)(a) GDPR (that processing must be lawful);
- d. **Issue D:** LinkedIn did not comply with its obligations of transparency insofar as it concerned information on its reliance on the lawful basis of consent under Article 6(1)(a) GDPR, contractual necessity under Article 6(1)(b) GDPR or legitimate interests under Article 6(1)(f) GDPR as required under Articles 13(1)(c) and 14(1)(c) GDPR; and
- e. **Issue E:** LinkedIn infringed the principle of fairness in Article 5(1)(a) GDPR.

414. In its Final Submissions, LinkedIn submitted that it understood that the DPC did not purport to find an infringement of the principle of lawfulness under Article 5(1)(a) GDPR and requested that the DPC clarify this matter. The Preliminary Draft Decision clearly notified LinkedIn of the DPC's proposed finding of infringement in respect of the lawfulness principle and that finding has been maintained throughout the inquiry since the Preliminary Draft Decision. Therefore, for the avoidance of all doubt, as is detailed in the summary of conclusions at section 11 above, and in relation to the exercise of corrective powers at paragraph 413, it is the finding of the DPC that LinkedIn infringed the principle of lawfulness in Article 5(1)(a) in respect of Issues A, B and C as the processing examined under each of those issues was conducted without a valid lawful basis.

415. Under Section 113(4)(a) of the 2018 Act, where the DPC adopts a decision (in accordance with Section 113(2)(b)), it must, in addition, make a decision as to whether a corrective power should be exercised in respect of the controller or processor concerned and, if so, the corrective power to be exercised. The remaining question for determination in this Decision is whether or not any of those infringements merit the exercise of any of the corrective powers set out in Article 58(2) and, if so, which corrective powers.

416. Article 58(2) GDPR sets out the corrective powers that supervisory authorities may exercise in respect of non-compliance by a controller or processor. In deciding whether to exercise those powers, Recital 129 provides guidance as follows:

*... each measure should be appropriate, necessary and proportionate in view of ensuring compliance with this Regulation, taking into account the circumstances of each individual case...*

417. Having carefully considered the infringements identified in this Decision, the DPC has decided to exercise certain corrective powers in accordance with Section 115 of the 2018 Act and Article 58(2) GDPR. In summary, the corrective powers that the DPC has decided are appropriate to address the infringements in the particular circumstances are:

- a. **Article 58(2)(b)**: issuing a reprimand to LinkedIn in respect of its infringements of the GDPR identified in this Decision;
- b. **Article 58(2)(d)**: imposing an order to LinkedIn to bring its processing into compliance with the GDPR in the manner specified below;
- c. **Article 58(2)(i)**: imposing administrative fines, pursuant to Article 83, in respect of LinkedIn's infringements of the GDPR identified in this Decision.

418. The DPC has set out further detail below in respect of each of these corrective powers and the reasons why the DPC has decided to exercise them.

A. *Decision to impose a reprimand*

419. Article 58(2)(b) GDPR provides that a supervisory authority shall have the power:

*to issue reprimands to a controller or a processor where processing operations have infringed provisions of this Regulation.*

420. The DPC has decided to impose a reprimand on LinkedIn for the infringements identified in this Decision: Articles 5(1)(a), 6(1), 13(1)(c) and 14(1)(c) GDPR. The purpose of the reprimand is to dissuade non-compliance with the GDPR. The infringements concern the personal data of a large number of data subjects, indicate a lack of an appropriate legal basis for BA & TA, include a failure to comply with a number of the substantive transparency provisions of the GDPR, and core principles of the GDPR set out in Article 5(1)(a) GDPR. Reprimands are appropriate in respect of such non-compliance, to formally recognise the serious nature of the infringements and to dissuade such non-compliance.

421. The reprimand is necessary and proportionate in addition to the other corrective measures imposed in this Decision. The DPC finds it is appropriate to impose a reprimand on LinkedIn to deter future similar non-compliance by LinkedIn and other controllers or processors carrying out similar processing operations. A reprimand is proportionate in the circumstances where it does not exceed what is required to enforce compliance with the GDPR, taking into account the serious nature of the infringements and the potential for harm to data subjects.

B. *Decision to order that processing be brought into compliance*

422. Article 58(2)(d) GDPR provides that a supervisory authority shall have the power

*to order the controller or processor to bring processing operations into compliance with the provisions of this Regulation, where appropriate, in a specified manner and within a specified period.*

423. The DPC considers that an order to bring processing into compliance under Article 58(2)(d) should be imposed (the '**Order**'). This Order:

- a. firstly, requires LinkedIn to bring its Privacy Policy into compliance with Articles 13(1)(c) and 14(1)(c) GDPR as regards information provided on data processed pursuant to Articles 6(1)(a), 6(1)(b) and 6(1)(f) GDPR, if those legal bases continue to be relied upon by LinkedIn for the purposes of BA & TA and analytics; and
- b. secondly, requires LinkedIn to take the necessary action to bring its processing of personal data for the purpose of BA & TA into compliance with Article 6(1) GDPR, in particular, to take the necessary action to address the findings in this Decision that LinkedIn could not carry out the identified processing in this Decision on the basis of Articles 6(1)(a), 6(1)(b) and 6(1)(f) GDPR. Such action may include, but is not limited to, the identification of appropriate alternative legal basis/bases for the processing under Article 6(1) GDPR together with the implementation of any necessary measures, as might be required to satisfy the conditionality associated with that/those alternative legal basis/bases.

424. Having regard to the non-compliance in this Decision, in the DPC's view, the Order is proportionate and is the minimum order required to guarantee that compliance will take place in the future. The DPC is satisfied that the Order is a necessary and proportionate action, including with reference to the reprimand imposed above. The Order requires specific remedial action from LinkedIn, whereas the reprimand formally recognises the serious nature of the infringements. Both measures are necessary and proportionate in the context of the identified non-compliance in this Decision.

425. The DPC therefore requires LinkedIn to comply with the Order within three months of the date of notification of any final decision in this Inquiry. Further to this, the DPC requires LinkedIn to submit a report to the DPC within that period detailing the actions it has taken to comply with the Order.

426. The DPC has considered LinkedIn's Submissions on the Preliminary Draft Decision in which it requested that it be given a period of 6 months to comply with the above Order, to run from

the expiry of the time limit for appealing the final decision. The DPC does not consider that LinkedIn has demonstrated that it requires a period of 6 months to comply with the above Order to bring its processing into compliance with the GDPR.

C. *Administrative fines*

427. Article 58(2)(i) GDPR provides that a supervisory authority shall have the power:

*to impose an administrative fine pursuant to Article 83, in addition to, or instead of measures referred to in this paragraph, depending on the circumstances of each individual case.*

428. This makes clear that the DPC may impose administrative fines in addition to, or instead of, the order and reprimand imposed in this Decision. Section 115 of the 2018 Act mirrors this by providing that the DPC may do either or both of imposing an administrative fine and exercising any other corrective power specified in Article 58(2).

429. Article 83(1) GDPR provides:

*Each supervisory authority shall ensure that the imposition of administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in paragraphs 4, 5 and 6 shall in each individual case be effective, proportionate and dissuasive.*

430. Article 83(2) GDPR provides that when deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in each individual case, due regard shall be given to the following:

*(a) the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;*

*(b) the intentional or negligent character of the infringement;*

*(c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;*

*(d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;*

*(e) any relevant previous infringements by the controller or processor;*

*(f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;*

*(g) the categories of personal data affected by the infringement;*

*(h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;*

*(i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;*

*(j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and*

*(k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.*

431. The decision as to whether to impose an administrative fine in respect of an infringement is a cumulative decision which is taken having had regard to all of the factors as set out in Article 83(2)(a) to (k). Therefore, the DPC considers each of these factors below in respect of the infringements identified in this Decision.

432. In applying the Article 83(2)(a) to (k) factors to the infringements, the DPC has set out below its analysis of the infringements collectively where it is appropriate to do so. However, the DPC has considered every infringement separately when deciding whether to impose an administrative fine in respect of each infringement. The DPC has made a separate decision on each infringement, and has made each decision without prejudice to any factors arising in respect of the other infringements. For the avoidance of doubt, the decision as to whether to impose an administrative fine in respect of each infringement, and the amount of that fine where applicable is independent and specific to the circumstances of each particular infringement.

*i. Article 83(2)(a): the nature, gravity and duration of the infringement taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them*

433. In assessing the nature, gravity and duration of LinkedIn's infringements, the DPC must have regard to the nature, scope and purpose of the processing, as well as the number of data subjects affected and the level of damage suffered by them. Therefore, the DPC will first assess these factors, before analysing the nature, gravity and duration of the infringements.

434. In terms of the **number** of data subjects affected, it is reported that LinkedIn had over 700 million members globally in 2020.<sup>242</sup> Furthermore, LinkedIn reported "For the six-month period ending on 31 December 2022, a monthly average of: ██████████ logged-in users visited LinkedIn's services in the EU; and ██████████ site visits from EU-based users to LinkedIn occurred in a logged-out state."<sup>243</sup> In its submissions on the Preliminary Draft Decision, LinkedIn

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<sup>242</sup> <https://www.microsoft.com/investor/reports/ar20/index.html>

<sup>243</sup> <https://www.linkedin.com/help/linkedin/answer/a1441790>

has submitted that the number of EU/EEA users affected by the relevant processing activities is in fact a lower number, and stated that available data shows that LinkedIn had an estimated [REDACTED] members<sup>244</sup> on 28 May 2018 and [REDACTED] members on 14 September 2020 (the two dates constituting the temporal scope of this Decision), representing the maximum potential number of affected users. LinkedIn also stated that the amount of members affected by each issue in respect of which this Decision makes a finding of an infringement is lower than this estimated maximum amount. LinkedIn stated that, with respect to Issue A (consent), between 28 May 2018 and 14 September 2020, an estimated [REDACTED] members provided consent. LinkedIn also stated that in May 2018, approximately [REDACTED] members visited the LinkedIn site in a logged-in state, and that any user who did not visit the LinkedIn site in a logged-in state would not have seen targeted ads on the platform. In respect of Issue B (legitimate interests), LinkedIn stated that it only used Bing Data in respect of likely [REDACTED] of its members in September 2020. The DPC accepts the submission of LinkedIn that the amount of users likely to have been actually affected by the relevant infringements was lower than an amount in the hundreds of millions. However, the figures identified by LinkedIn nevertheless represent an extremely significant amount of affected data subjects.

435. In relation to the **nature, scope and purposes** of the processing, it includes information obtained by LinkedIn directly from individuals in their member profiles as well based on their use of LinkedIn and the Bing Search engine. It also includes information collected/observed/inferred by third parties about individuals, and data provided to LinkedIn by its enterprise customers (Third Party Data). The purpose of such collection is to serve targeted advertising to individuals. A large ecosystem of advertising technology behind the scenes of the LinkedIn user interface facilitates this purpose by matching and analysing individuals' First Party Data and conducting analytics on Third Party Data for the purpose of BA & TA. The DPC does not accept the submission made by LinkedIn, in its Submissions on the Preliminary Draft Decision, that the scope of the processing for which it relied on the consent lawful basis was narrow. In circumstances where the DPC has found that LinkedIn could not rely on any of the lawful bases for processing it selected in respect of the processing of personal data within the scope of this Decision, the DPC considers it appropriate to consider the breadth of such processing in its entirety, and having regard to the considerations set out in this paragraph the DPC considers that the nature, scope and purposes of this processing are broad.

436. In terms of the **nature** of the infringements, the infringements in relation to Issues A-C concern LinkedIn's processing of personal data of individuals without having a lawful basis for doing so. This processing of personal data without a lawful basis constitutes a serious interference with the fundamental right to data protection set out in Article 8 of the Charter of Fundamental Rights and supplemented by the GDPR. The EDPB has described lawfulness of processing as "*one of the fundamental pillars of the data protection law and considers that processing of*

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<sup>244</sup> As per LinkedIn's submission submissions of 20 July 2023 on the Preliminary Draft Decision, the references to "Members" in this section encompass all data subjects in the EEA and UK who held a LinkedIn account at the relevant dates.

*personal data without an appropriate legal basis is a clear and serious violation of the data subjects' fundamental right to data protection".*<sup>245</sup>

437. Processing personal data without a valid lawful basis causes data subjects to suffer significant loss of control over their data. The DPC considers that this loss of control constitutes significant non-material damage to data subjects. LinkedIn's use of third party segments to target advertising to data subjects based on first party data (as described in paragraph 164 of this Decision) was insufficiently communicated to data subjects. Similarly, LinkedIn provided misleading information to data subjects in the consent interstitial about the personal data that would be processed based on each of consent and legitimate interests. Individuals could also be targeted, or, more problematically excluded, from job advertisements based on inferred data that would normally be inappropriate factors to consider in a professional context.
438. The infringements in Issue D concern data subjects' right to information about the processing of personal data. Infringing transparency obligations prevents data subjects making informed decisions about engaging in activities that cause their personal data to be processed, or making informed decisions about enforcing their data protection rights. The transparency infringements likely affected data subjects' decisions when consenting to the processing of their data (if they did indeed consent). In addition, the transparency infringements likely made it impossible for individuals to understand what legal basis was being relied upon by LinkedIn, and in what circumstances their personal data was processed by LinkedIn for the purposes of BA & TA.
439. The infringement identified in Issue E in relation to the principle of fairness, that of Article 5(1)(a), "*is an overarching principle which requires that personal data should not be processed in a way that is unjustifiably detrimental, unlawfully discriminatory, unexpected or misleading to the data subject.*"<sup>246</sup> As noted by the EDPB, measures and safeguards implementing the principle of fairness also support the rights and freedoms of data subjects, specifically the right to information (transparency), the right to intervene (access, erasure, data portability, rectify) and the right to limit the processing (right not to be subject to automated individual decision-making and non-discrimination of data subjects in such processes).<sup>247</sup> The lack of fairness resulted in a loss of autonomy of data subjects over their personal data, put them in a position where they may be unable to exercise other GDPR rights, and impacted their fundamental rights to privacy and personal data protection.
440. In terms of the **gravity** of the infringements set out in Issues A-C, the DPC has already outlined the seriousness of processing personal data without a valid legal basis above. The EDPB Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR) stated at paragraph 441, that "*The EDPB reiterates that lawfulness of processing is one of the fundamental pillars of the data protection law and*

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<sup>245</sup> EDPB Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR), at [441].

<sup>246</sup> Binding decision 2/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding Tiktok Technology Limited (Art 65 GDPR) (Adopted on 2 August 2023), [192].

<sup>247</sup> EDPB Guidelines 4/2019 on Article 25 Data Protection by Design and by Default, p18.

*considers that processing of personal data without an appropriate legal basis is a clear and serious violation of the data subjects' fundamental right to data protection".*

441. In terms of the **gravity** of the infringements set out in Issues D and E, the DPC notes that LinkedIn did not take steps to provide sufficient information to users whose personal data it processes and implemented a number of unfair practices. Its Privacy Policy did not provide enough information to put data subjects in a position to understand what legal bases were being relied upon when LinkedIn conducts processing for the purposes of BA & TA. The EDPB has described compliance with the principle of fairness under Article 5(1)(a) GDPR as:

*pursuing 'power balance' as a 'key objective of the controller-data subject relationship', especially in the context of online services provided without monetary payment, where users are often not aware of the ways and extent to which their personal data is being processed. Consequently, lack of transparency can make it almost impossible in practice for the data subjects to exercise an informed choice over the use of their data which is in contrast with the element of 'autonomy' of data subjects as to the processing of their personal data.<sup>248</sup>*

442. The DPC considers that the lack of information LinkedIn provided to data subjects and its use of unfair practices misled and removed autonomy from data subjects, leading to it being difficult for them to exercise an informed choice over the use of their data. The DPC accepts that LinkedIn did provide certain information to members in a layered manner, and draws a distinction between a case where a controller does not provide any or very limited transparency information (which would be an extremely serious infringement) and a situation (as in this case) where the transparency information was deficient. However, for the reasons set out above, the failure to provide sufficient transparency information, combined with a number of unfair practices, is a significant infringement, given its impact on the autonomy of users.

443. In relation to the **damage suffered by data subjects**, the infringements outlined above demonstrate a lack of autonomy of data subjects over the use of their personal data. Recital 75 (which acts as an aid to the interpretation of Article 24 GDPR, the provision that addresses the responsibility of the controller), describes the "damage" that can result where processing does not accord with the requirements of the GDPR:

*The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage, in particular: ... where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data ...*

444. As set out in Issues A-C, LinkedIn's processing for BA & TA with regard to first party and third party data did not have a valid legal basis during the temporal scope of the Inquiry, under

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<sup>248</sup> Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR) at [223].



Articles 6(1)(a), (b) and (f) GDPR. The EDPB has outlined its position in relation to behavioural advertising having been conducted without proper legal basis as follows:

*Though the damage is very difficult to express in terms of a monetary value, it remains the case that data subjects have been faced with data processing that should not have occurred (by relying inappropriately on Article 6(1)(b) as a legal basis as established in section 4.4.2). The data processing in question - behavioural advertising - entails decisions about information that data subjects are exposed to or excluded from receiving. The EDPB recalls that non-material damage is explicitly regarded as relevant in Recital 75 and that such damage may result from situations “where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data”. Given the nature and gravity of the infringement of Article 6(1)(b), a risk of damage caused to data subjects is, in such circumstances, consubstantial with the finding of the infringement itself.<sup>249</sup>*

445. Considering that processing without a proper legal basis occurred, at a large scale (as described above) the DPC considers the level of damage suffered by data subjects to be significant. The fact that data subjects were unlikely to be aware of the unlawfulness of the processing, exacerbated by the lack of compliance with transparency obligations and the principle of fairness as identified in Issues E and D, likely led to a significant inability to exercise control over personal data. The DPC accepts the submission of LinkedIn, that members did have a certain level of control over the processing of their personal data, having regard to their ability to opt out of certain processing and their ability to withdraw their consent. However, the infringements found in this Decision nevertheless show that members had a significant inability to exercise appropriate control over their data, arising out of the lack of transparency of processing of their data, and particularly the fact that their data were being processed unlawfully (which cannot be cured by the ability to opt out or withdraw consent). Given the centrality of the processing to LinkedIn’s business model, it is even more important that information on this processing be provided in a fair and transparent manner, and makes the implications of it not being provided in such a manner all the more significant.

446. The **duration** of the infringements was for the duration of the Temporal Scope as outlined at paragraphs 81 - 84. The duration of the infringements is calculated as of 28 May 2018 (the date of the Complaint), when contractual necessity and legitimate interests were jointly relied upon for the processing of first party personal data for the purposes of BA & TA, and 14 September 2020 (the date of the DPC’s first correspondence to LinkedIn after its cessation of reliance on the contractual necessity under Article 6(1)(b) GDPR as a lawful basis for processing first party personal data).

ii. Article 83(2)(b): the intentional or negligent character of the infringement

447. In assessing the character of the infringements, the GDPR does not identify the factors that need to be present in order for an infringement to be classified as either “*intentional*” or

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<sup>249</sup> Binding Decision 3/2022 on the dispute submitted by the Irish SA on Meta Platforms Ireland Limited and its Facebook service (Art. 65 GDPR) at [446].

“negligent”. The Article 29 Working Party considered this in its “*Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679*” (the ‘**Administrative Fines Guidelines**’) as follows:

*In general, ‘intent’ includes both knowledge and wilfulness in relation to the characteristics of an offence, whereas ‘unintentional’ means that there was no intention to cause the infringement although the controller/processor breached the duty of care which is required in the law.*<sup>250</sup>

448. The Administrative Fines Guidelines proceed to detail how supervisory authorities should determine whether wilfulness or negligence was present in a particular case:

*The relevant conclusions about wilfulness or negligence will be drawn on the basis of identifying objective elements of conduct gathered from the facts of the case.*<sup>251</sup>

449. In determining whether an infringement was **intentional**, the DPC must determine whether the objective elements of conduct demonstrate both knowledge and wilfulness in respect of the characteristics of the infringement at the time under consideration.

450. The DPC does not consider that LinkedIn’s actions meet this threshold with respect to any of the infringements identified. There is no evidence that LinkedIn knowingly and wilfully did not meet the requirements for reliance on the legal bases identified by it for BA & TA in Issues A – C or its requirements for transparency in Issue D and fairness in Issue E.

451. In determining whether an infringement was **negligent**, the DPC must determine whether, despite there being no knowledge and wilfulness in respect of the characteristics of the infringement, the objective elements of conduct demonstrate that the controller ought to have been aware in the circumstances that it was falling short of the duty owed at the time under consideration.

452. The DPC considers Issue A, the infringement of Article 6(1)(a), was negligent in the particular circumstances. LinkedIn ought to have been aware of the flaws in its consent seeking mechanism and that the consent obtained was not freely given, informed or specific, or an unambiguous indication of data subjects’ wishes. The infringements identified above contain numerous examples of how LinkedIn’s consent seeking mechanism infringed the GDPR of which LinkedIn ought to have been aware. For example, the phrasing of the consent tool including reference to “*relevant jobs and ads*” was such that a member might perceive a detriment of not being shown job opportunities if they did not consent to the processing, which meant that the consent was not ‘freely given’. LinkedIn ought to have been aware that the use of such phrasing on a platform which people use to find employment opportunities would have had such a consequence.

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<sup>250</sup> Article 29 Working Party, Guidelines on the application and setting of administrative fines for the purposes of Regulation 2016/679, WP254, adopted on 3 October 2017 (“Administrative Fines Guidelines”), p11.

<sup>251</sup> Ibid, p12.

453. The DPC also considers that Issue B, the infringement of Article 6(1)(f), was negligent, as LinkedIn ought to have been aware that the extent of its processing went beyond data subjects' reasonable expectations. While the DPC has found that some level of BA & TA is likely to be expected by data subjects when using a service such as LinkedIn, the DPC does not consider that this would include inferred data, in particular such as that relating to their age, gender, and also including data such as location from IP address or 'member personas', such as being a 'business traveller' or 'mass affluent'. Furthermore, the DPC considers that LinkedIn ought to have been aware that the monitoring and use of Members' activities on the Bing search engine for the purpose of BA and TA was not within the reasonable expectations of data subjects and it failed to include an explicit reference to this in its Privacy Policy. In all the circumstances, the DPC is satisfied that LinkedIn was negligent within the meaning of Article 83(2)(b).
454. Furthermore, the DPC considers Issue C, the infringement of Article 6(1)(b) to have been negligent in the circumstances. LinkedIn ought to have known that its reliance on 6(1)(b) for BA & TA was inappropriate where the substance and fundamental object of the User Agreement was that of connecting professionals, enabling the exchange of information/ideas and assisting members to build a network and avail of job opportunities or job candidates. LinkedIn furthermore made it clear in its submissions that any processing of personal data for the purpose of BA & TA was subject to a Member's personal settings. In its submissions of 2 November 2020, LinkedIn outlined how its default was not to use a Member's third party data to target ads to them and how it was easy for members to opt out of LinkedIn's use of first party data for BA & TA. Therefore, LinkedIn should have known that it could not rely on Article 6(1)(b) where it was possible to provide the service to members without BA & TA.
455. With respect to Issues D and E, the DPC considers that by providing sufficient information to data subjects in relation to legitimate interests in compliance with Article 13(1)(d) and 14(2)(b) GDPR, LinkedIn demonstrated that it was capable of providing adequate information to data subjects in relation to the legal bases being relied upon. Therefore, the DPC finds that it ought to have been aware, in the circumstances, that the information provided to data subjects with respect to its processing in reliance on the lawful bases of consent, contractual necessity and legitimate interests fell short of the required standard and was not sufficiently transparent under Article 13(1)(c) and 14(1)(c). In such circumstances, the DPC finds that LinkedIn was negligent within the meaning of Article 83(2)(b).
456. Similarly, LinkedIn ought to have been aware that the level of information it was providing to data subjects in relation to BA & TA would not meet the requirements of Article 5(1)(a) GDPR. As outlined above in Issue E, LinkedIn's processing practices affected at least five aspects of the fairness principle highlighted by the EDPB.<sup>252</sup> The DPC acknowledges that those guidelines were not yet adopted during the temporal scope. However, the aspects of the fairness principle highlighted therein and considered above reflect core parts of this principle, such as truthfulness, autonomy and the reasonable expectations of users, which should have been apparent to LinkedIn prior to the adoption of those guidelines.

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<sup>252</sup> EDPB Guidelines 4/2019 on Article 25 Data Protection by Design and by Default [70].

457. The DPC has had regard to the judgments of the CJEU in Case C-683/21 *Nacionalinis visuomenės sveikatos centras*<sup>253</sup> and Case C-807/21 *Deutsche Wohnen SE*,<sup>254</sup> which establish that the characterisation of an infringement as either intentional or negligent is a pre-condition for the imposition of an administrative fine. In the light of the clarification brought by these judgments, the DPC does not consider the negligent nature of the infringements, in light of the level of negligence present on the facts in this case, as an aggravating factor.

iii. Article 83(2)(c): any action taken by the controller or processor to mitigate the damage suffered by data subjects

458. In January 2020, following an internal review of EDPB Guidelines published in October 2019 and consultation with external counsel, LinkedIn ceased relying on contractual necessity as a lawful basis for processing first party personal data for BA & TA, relying solely on legitimate interests pursuant to Article 6(1)(f) GDPR after this date. Considering the finding that LinkedIn could not rely on legitimate interests for this processing, the DPC considers this as neither an aggravating nor mitigating factor as it had no meaningful impact on the lawfulness of the processing, both being found to have been unlawful in this Decision.

459. The DPC acknowledges that LinkedIn did remove the reference to “*relevant jobs*” and replace it with the phrase “*ads, such as job ads*” in its in product notification for the “*Interactions with businesses*” setting (changed as of August 2020)<sup>255</sup>, which, while positive, is not so significant as to amount to an action which mitigated the damage identified in this Decision. The DPC considers that this factor is neither aggravating nor mitigating in the circumstances.

460. In its submissions on the Preliminary Draft Decision, LinkedIn submitted that the DPC ought to take into account the fact that between October 2020 and March 2021, it introduced a new feature called “*Why Am I Seeing This Ad*” that gave members additional information and control over ads they see on LinkedIn, and that it ceased using Bing data in March 2023. The DPC accepts that, to a certain extent, these measures do mitigate the impact of the infringements on data subjects. The DPC also considers that the measures adopted by LinkedIn to prohibit potentially discriminatory advertising and the measures taken to ensure that analytics reports did not contain identifiable data amount to mitigating measures. However, the DPC considers that the extent of this mitigation is limited having regard to the dates of the measures identified and having regard to the fact that these measures did not resolve the deficiencies identified in this Decision.

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<sup>253</sup> Case C-683/21 *Nacionalinis visuomenės sveikatos centras* prie Sveikatos apsaugos ministerijos v Valstybinė duomenų apsaugos inspekcija, Judgment of 5 December 2023.

<sup>254</sup> Case C-807/21 *Deutsche Wohnen SE* v Staatsanwaltschaft Berlin, Judgment of 5 December 2023.

<sup>255</sup> LinkedIn Submissions 3 November 2020, p. 33.

- iv. Article 83(2)(d): the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32

461. The DPC considers that LinkedIn holds a high degree of responsibility for the infringements identified in this Decision taking into account the technical and organisational measures implemented pursuant to Article 25 GDPR. Article 25(1) GDPR states (emphasis added):

*Taking into account the state of the art, the cost of implementation and the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for rights and freedoms of natural persons posed by the processing, **the controller shall, both at the time of the determination of the means for processing and at the time of the processing itself, implement appropriate technical and organisational measures, such as pseudonymisation, which are designed to implement data-protection principles, such as data minimisation, in an effective manner and to integrate the necessary safeguards into the processing in order to meet the requirements of this Regulation and protect the rights of data subjects.***

462. LinkedIn's failure to implement appropriate measures resulted in an infringement of the principle of fairness in Article 5(1)(a) GDPR as well as conducting processing without a valid legal basis under Article 6 GDPR. Given the nature, purposes and size of LinkedIn's processing, it ought to have implemented measures to ensure the legality, fairness and transparency of its processing. LinkedIn holds a high degree of responsibility for its failure to do so.

463. In its submissions on the Preliminary Draft Decision, LinkedIn has identified a number of measures which it says show that LinkedIn does not bear a high degree of responsibility for the infringements. LinkedIn points to: (a) its decision to opt all members out by default from processing of third party data for targeted advertising purposes; (b) its Advertising Data Controls; (c) its decision to cease relying on contractual necessity; (d) its prohibitions on advertising that might be considered discriminatory; (e) its use of differential privacy techniques to ensure that the analytics reports do not contain personal data; and (f) its prohibition on re-identification by LMS customers. However, for the reasons set out in this Decision, these measures did not ensure the legality, fairness and transparency of LinkedIn's processing, and in the DPC's view do not affect LinkedIn's degree of responsibility for failing to do so.

- v. Article 83(2)(e): any relevant previous infringements by the controller or processor

464. No relevant previous infringements by LinkedIn arise for consideration in this context, and accordingly the DPC views this as neither an aggravating nor a mitigating factor in the circumstances.

- vi. Article 83(2)(f): the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement

465. LinkedIn cooperated fully with the DPC at all stages of the Inquiry, as it is required to do so by law. In the circumstances, nothing arises for assessment by reference to this criterion.

vii. Article 83(2)(g): the categories of personal data affected by the infringement

466. This Inquiry does not concern special categories of personal data. Given the data sharing between LinkedIn and other entities, and the processing of personal data to infer information about data subjects' interests and preferences, LinkedIn processed a high quantity of personal data about individual data subjects in a manner that impacts their personal privacy. These are considered aggravating factors in the circumstances.

467. In its submissions on the Preliminary Draft Decision, LinkedIn submitted that Article 83(2)(g) does not provide any basis to assess the quantity of data processed. LinkedIn further noted that the DPC has already referenced the quantity of data when assessing the nature, scope and purposes of the processing and had therefore relied on the same factor twice. In this regard, the DPC notes the position of the EDPB that the amount of data regarding each data subject is of relevance under this heading, considering that the infringement of the right to privacy and protection of personal data increases with the amount of data regarding each data subject.<sup>256</sup> The DPC has noted the various types of data processed and the scale of the processing in its consideration of the overall nature, scope and purposes of the processing above. While the DPC has therefore considered the quantity of data processed - in particular concerning data obtained from third parties and inferred data - in deciding whether to impose an administrative fine, as well as the amount of that fine, it has done so only once and has not engaged in any "double-counting" as asserted by LinkedIn.

viii. Article 83(2)(h): the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement

468. The DPC commenced this Inquiry following its receipt of the Complaint. LinkedIn did not notify the DPC of any of the infringements. This is neither aggravating nor mitigating in the circumstances.

ix. Article 83(2)(i): where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;

469. Corrective powers have not previously been ordered against LinkedIn with regard to the subject matter of this Decision. This is neither an aggravating nor a mitigating factor in the circumstances.

x. Article 83(2)(j): adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and

470. Such considerations do not arise in this case.

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<sup>256</sup> EDPB Guidelines 04/2022 on the calculation of administrative fines under the GDPR, p20.

- xi. Article 83(2)(k): any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement

471. Under this heading, the DPC notes the EDPB's view, as set out in its binding decision 1/2021,<sup>257</sup> that the turnover of the undertaking concerned ought to be taken into account not just for the calculation of the applicable fining "cap" but also for the purpose of assessing the quantum of the administrative fine itself. The DPC's assessment of the undertaking concerned and the applicable turnover figure is detailed further below. While this is not a matter that can properly be classified as either mitigating or aggravating, by reference to the circumstances of the case, the DPC has taken the significant turnover of the undertaking concerned into account when determining the quantum of the fine imposed, as set out below.

472. The DPC considers that the matters considered under Article 83(2)(a)-(j) reflect an exhaustive account of both the aggravating and mitigating factors applicable in the circumstances of the case.

D. *Decision on whether to impose administrative fines*

473. When imposing corrective measure(s), the DPC is obliged to select the measure(s) that are effective, proportionate and dissuasive in response to the particular infringements.<sup>258</sup> This assessment must be made in the context of the objective pursued by the corrective measures. The Administrative Fines Guidelines provide that:

*The assessment of what is effective proportional and dissuasive in each case will have to also reflect the objective pursued by the corrective measure chosen, that is either to re-establish compliance with the rules, or to punish unlawful behaviour (or both).*<sup>259</sup>

474. The DPC has also had regard to the effect of the reprimand and order to bring processing into compliance imposed in ensuring compliance with the GDPR. The DPC considers that the reprimand is of significant value in dissuading future non-compliance, as a formal recognition of LinkedIn's identified infringements. The order to bring processing into compliance should result in LinkedIn's immediate action to remedy the identified infringements. However, the DPC considers that these measures are not sufficient in the circumstances.

475. The infringed articles include a principle of the GDPR under Article 5(1)(a), as well as a controller's obligation to ensure that processing is conducted based on the lawful bases identified in Article 6(1) GDPR, and in a transparent manner, pursuant to Articles 13 and 14 GDPR. The DPC considers that administrative fines are appropriate, necessary and proportionate in respect of the identified infringements to dissuade future non-compliance by LinkedIn, and to dissuade other entities from similarly infringing the GDPR.

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<sup>257</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted 28 July 2012, [409].

<sup>258</sup> Article 83(1) GDPR.

<sup>259</sup> Administrative Fines Guidelines, p11.

476. In coming to the conclusion that administrative fines are necessary, the DPC has had particular regard to the nature, gravity and duration of the infringements, the negligent nature of the infringements, the degree of responsibility of LinkedIn, and the fact that the infringements concern the processing of a large volume of personal data. The DPC has balanced these factors with the mitigating factors identified above. The DPC has also had regard to all the corrective powers available as set out in Article 58(2) GDPR.

477. The DPC has placed significant weight as an aggravating factor on the nature of the infringements, as they involve large amounts of users, large amounts of data and would have a significant impact on users' experience of LinkedIn. Similarly, the DPC has placed significant weight as an aggravating factor on the gravity of the infringements, as they involve the principle of fairness, as well as the lawfulness of processing and transparency obligations. The DPC has placed moderate weight as a mitigating factor on the duration of the infringements, in light of the temporal scope of this inquiry, and that LinkedIn ceased its reliance on Article 6(1)(b) GDPR for BA & TA in January 2020. The DPC has placed low weight as a mitigating factor on the action taken by LinkedIn to mitigate the damage suffered by data subjects, pursuant to Article 83(2)(c) GDPR. The DPC has placed significant weight as an aggravating factor on the degree of responsibility of LinkedIn, pursuant to Article 83(2)(d) GDPR. The DPC has placed moderate weight as an aggravating factor on the categories of personal data affected by the infringements under Article 83(2)(g) GDPR.

478. For the reasons set out above, and having particular regard to the matters discussed under Article 83(2)(a)-(j) cumulatively, the DPC considers it appropriate to impose administrative fines in respect of the findings above, in addition to the reprimand and order to bring processing into compliance also imposed in this Decision.

479. Based on the analysis set out above, the DPC imposes the following administrative fines:

- a. LinkedIn was not entitled to rely on Article 6(1)(a) GDPR for the processing of third party data of its members for BA & TA to the extent found in this Decision. As a result, the processing of personal data by LinkedIn (to the extent that found in this Decision) was conducted without a valid lawful basis under Article 6 GDPR and the requirements in Article 5(1)(a) GDPR (that processing must be lawful and fair); a fine of €105 million;
- b. LinkedIn was not entitled to rely on Article 6(1)(b) GDPR for the processing of first party personal data of its members for BA & TA or on Article 6(1)(f) GDPR for the processing of first party personal data of its members for BA & TA or third party data for analytics, to the extent found in this Decision. As a result, the processing of personal data by LinkedIn (to the extent that found in this Decision) was conducted without a valid lawful basis under Article 6 GDPR and the requirements in Article 5(1)(a) GDPR (that processing must be lawful and fair); a fine of €110 million; and
- c. LinkedIn infringed Article 13(1)(c) GDPR and 14(1)(c) GDPR insofar as it concerned the provision of information on its reliance on the lawful basis of consent under Article 6(1)(a) GDPR, contractual necessity under Article 6(1)(b) GDPR and



legitimate interests under Article 6(1)(f) GDPR as required under Articles 13(1)(c) and 14(1)(c) GDPR; a fine of €95 million.

480. The total fine is €310 million.

481. In the Preliminary Draft Decision, the DPC proposed a total of five administrative fines (one for each of issues A to E in this Decision). However, in respect of issues B and C, the DPC notes the submission of LinkedIn on the Preliminary Draft Decision that separate fines should not be imposed as they concern the same infringement (i.e. the processing of first party data without a lawful basis under Articles 6(1) and 5(1)(a)). The DPC accepts the submission of LinkedIn that there is an overlap between those issues and, accordingly, in order to avoid punishing LinkedIn twice for the same wrongdoing, imposes one fine for the processing of first-party personal data without a lawful basis under Articles 6(1) and 5(1)(a) GDPR. However, the DPC notes that LinkedIn relied exclusively on Article 6(1)(f) GDPR for the processing of third party data for the purpose of analytics has also taken account of this in imposing the administrative fine above.

482. The DPC does not accept the submission of LinkedIn that a single administrative fine should be imposed for Issues A-C. With regard to Issue A, while the processing of third-party data considered under this heading was equally conducted for the purpose of BA & TA, and was therefore linked to the processing considered as part of Issues B and C, the DPC notes that the processing was distinct in a number of respects. In particular, it involved different categories of personal data, processing operations, and third party partners. The processing could also be carried out independently, as users may have provided consent to the processing of their third party data for BA & TA but opted out to the use of their first party data (or vice versa) for this purpose. Should LinkedIn have carried out the processing examined as part of Issue A in a lawful manner, no fine would have been imposed in respect of this processing. The DPC therefore does not consider that the imposition of a separate fine for Issue A amounts to imposing multiple fines for the same infringement.

483. In relation to Issue E, the DPC does not consider that an additional separate fine for the breach of the Article 5(1)(a) GDPR principle of fairness is an appropriate corrective measure in the specific circumstances of this case. In particular, the DPC notes that the infringement is based on conduct that the DPC has already taken into account in considering that LinkedIn could not validly rely on Article 6(1)(a) GDPR for the processing of third party data for BA & TA, or Article 6(1)(f) GDPR for the processing of first party personal data of its members for BA & TA and third party data for analytics. Significant administrative fines have been imposed for those infringements. As outlined in considering the infringements under Article 83(2)(a)-(j) GDPR above, the fundamental lack of fairness in this processing is a relevant factor and has been taken into account in the conclusion that the processing was not lawful and fair and in relation to the fines imposed above for this conduct.

484. In having determined the quantum of the fines above, the DPC has taken account of the requirement, set out in Article 83(1) GDPR, for fines imposed to be “*effective, proportionate and dissuasive*” in each individual case. The DPC’s view is that, in order for any fine to be “*effective*,” it must reflect the circumstances of the individual case. As outlined above, the infringements are all serious in nature and high in gravity. In order for a fine to be “*dissuasive*,” it must dissuade both the controller or processor concerned as well as other controllers or

processors carrying out similar processing operations from repeating the conduct concerned. The DPC considers that the fines are dissuasive for both. As regards the requirement for any fine to be “*proportionate*”, this requires the DPC to adjust the quantum of any fines to the minimum amount necessary to achieve the objectives pursued by the GDPR.

485. The DPC is satisfied that the quantum of the fines above do not exceed what is necessary to enforce compliance with the GDPR taking into account the size of LinkedIn’s user base, the lack of valid lawful bases for processing, the loss of control over personal data suffered by the data subjects, and how the infringements increased risks posed by the processing to the rights and freedoms of the data subjects. The DPC has also had regard to the turnover of the undertaking concerned, as detailed below. The DPC is satisfied that the fines above are effective, proportionate and dissuasive, taking into account all of the circumstances of the Inquiry.

E. *Other relevant factors*

i. Article 83(3) GDPR

486. Having completed an assessment of whether or not to impose a fine (and of the amount of any such fine), the DPC must<sup>260</sup> now consider the remaining provisions of Article 83 GDPR, with a view to ascertaining if there are any factors that might require the adjustment of the fines. Article 83(3) GDPR provides that:

*If a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement.*

487. In the case of multiple infringements arising from “*the same or linked processing operations*,” Article 83(3) therefore acts to limit the amount of the administrative fines imposed to the amount specified for the gravest infringement. The term “*gravest infringement*” is a reference to the legal maximum of fines under Articles 83(4), (5) and (6) GDPR. This requires that all infringements have to be taken into account when assessing the amount of a fine, or fines, arising from the “*same or linked processing operations*” and that administrative fine(s) would be imposed cumulatively, as opposed to imposing only the proposed fine for the gravest infringement. The only applicable limit for the total fine imposed, under this interpretation, would be the overall “*cap*.” By way of example, in a case of multiple infringements, if the gravest infringement was one which carried a maximum administrative fine of 2% of the turnover of the undertaking, the cumulative fine imposed could also not exceed 2% of the turnover of the undertaking.

488. In respect of the interpretation of Article 83(3) GDPR, the DPC is also mindful of its obligations of cooperation and consistency in, inter alia, Articles 60(1) and 63 GDPR. Accordingly, it is necessary to follow the EDPB’s interpretation of Article 83(3) GDPR which was set out in the

EDPB's binding decision 1/2021, which was made in relation to an inquiry conducted by the DPC (Inquiry IN-18-12-2).

489. The relevant passage of that binding decision is as follows:<sup>261</sup>

*315. All CSAs argued in their respective objections that not taking into account infringements other than the "gravest infringement" is not in line with their interpretation of Article 83(3) GDPR, as this would result in a situation where WhatsApp IE is fined in the same way for one infringement as it would be for several infringements. On the other hand, as explained above, the IE SA argued that the assessment of whether to impose a fine, and of the amount thereof, must be carried out in respect of each individual infringement found and the assessment of the gravity of the infringement should be done by taking into account the individual circumstances of the case. The IE SA decided to impose only a fine for the infringement of Article 14 GDPR, considering it to be the gravest of the three infringements.*

*316. The EDPB notes that the IE SA identified several infringements in the Draft Decision for which it specified fines, namely infringements of Article 12, 13 and 14 GDPR, and then applied Article 83(3) GDPR.*

*317. Furthermore, the EDPB notes that WhatsApp IE agreed with the approach of the IE SA concerning the interpretation of Article 83(3) GDPR. In its submissions on the objections, WhatsApp IE also raised that the approach of the IE SA did not lead to a restriction of the IE SA's ability to find other infringements of other provisions of the GDPR or of its ability to impose a very significant fine. WhatsApp IE argued that the alternative interpretation of Article 83(3) GDPR suggested by the CSAs is not consistent with the text and structure of Article 83 GDPR and expressed support for the IE SA's literal and purposive interpretation of the provision.*

*318. In this case, the issue that the EDPB is called upon to decide is how the calculation of the fine is influenced by the finding of several infringements under Article 83(3) GDPR.*

*319. Article 83(3) GDPR reads that if "a controller or processor intentionally or negligently, for the same or linked processing operations, infringes several provisions of this Regulation, the total amount of the administrative fine shall not exceed the amount specified for the gravest infringement."*

*320. First of all, it has to be noted that Article 83(3) GDPR is limited in its application and will not apply to every single case in which multiple infringements are found to have occurred, but only to those cases where multiple infringements have arisen from "the same or linked processing operations".*

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<sup>261</sup> EDPB Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR.

321. The EDPB highlights that the overarching purpose of Article 83 GDPR is to ensure that for each individual case, the imposition of an administrative fine in respect of an infringement of the GDPR is to be effective, proportionate and dissuasive. In the view of the EDPB, the ability of SAs to impose such deterrent fines highly contributes to enforcement and therefore to compliance with the GDPR.

322. As regards the interpretation of Article 83(3) GDPR, the EDPB points out that the *effet utile* principle requires all institutions to give full force and effect to EU law. The EDPB considers that the approach pursued by the IE SA would not give full force and effect to the enforcement and therefore to compliance with the GDPR, and would not be in line with the aforementioned purpose of Article 83 GDPR.

323. Indeed, the approach pursued by the IE SA would lead to a situation where, in cases of several infringements of the GDPR concerning the same or linked processing operations, the fine would always correspond to the same amount that would be identified, had the controller or processor only committed one – the gravest – infringement. The other infringements would be discarded with regard to calculating the fine. In other words, it would not matter if a controller committed one or numerous infringements of the GDPR, as only one single infringement, the gravest infringement, would be taken into account when assessing the fine.

324. With regard to the meaning of Article 83(3) GDPR the EDPB, bearing in mind the views expressed by the CSAs, notes that in the event of several infringements, several amounts can be determined. However, the total amount cannot exceed a maximum limit prescribed, in the abstract, by the GDPR. More specifically, the wording “amount specified for the gravest infringement” refers to the legal maximums of fines under Articles 83(4), (5) and (6) GDPR. The EDPB notes that the Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679 state that the “occurrence of several different infringements committed together in any particular single case means that the supervisory authority is able to apply the administrative fines at a level which is effective, proportionate and dissuasive within the limit of the gravest infringement”. The guidelines include an example of an infringement of Article 8 and Article 12 GDPR and refer to the possibility for the SA to apply the corrective measure within the limit set out for the gravest infringement, i.e. in the example the limits of Article 83(5) GDPR.

325. The wording “total amount” also alludes to the interpretation described above. The EDPB notes that the legislator did not include in Article 83(3) GDPR that the amount of the fine for several linked infringements should be (exactly) the fine specified for the gravest infringement. The wording “total amount” in this regard already implies that other infringements have to be taken into account when assessing the amount of the fine. This is notwithstanding the duty on the SA imposing the fine to take into account the proportionality of the fine.

326. Although the fine itself may not exceed the legal maximum of the highest fining tier, the offender shall still be explicitly found guilty of having infringed several provisions and these infringements have to be taken into account when assessing the

*amount of the final fine that is to be imposed. Therefore, while the legal maximum of the fine is set by the gravest infringement with regard to Articles 83(4) and (5) GDPR, other infringements cannot be discarded but have to be taken into account when calculating the fine.*

*327. In light of the above, the EDPB instructs the IE SA to amend its Draft Decision on the basis of the objections raised by the DE SA, FR SA and PT SA with respect to Article 83(3) GDPR and to also take into account the other infringements – in addition to the gravest infringement – when calculating the fine, subject to the criteria of Article 83(1) GDPR of effectiveness, proportionality and dissuasiveness.*

490. In this Inquiry, the gravest infringement is the processing of personal data without a valid lawful basis under Article 6(1) GDPR and in contravention of the requirements in Article 5(1)(a) GDPR. The associated maximum possible fine for this infringement under Article 83(5) GDPR is €20,000,000, or in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher. The DPC has taken account of the undertaking's turnover in the calculation of the individual infringement fines.

ii. Article 83(5) GDPR

491. In order to calculate the numeric amount of the applicable fining “cap”, it is first necessary to consider whether or not the fine is to be imposed on “an undertaking.” Recital 150 clarifies, in this regard, that:

*Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes.*

492. Accordingly, when considering a respondent's status as an undertaking, the GDPR requires the DPC to do so by reference to the concept of “undertaking,” as that term is understood in a competition law context. In this regard, the CJEU has established that:

*an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed<sup>262</sup>*

493. The CJEU has held that a number of different enterprises could together comprise a single economic unit where one of those enterprises is able to exercise decisive influence over the behaviour of the others on the market. Such decisive influence may arise, for example, in the context of a parent company and its wholly owned subsidiary. Where an entity (such as a subsidiary) does not independently decide upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by another entity (such as a parent), this means that both entities constitute a single economic unit and a single undertaking for the purpose of Articles 101 and 102 TFEU. The ability, on the part of the parent company, to exercise decisive influence over the subsidiary's behaviour on the market means that the

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<sup>262</sup> Case C-41/90, *Höfner and Elser v Macrotron GmbH*, Judgment of 23 April 1991, [21].

conduct of the subsidiary may be imputed to the parent company, without having to establish the personal involvement of the parent company in the infringement.<sup>263</sup>

494. In the context of Article 83 GDPR, the concept of “*undertaking*” means that, where there is another entity that is in a position to exercise decisive influence over the controller/processor’s behaviour on the market, then they will together constitute a single economic entity and a single undertaking. Accordingly, the relevant fining cap will be calculated by reference to the turnover of the undertaking as a whole, rather than the turnover of the controller or processor concerned.

495. In order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case.<sup>264</sup>

496. The CJEU has established<sup>265</sup> that, where a parent company has a 100% shareholding in a subsidiary, it follows that: the parent company is able to exercise decisive influence over the conduct of the subsidiary; and a rebuttable presumption arises that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary. The CJEU also established that, in a case where a company holds all or almost all of the capital of an intermediate company which, in turn, holds all or almost all of the capital of a subsidiary of its group, there is also a rebuttable presumption that that company exercises a decisive influence over the conduct of the intermediate company and indirectly, via that company, also over the conduct of that subsidiary.<sup>266</sup>

497. The General Court has further held that, in effect, the presumption may be applied in any case where the parent company is in a similar situation to that of a sole owner as regards its power to exercise decisive influence over the conduct of its subsidiary<sup>267</sup>. This reflects the position that:

*... the presumption of actual exercise of decisive influence is based, in essence, on the premise that the fact that a parent company holds all or virtually all the share capital of its subsidiary enables the Commission to conclude, without supporting evidence, that that parent company has the power to exercise a decisive influence over the subsidiary without there being any need to take into account the interests of other shareholders when adopting strategic decisions or in the day-to-day business of that*

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<sup>263</sup> Case C-97/08P *Akzo Nobel and Others v Commission*, Judgment of 10 September 2009, [58 – 60].

<sup>264</sup> C-490/15 P *Ori Martin and SLM v Commission* (14 September 2016) ECLI:EU:C:2016:678, [60].

<sup>265</sup> Case C-97/08 P *Akzo Nobel and Others v Commission* (10 September 2009) EU:C:2009:536.

<sup>266</sup> Case C-508/11 P *Eni v Commission* (8 May 2013) EU:C:2013:289, at para. 48.

<sup>267</sup> T-206/06 *Total and Elf Aquitaine v Commission* (7 June 2011) EU:T:2011:250, at para. 56; T-562/08 *Repsol Lubricantes y Especialidades and Others v Commission* (12 December 2014) EU:T:2014:1078, at para. 42; T-413/10 and T-414/10 *Socitrel and Companhia Previdente v Commission* (15 July 2015) EU:T:2015:500, at para. 204.

*subsidiary, which does not determine its own market conduct independently, but in accordance with the wishes of that parent company ...*<sup>268</sup>

498. Where the presumption of decisive influence has been raised, it may be rebutted by the production of sufficient evidence that shows, by reference to the economic, organisational and legal links between the two entities, that the subsidiary acts independently on the market. It is important to note that “*decisive influence*”, in this context, refers to the ability of a parent company to influence, directly or indirectly, the way in which its subsidiary organises its affairs, in a corporate sense, for example, in relation to its day-to-day business or the adoption of strategic decisions. While this could include, for example, the ability to direct a subsidiary to comply with all applicable laws, including the GDPR, in a general sense, it does not require the parent to have the ability to determine the purposes and means of the processing of personal data by its subsidiary.

499. In LinkedIn’s directors’ report and financial statements for the financial year ended 31 December 2021 (the “**2021 Financial Statements**”), LinkedIn’s ultimate parent company is identified as Microsoft Corporation, a company incorporated in the United States of America (“**Microsoft**”).

500. Therefore, as the “*ultimate parent company*” it is assumed that Microsoft is in a similar situation to that of a sole owner as regards its power to (directly or indirectly) exercise a decisive influence over the conduct of LinkedIn. Accordingly, a rebuttable presumption arises to the effect that Microsoft Corporation does in fact exercise a decisive influence over the conduct of LinkedIn on the market. If this presumption is not rebutted, it would mean that LinkedIn and Microsoft Corporation constitute a single economic unit and therefore form a single undertaking within the meaning of Article 101 TFEU. Consequently, the relevant cap for the purpose of Articles 83(5) GDPR would fall to be determined by reference to the total turnover of all of the component companies in the undertaking, namely LinkedIn and Microsoft.

501. The DPC brought this presumption to LinkedIn’s attention on 9 March 2023. In its correspondence of this date, the DPC noted that LinkedIn’s Annual Report and Financial Statements for the Financial Year ended 31 December 2021, indicated that the LinkedIn’s ultimate parent company was Microsoft Corporation. The DPC further noted that the immediate shareholders of LinkedIn listed in its Form B1C - Annual Return General were LinkedIn Worldwide and Microsoft Ireland Research Unlimited Company. The DPC noted the established case law of the CJEU, to the effect that where a company holds all or almost all of the capital of an intermediate company which, in turn, holds all or almost all of the capital of a subsidiary of its group, there is a rebuttable presumption that that company exercises a decisive influence over the conduct of the intermediate company and indirectly, via that company, also over the conduct of that subsidiary. As such, the DPC proposed to consider

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<sup>268</sup> Case C-97/08 P *Akzo Nobel and Others v Commission* EU:C:2009:262 (Opinion of Advocate General Kokott), at para. 73 cited in Case T-419/14 *The Goldman Sachs Group, Inc. v European Commission* (12 July 2018) ECLI:EU:T:2018:445, at para. 51.

LinkedIn and Microsoft Corporation as comprising of a single undertaking for the purpose of calculating the relevant turnover.

502. In response, LinkedIn confirmed that it had brought the letter to the attention of Microsoft. In relation to the content of the presumption, LinkedIn made the following submission:

*We have informed Microsoft Corporation about the DPC's position on this issue. Please note, however, that both LIUC and Microsoft Corporation strongly disagree that their companies form part of a single "undertaking" for purposes of this inquiry, including as that term is used in Article 83 GDPR. While we take note of the CJEU case law referenced in the DPC's letter of 9 March, we are of the firm view that these cases, and EU law generally, do not lead to the determination of an "undertaking" under Article 83 as set out in that letter. We also believe that LIUC would be successful in rebutting any presumption that Microsoft Corporation exercises a decisive influence over LIUC with regard to the actions that form the basis of the DPC's current inquiry.*

*In addition, Article 83 is clear that the determination of which entities comprise a single "undertaking," and that undertaking's "total worldwide annual turnover," are relevant only in establishing the maximum fine that supervisory authorities may impose on such an undertaking (see Article 83(4)). While we take note of the European Data Protection Board's view that such turnover might, in certain cases, also be relevant to the determination of whether a fine would be "effective, proportionate, and dissuasive" under Article 83(1), this view is not supported by the text of the GDPR, or by the facts in this case.<sup>269</sup>*

503. In addition, LinkedIn provided the DPC with a corporate structure chart, which set out the relationships between LinkedIn, LinkedIn Corporation, LinkedIn Worldwide, Microsoft Ireland Research Company and Microsoft Corporation. [REDACTED]

504. The DPC does not consider that the above information is sufficient to rebut the presumption of decisive influence. Aside from the submission above, LinkedIn has not furnished any evidence to support its assertions that LinkedIn Ireland has the relevant economic, organisational and legal links to the processing being examined in this inquiry.

505. The EDPB has explained in its binding decision 1/2021, that the CJEU has ruled that when a parent company and its subsidiary form the single undertaking that has been found liable for the infringement committed by the subsidiary, the total turnover of its component companies determines the financial capacity of the single undertaking in question.<sup>270</sup> With regard to the

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<sup>269</sup> LinkedIn letter to the DPC of 30 March 2023.

<sup>270</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted 28 July 2012 and case law cited therein: Case C-58/12 P *Groupe Gascogne SA v. European Commission* (26 November 2013), ECLI:EU:C:2013:770, at para 51-56; C-508/11 P *Eni SpA v. European Commission* (8 May 2013),



parent company at the head of a group, the CJEU specified that the consolidated accounts of the parent company are relevant to determine its turnover.<sup>271</sup>

506. Applying the above to Article 83(5) GDPR, the DPC first notes that, in circumstances where the fine is being imposed on an “*undertaking*,” a fine of up to 4% of the undertaking’s total worldwide annual turnover of the preceding financial year may be imposed. As confirmed by LinkedIn in its Final Submissions, Microsoft Corporation’s turnover for the financial year ending 2023 was \$211,915 million.<sup>272</sup> The DPC further notes that the fines are cumulatively less than 4% of Microsoft Corporation’s worldwide annual turnover for the preceding financial year.
507. In its submissions on the Preliminary Draft Decision, LinkedIn disputed the approach taken in the Preliminary Draft Decision, and as detailed above, regarding the taking into account of Microsoft’s global annual turnover under Article 83(5) and in determining the individual fining ranges. LinkedIn submits, in summary, that: (a) there is no basis for using an undertaking’s turnover to assess the amount of the fine (as distinct from determining the cap); (b) the relevant undertaking is LinkedIn rather than Microsoft; and (c) in any event the undertaking’s turnover for the years 2017 (in respect of issues A, C and D); and 2019 (in respect of issues B and E) ought to have been taken into account.
508. With regard to taking into account an undertaking’s turnover to assess the amount of a fine, the DPC disagrees with the interpretation advanced by LinkedIn. The DPC considers that Microsoft’s turnover is one relevant factor in this Inquiry to the question of proportionality of the fine, insofar as the fine must be proportionate to an undertaking’s ability to pay, and its dissuasiveness and effectiveness because the dissuasive effect of a fine in this case would be meaningless in terms of discouraging both LinkedIn and others from committing similar infringements in the future without reference to the turnover of Microsoft.
509. With regard to LinkedIn’s submission that the relevant undertaking for the purpose of calculating global annual turnover is LinkedIn, rather than Microsoft, the DPC disagrees with the submission made by LinkedIn for the reasons that are set out in this section, which are consistent with the EDPB Binding Decision 1/21.<sup>273</sup>
510. Finally, with regard to the relevant year for the calculation of turnover, Article 83(5) states that the fining cap is “*in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year*” (emphasis added). The DPC disagrees with LinkedIn’s submission that the text of Article 83(5) makes clear that the correct year is the financial year preceding the date of the infringement. Rather, interpreting Article 83(5) GDPR in a manner consistent with competition law rules (in accordance with Recital (150)), the DPC considers

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ECLI:EU:C:2013:289, at para 109; T-122/07 to T-124/07 *Siemens Österreich et VA Tech Transmission & Distribution v. European Commission* (3 March 2011), ECLI:EU:T:2011:70, at para 186-187

<sup>271</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR, adopted 28 July 2012 and case law cited therein: Case C-58/12 P *Groupe Gascogne SA v. European Commission* (26 November 2013), ECLI:EU:C:2013:770, at para 52-57.

<sup>272</sup> Microsoft Corporation Annual Report, 2023.

<sup>273</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR Adopted on 28 July 2021.

that the relevant year is the year prior to the decision to impose an administrative fine (see, to that effect, Case C-637/13 P *Laufen Austria AG*).<sup>274</sup> As noted by the EDPB in Binding Decision 1/2021, in the case of cross-border processing, the relevant fining decision is not the draft decision, but rather the final decision issued by the Lead Supervisory Authority.<sup>275</sup> The DPC therefore uses the most up to date financial information in making this calculation.

511. That being the case, the fines do not exceed the applicable fining caps prescribed by Article 83(5) GDPR.

#### LinkedIn's Final Submissions on fining matters

512. LinkedIn expressed the view that DPC “ought to fix the administrative fine at the lower end of the fining range”.<sup>276</sup> In support of this view, LinkedIn repeated certain submissions that were previously made and which have already been taken into account elsewhere in this Decision. For example, LinkedIn repeated its earlier positions, as follows: the number of data subjects affected by the infringements of Articles 5(1)(a) and 6(1) GDPR was lower than that identified in the Preliminary Draft Decision; LinkedIn opted out by default each member from the processing of third-party data for BA & TA by 25 May 2018; LinkedIn voluntarily ceased its reliance on Article 6(1)(b) for the processing of first party data following an internal review of EDPB Guidelines published in October 2019<sup>277</sup>; and that the DPC has improperly taken account of the turnover of Microsoft Corporation as a relevant factor in determining the amount of the fine. LinkedIn additionally suggests that a number of factors already considered as part of the 83(2) assessment do not warrant the fixing of the amount of the fines at the upper end of the fining ranges. This includes the mitigations considered by the DPC pursuant to Article 83(2)(c); the absence of previous infringements pursuant to Article 83(2)(e); cooperation with the DPC pursuant to Article 83(2)(f) and the fact that the Inquiry did not concern special categories of data as considered under Article 83(2)(g). In circumstances where the DPC has already addressed these matters in coming to this Decision, it is not necessary to repeat its position on such previously assessed matters here.

513. LinkedIn's Final Submissions additionally suggest that the fining range was too high in comparison to other decisions and, in support of this, cited administrative fines imposed in other distinct DPC matters. However, as can be seen from the detailed analysis of processing set out in this Decision, a decision on the nature of an infringement requires an in-depth and fact specific assessment of processing of personal data by a controller. The DPC also notes that Articles 58(2)(i) and 83(2) each expressly state that administrative fines depend on the circumstances of the individual case. Accordingly, the DPC does not agree with the direct comparative approach suggested by LinkedIn.

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<sup>274</sup> Case C-637/13 P *Laufen Austria AG v. European Commission* (26 January 2017) ECLI:EU:C:2017:51.

<sup>275</sup> Binding decision 1/2021 on the dispute arisen on the draft decision of the Irish Supervisory Authority regarding WhatsApp Ireland under Article 65(1)(a) GDPR Adopted on 28 July 2021, para 298.

<sup>276</sup> LinkedIn submissions of 8 October 2024, page 12.

<sup>277</sup> EDPB Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects, adopted on 16 October 2019 ('Guidelines 2/2019').

514. LinkedIn suggested that its ability to make the Final Submissions was curtailed as the DPC did not provide the full inquiry file or its “*provisional views*” on the final amount of the administrative fine and, in particular, had “*not explained the basis upon which it considers that it is required to comply with the comments of the CSAs, notwithstanding that they were expressed in comments rather than RROs.*”<sup>278</sup> This latter submission appears to have been founded on the presumption that the DPC considered that it was bound to follow the CSA’s comments, however, as articulated in the following paragraphs, the DPC considers LinkedIn has had ample opportunity to make its Final Submissions and does not consider that the DPC’s obligation to take due account of the views of CSAs means that the DPC must follow each view that has been expressed by way of a comment.

- a. Firstly, as clarified by way of correspondence to LinkedIn on 24 September 2024 and 30 September 2024, the DPC’s final determination regarding the fines in this Decision is based on: (a) the DPC’s assessment of the criteria outlined in Articles 83(1) and (2) GDPR (as already recorded in the Draft Decision), taking into account; (b) the views that were expressed by the CSAs, along with; (c) LinkedIn’s Final Submissions. LinkedIn was provided with a copy of the Preliminary Draft Decision on 25 April 2023 and provided extensive responding submissions in respect of the application of the criteria in Articles 83(1) and (2) GDPR. The DPC also provided LinkedIn with the CSAs’ comments on the Draft Decision, in full, and provided information as to how it interpreted those comments relating the selection of the specific quantum of the administrative fine, from within the identified fining range, pending any submissions that LinkedIn wished to make in relation to them. The DPC is therefore satisfied that LinkedIn’s ability to make meaningful submissions on this aspect of matters was in no way compromised and that it was furnished with all relevant information to allow it do so. The DPC is also satisfied that, contrary to the view expressed by LinkedIn, LinkedIn was provided with sufficient time (2 weeks) to make its Final Submissions. In this respect, the DPC notes that the submissions sought at this point in time were limited in nature and that LinkedIn had already made extensive submissions on the application of the criteria outlined in Articles 83(1) and (2) GDPR and the proposed fining ranges set out in the Preliminary Draft Decision. Those submissions were taken into account in the DPC’s determination of the final quantum of the fines in this Decision.
- b. Secondly, LinkedIn submits in its Final Submissions that “[w]hile the DPC is required to have regard to the comments of the CSAs, they are not binding on the DPC” and “the DPC is not under any obligation to amend the Draft Decision to give effect to same”.<sup>279</sup> LinkedIn cites decisions of the CJEU in respect of analogous obligations,<sup>280</sup> in this regard, as well as guidance of the EDPB, which states “... the

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<sup>278</sup> LinkedIn submissions of 8 October 2024, page 3.

<sup>279</sup> LinkedIn submissions of 8 October 2024, page 4.

<sup>280</sup> Case C-689/19 P *VodafoneZiggo Group B.V. v. Commission*, judgment of 25 February 2021, regarding Article 7(3) of the former Directive 2002/21/EC (as amended) (the electronic communications “Framework Directive”).

*LSA is obliged to take account of all the views. However, the LSA is not obliged to follow each view that has been expressed. This is in particular the case where there are contradictory views...".*<sup>281</sup> The cooperation mechanism outlined in Article 60 GDPR requires the lead supervisory authority (in this case, the DPC) to take “due account” of the views that might be expressed by a CSA, further to the circulation of a draft decision. This is clear from the text of Article 60(3) GDPR. That obligation applies regardless of whether the views have been expressed in the form of a relevant and reasoned objection or otherwise in the form of comments, as on this occasion. Recital 130 additionally refers to the requirement of the LSA to “take utmost account” of the view of the CSA with which the complaint has been lodged, in this case the FR SA, when taking measures intended to produce legal effects, including the imposition of administrative fines. Therefore, the DPC agrees with LinkedIn’s submission that it is not bound to follow or implement the views expressed by the CSA Comments. The changes that the DPC has made to the Decision and in determining the final quantum of the fine following receipt of these views are those which it has independently considered are necessary and appropriate having regard to the views expressed by the CSAs and LinkedIn’s Final Submissions.

515. LinkedIn further submitted that the comments of the FR SA and BY SA, made in response to the Draft Decision circulated under Article 60(3) GDPR, were insufficiently reasoned for the purpose of the selection of the final quantum of the administrative fine. The DPC does not accept this submission. The views of these CSAs were clearly stated in response to the detailed analysis set out in the Draft Decision and contain sufficient reasoning so as to enable the DPC as LSA to take due account of them in its final decision if it considers that it is appropriate to do so. In considering the comments made regarding the administrative fine, and LinkedIn’s submissions on this matter, it is important to recall that the DPC’s final determination of the specific fines to be imposed, from within any previously proposed fining ranges, does not require or entail a fresh assessment of the Article 83(2) GDPR criteria. Neither does it require a separate process involving the assessment of matters not previously taken into account as part of the original Articles 83(2) and (1) GDPR assessments. Rather, it is a summing up of the established position with a view to determining the specific point within the proposed fining range(s) that best reflects the significant features of the particular case (both aggravating and mitigating) as well as the requirement for the final amount to be “effective, proportionate and dissuasive”, as required by Article 83(1) GDPR.

The views expressed by the FR SA and BY SA regarding the level of the fine

516. As set out in paragraph 8 above, in response to the Draft Decision circulated under Article 60(3) GDPR, the Italian, French and Bavarian SAs provided views to the DPC. The views of the French and Bavarian SAs included views on the DPC’s determination of the specific quantum of the administrative fine. As outlined above in response to LinkedIn’s Final Submissions, the

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<sup>281</sup> Guidelines 02/2022 on the application of Article 60 GDPR at [129].

DPC considers it is appropriate to take due account of the views express by the FR SA and BY SA in relation to the level of the fine.

517. In response to the Article 60 Draft Decision, the FR SA made the following comment:

*“With regard to the total amount of the proposed fine, the restricted committee agrees with the DPC’s analysis of the level of seriousness of the breaches and insists that, given the nature of the breaches, the number of people concerned and the significant harm caused to them, particularly in terms of the loss of control over their data, the total amount of the fines should approach the high end of the range proposed, i.e. 320 million euros.”*

518. Accordingly, the FR SA expressly states that the administrative fines should be selected from the highest end of the proposed fining ranges.

519. In response to the Article 60 Draft Decision, the BY SA made the following comment:

*“In view of the identified turnover, a fine between 100 and 110 million Euros or EUR 90 and 100 million appears very low for the infringements to be sanctioned. In the categories that the „Guidelines on the calculation of administrative fines under the GDPR“ provide for the classification of the severity of an infringement, the result is therefore likely to be only minor infringements, which are also in the lower range within this category, even though the infringement of Art. 5, 6 and 13 violates fundamental rights and principles of the GDPR - as stated in recitals 429 to 435 of the Draft Decision.*

*Furthermore the Draft Decision also assumes a high number of data subjects (cf. para. 427), a high number of processed data (cf. para. 459) and a high level of damage to the data subjects (cf. para. 438) and the degree of negligence is also assessed as an aggravating factor (cf. para. 450). In addition, a high degree of responsibility on the side of LinkedIn was identified, which is to be given high weight according to the Draft Decision, whereas only a few mitigating factors could be identified, which are to be given medium weight at best according to the Draft Decision. As a result, the other factors of Art. 83 (2) GDPR are therefore unlikely to lead to a reduction in the starting amounts determined due to the seriousness of the infringements”*

520. The DPC understands the position of the BY SA to be that the fining ranges proposed in the Draft Decision were too low, and therefore fail to be effective, proportionate and dissuasive in light of, inter alia, the severity of the infringements, the number of persons affected, the high volume of data processed, the high level of turnover of the undertaking and the high degree of responsibility of the controller. An upwards revision of the fining ranges cannot be made at this stage of the decision-making process. Therefore, in order to take due account of the views of the BY SA (bearing in mind its statement that the overall ranges are too low), it is necessary to construe this comment as being in favour of the selection of administrative fines from the upper end of the proposed fining ranges.

521. In the present circumstances, the comments by the FR SA and BY SA both suggest fines at the top end of the proposed ranges. The comment of the BY SA refers to the high number of data

subjects and data processed, the high level of damage, the turnover of the undertaking, the high degree of responsibility and degree of negligence, as balanced against the less significant mitigating factors set out in the Decision. The DPC accepts the submission of LinkedIn that the BY SA appears to have incorrectly understood that the degree of negligence was cited as an aggravating factor in the Decision. Nonetheless, the BY SA has clearly identified numerous factors in the Decision that it considers are in favour of the selection of an administrative fine from the upper end of the proposed fining ranges, in circumstances where an upwards adjustment of those ranges cannot be made. While, as is additionally noted by LinkedIn, the BY SA comment refers to the EDPB Fining Guidelines, the adoption of which post-dated the preparation of the PDD, by reference to which LinkedIn was afforded a right to be heard, the guidelines do not supplant the criteria established by Articles 83(1) and 83(2) of the GDPR - such criteria to which the comment of the BY SA manifestly refers. With regard to the comment of the FR SA, this refers to the analysis contained in the Draft Decision on the nature and seriousness of the infringements, as well as the number of data subjects concerned and the level of harm, in requesting administrative fines approaching the high end of the range proposed in the Draft Decision. The DPC has taken account of those views in exercising its discretion in the above selection of the administrative fines.

F. *Summary of envisaged action*

522. In summary, the corrective powers that the DPC hereby exercises, by way of this Decision, are:

- a. A reprimand to LinkedIn pursuant to Article 58(2)(b) GDPR regarding the infringements identified in this Decision;
- b. An order for LinkedIn to bring its processing into compliance
- c. Three administrative fines pursuant to Article 58(2)(i), totalling €310 million, as follows:
  - i. With regard to LinkedIn's reliance on the lawful basis in Article 6(1)(a) GDPR, and in respect of LinkedIn's infringements of Articles 5(1)(a) and 6(1) GDPR for the processing of third party data of its members for BA & TA without a valid lawful basis, a fine of €105 million.
  - ii. With regard to LinkedIn's reliance on the lawful bases in Articles 6(1)(b) and 6(1)(f) GDPR, and in respect of LinkedIn's infringements of Articles 5(1)(a) and 6(1) GDPR for the processing of first party data of its members for BA & TA and third party data for analytics without a valid lawful basis, a fine of €110 million.
  - iii. In respect of LinkedIn's infringements of Article 13(1)(c) GDPR and 14(1)(c) GDPR, a fine of €95 million.

523. In having selected, from within the fining ranges that were proposed in the Draft Decision, the specific amounts of the administrative fines to be imposed in respect of the infringements identified above, the DPC has taken account of the following:

- a. The DPC's assessment of the individual circumstances of this particular Inquiry, as summarised above;
- b. The purpose of the administrative fines, which, as noted above, is to enforce compliance with the GDPR by sanctioning the infringements that were found to have occurred (effectiveness);
- c. The requirement for a genuine deterrent effect, in terms of discouraging both LinkedIn and others from committing the same infringement in the future (dissuasiveness);
- d. The requirement for any fine to be proportionate and to not exceed what is necessary to achieve the stated objective (as recorded at point (b) above). The DPC considers that the fines are proportionate to the circumstances of the case, taking into account the gravity of the infringements and all of the elements that may lead to an increase (aggravating factors) or decrease (mitigating factors) of the initial assessment as well as the significant turnover of the undertaking concerned;

- e. The views expressed by LinkedIn in the various submissions furnished on fining matters, including the Final Submissions as addressed in further detail above; and
- f. The views expressed by the supervisory authorities of France (“**FR SA**”) and Bavaria (“**BY SA**”), insofar as those views concerned the level of fine that would be necessary in order to satisfy the requirement for fines to be effective, proportionate and dissuasive, as addressed in further detail above.

524. LinkedIn has the right of an effective remedy against this Decision, the details of which have been provided separately.

**This Decision is addressed to:**

**LinkedIn Ireland Unlimited Company  
Wilton Place  
Gardner House,  
Dublin 2  
D02 AD98  
Ireland**

**Dated the 22nd day of October 2024**

**Decision-Makers for the Data Protection Commission:**

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**Dr. Des Hogan  
Commissioner for Data Protection  
Chairperson**

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**Dale Sunderland  
Commissioner for Data Protection**



# REJOINDRE LA PROCEDURE

Prénom et nom

Adresse email

Les services des GAFAM ne peuvent s'accaparer nos données qu'avec notre consentement **libre et explicite**. Il n'est pas libre s'il nous est **imposé** de le donner pour accéder à leurs services. Or, c'est bien ce qu'ils font.

Je ne souhaite plus subir cette surveillance illicite quand j'utilise ces services.

Pour mettre fin à la **violation de mes droits**, je donne mandat à La Quadrature du Net pour saisir la CNIL en mon nom contre les responsables des services suivants :

#### 14. Appendix B

- Google Search
- iOS
- Facebook
- Whatsapp
- Instagram
- Amazon
- Outlook (messagerie, comprend Hotmail, Live et MSN)
- Skype
- LinkedIn

Cette action n'implique aucun risque légal pour les plaignants ni aucune démarche supplémentaire, ne coûte et ne rapporte pas d'argent.

Voir les **détails du mandat** ▶

Ce mandat ne sera pas public, seule la CNIL recevra la liste des mandataires.

Voir comment **mes données** seront utilisées ▶

- Me tenir informé-e des démarches par email

**CONFIRMER**

*Seules les personnes résidentes en France peuvent donner ce mandat*

Modifier un mandat déjà donné ▶

## 15. Appendix C

Figure 1: 1<sup>st</sup> part of in-product notification

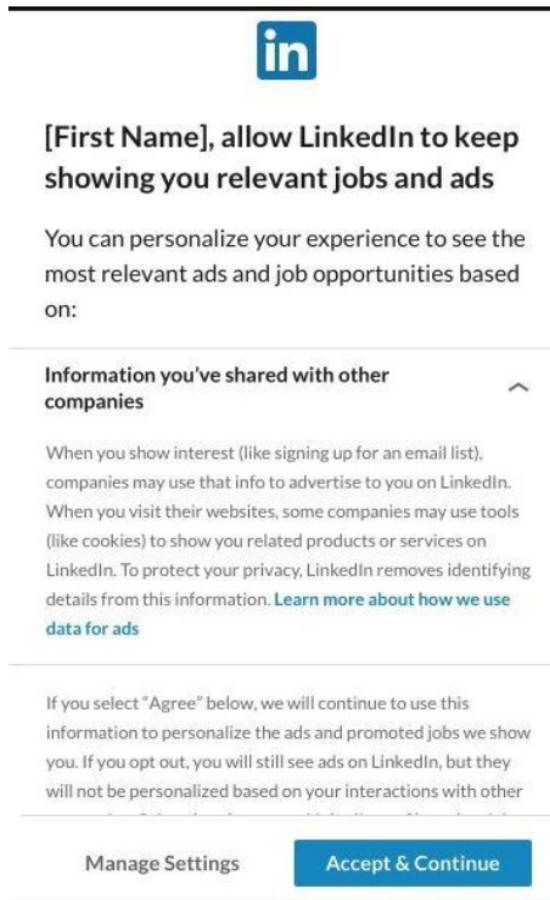
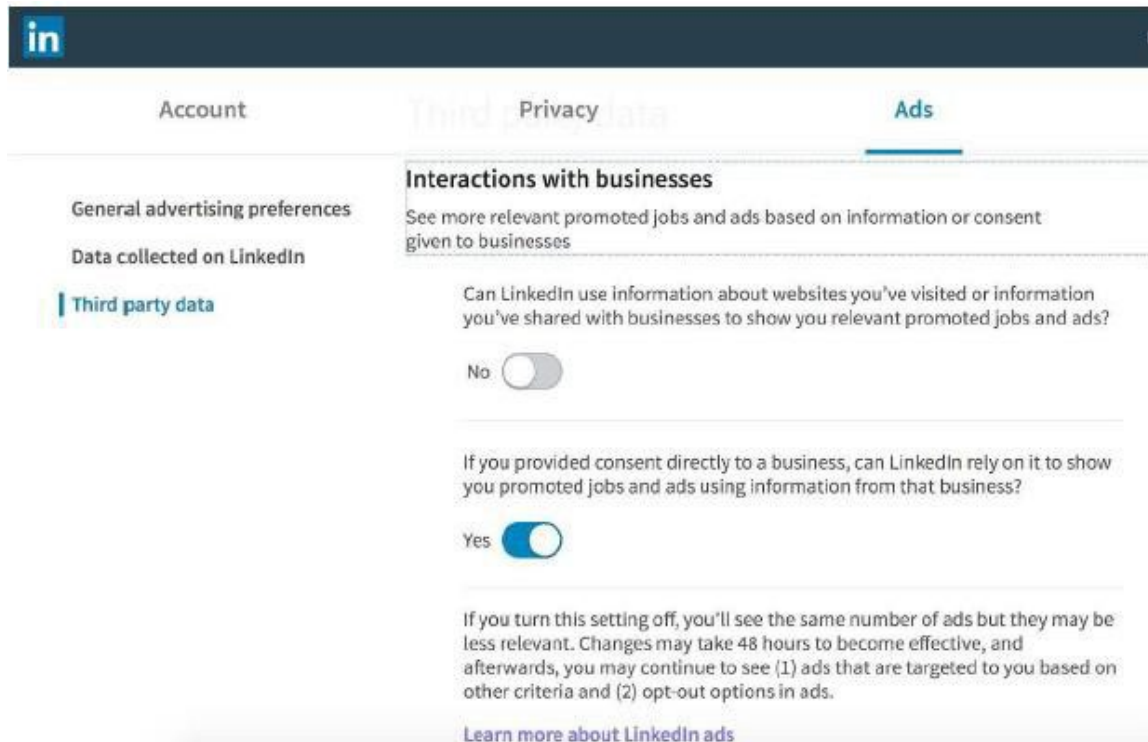


Figure 2: 2<sup>nd</sup> part of in-product notification

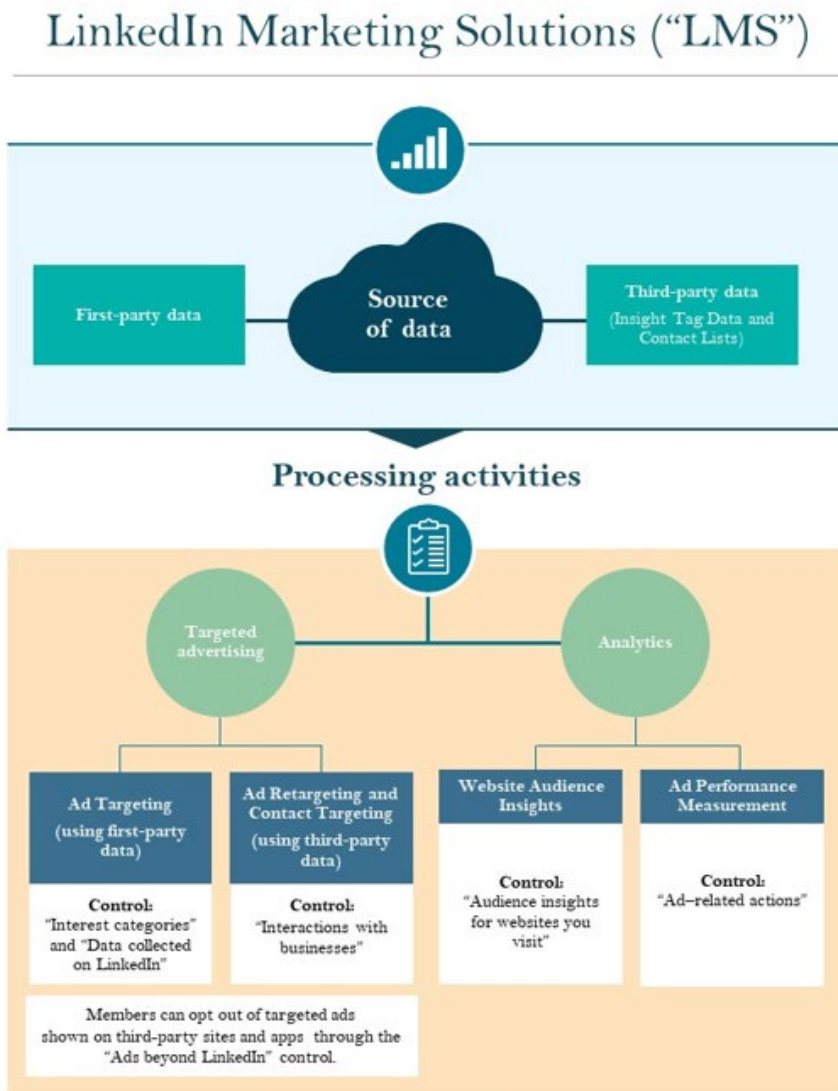
If you select "Accept & Continue" below, we will continue to use this information to personalize the ads and promoted jobs we show you. If you opt out, you will still see ads on LinkedIn, but they will not be personalized based on your interactions with other companies. Other data from your LinkedIn profile and activity may be used to personalize ads. Also, if you provide consent directly to a company you trust to use your data for ad relevance, LinkedIn may rely on that consent when showing you ads.

**Figure 3:** Screenshot of settings toggle allowing members to opt in to the processing of their third party personal data for BA & TA



## 16. Appendix D

Figure 4: LinkedIn's diagram of the differences between BA & TA, and analytics



## 17. Appendix E

Data type	Purpose of processing according to LinkedIn
Request URL	Automatically included in all HTTP calls. This is the URL in the LinkedIn domain to which the Insight Tag on the customer's website sends the HTTP call. Processing of this data is necessary for the purpose of receiving the HTTP call from the customer's webpage. This data is encrypted by LinkedIn.
Referrer URL	Automatically included in all HTTP calls. This is the URL of the customer's webpage on which the Insight Tag is placed. Processing of this data is necessary for the purpose of identifying the specific webpage and attributing the visit to that page. This data is encrypted by LinkedIn.
IP address	Automatically included in all HTTP calls. This is the IP address of the user. Processing of this data is necessary for aggregate analytics reporting (e.g., " <i>x% of visitors to your site came from country Y</i> "). The last octet of this data is truncated by LinkedIn.
Device and browser characteristics (user agent string)	Automatically included in all HTTP calls. This is information sent by the user's browser to all websites. Processing of this data is necessary for the purpose of debugging errors. (This data is not used for the purpose of matching the website visitor to a LinkedIn member.) This data is encrypted by LinkedIn.
Time Stamp	Automatically included in all HTTP calls. This is the time that the user accessed the webpage. Processing of this data is necessary to mark the start of the data retention period.
Cookie data	Access to this is inherent in all HTTP calls. Processing of this data is necessary for the purpose of matching the website visitor to a LinkedIn member. LinkedIn only receives information about LinkedIn's own cookies.

## 18. Appendix F

- A three step procedure is set out on LinkedIn’s website entitled “*How to get started with website demographics*” as follows:
  1. *Add the LinkedIn Insight Tag to your site;*
  2. *Create audiences to track;*
  3. *Apply audience insights to your marketing strategy. Under this heading is it is stated that ‘once you are set up you’ll start getting professional demographic data about your website visitors and which content they engage with most. Create ads tailored to the people you want to engage, and target the specific segment for each ad.’ (emphasis added).*
- To start an advertising campaign an enterprise customer logs into “Campaign Manager”, selects an objective and defines the target audience it wants to reach. Customers are told “*When in doubt, start broad and then narrow down your audience after seeing what performs best. By using LinkedIn’s demographic reporting, you can discover anonymized information on who is clicking and converting on your ads based on Titles, Functions, Company Industries, etc.*”<sup>282</sup> (emphasis added)
- Under a heading entitled “*Get started with LinkedIn website retargeting*” it is stated that: “*website retargeting gives advertisers the ability to retarget their website visitors with ad content on LinkedIn. By adding the LinkedIn Insight Tag to their website, advertisers can match their website visitors to members on LinkedIn for further engagement. Advertisers can also use website retargeting with LinkedIn demographic segments for more refined targeting.*”<sup>283</sup> (emphasis added)
- A page entitled “*Retargeting-Overview*” states that retargeting with ‘*Matched Audiences*’ allows enterprise customers/advertisers to build audiences of LinkedIn members based on previous internet activity.”<sup>284</sup> (emphasis added)
- Another part of the LinkedIn websites states “Get insights on what to do next with easy-to-use analytics: Get access to demographic data on audiences that are converting — including their job titles, companies, industries — and use this

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<sup>282</sup> ‘Mastering Targeting on LinkedIn’ <https://business.linkedin.com/content/dam/me/business/en-us/marketing-solutions/cx/2020/namer-pdfs/linkedin-marketing-solutions-updated-targeting-playbook-2020.pdf>.

<sup>283</sup> <https://www.linkedin.com/help/lms/answer/a420433>

<sup>284</sup> The actions listed are: visiting a page on enterprise customer/advertiser’s website; engaging with a single image ad; viewing a video ad; opening or submitted a Lead Gen Form; engaging with an enterprise customer/advertiser’s company page; RSVP’ing for a LinkedIn event ([https://www.linkedin.com/help/lms/answer/a427551?src=or-search&veh=www.google.com%7Cor-search&trk=nw\\_ml\\_at](https://www.linkedin.com/help/lms/answer/a427551?src=or-search&veh=www.google.com%7Cor-search&trk=nw_ml_at)).

intelligence to improve your campaign's targeting and content".<sup>285</sup> (emphasis added)

- Under the overall heading of “How Businesses and Websites Can Use Third-Party Data to Target Advertising Through LinkedIn” there is a sub-heading entitled “Third Party Data from Your Interactions With Websites” and under another heading entitled “Website Retargeting” it is stated that: “Advertisers can also use third-party data from their own company websites for LinkedIn ad campaigns if they enable the LinkedIn Insight Tag on their website. The Insight Tag is JavaScript code that tracks visits of LinkedIn members on third-party sites where the tag is enabled. Advertisers can then use this information about their website visitors to understand their site demographics, measure the effectiveness of their ad campaigns, and they can include their website visitors in the target audience of ad campaigns”.<sup>286</sup>
- On a webpage entitled “Website Demographics” “What You Can do With Website Demographics”<sup>287</sup> it is stated:
  - a. *Understand your audience better: Gain valuable audience insights—like job titles, company names, and industries—using the most accurate professional data, only on LinkedIn*
  - b. *Create tailored content: Compare different pages to learn which kinds of content resonate with different audiences. Customize content to your strongest prospects.*
  - c. *Reach your ideal prospects: Use what you learn about your website visitors to target the people who are most likely to become qualified leads and customers* (emphasis added).
- There is also a video on the “Website Demographics” page containing the following relevant statement: “Although website analytics have been around for years, the amount of actionable data is often limited. LinkedIn website demographics is a free reporting tool that helps your business understand what kind of professionals are visiting your website, then you can use those insights to improve your marketing strategy and results.”<sup>288</sup> (emphasis added)
- Also on the “Website Demographics” page there is a heading entitled “How to get started with website demographics” which includes the following information for enterprise customers:
  - a. *Add the LinkedIn insight tag to your website: The LinkedIn Insight Tag is a lightweight JavaScript tag that powers Website Demographics. Follow*

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<sup>285</sup> <https://business.linkedin.com/marketing-solutions/conversion-tracking>

<sup>286</sup> [https://www.linkedin.com/help/linkedin/answer/a426264?trk=microsites-frontend\\_legal\\_privacy-policy&lang=en](https://www.linkedin.com/help/linkedin/answer/a426264?trk=microsites-frontend_legal_privacy-policy&lang=en)

<sup>287</sup> <https://business.linkedin.com/marketing-solutions/website-demographics?#&lr=1>

<sup>288</sup> <https://business.linkedin.com/marketing-solutions/website-demographics>



[these steps](#) to add an Insight Tag to your website. Once added, sign in to [Campaign Manager](#) (the advertising platform on LinkedIn), click on Account Assets, and choose Insight Tag. Your website will be listed as Verified if your tag is added properly. Skip this step if you already have the Insight Tag on your website;

- b. Create audiences to track: Once you're on the audience creation page in Campaign Manager, click on **Create an audience**, and follow the setup steps to define [website audiences](#) for your campaigns;
- c. Apply audience insights to your marketing strategy: Once you're set up, you'll start getting professional demographic data about your website visitors and which content they engage with the most. Create ads tailored to the people you want to engage, and target the specific audience segment for each ad. Website Demographics map directly to the professional targeting traits available on LinkedIn ads. Website Demographics will help you measure the impact, so you can keep learning and optimizing your ROI [Return on Investment].<sup>289</sup> (emphasis added)

➤ A further document on the LinkedIn website entitled “*Reaching Your Audience: Mastering Targeting on LinkedIn*”<sup>290</sup> provides guidance (to potential enterprise customers) on the manner in which they can set up a targeted advertising campaign and the benefits of doing so. The document includes the following statements and information:

- a. At page 6, a step-by-step guide is given to potential enterprise customers as to how to set up a targeted advertising campaign which involves selecting an objective and defining the target audience that an enterprise customer wishes to reach. Enterprise customers are told that a tool called Campaign Manager allows them to “*segment audiences in several ways and combine different targeting options to reach people that are most relevant for your content goals and business*”. Page 8 contains a ‘tip’ in a box that says “*When in doubt, start broad and then narrow down your audience after seeing what performs best. By using LinkedIn’s demographic reporting, you can discover anonymized information on who is clicking on your ads based on Titles, Functions, Company Industries etc. Find out more on page 35*”.
- b. Page 29 contains a heading entitled “*Retargeting by Video and Lead Gen Forms*” with the accompanying text explaining that “*you can reach those taking an active interest in your brand based on the prior actions taken with your ads. This means you can reach those who watched part or all of a 15*

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<sup>289</sup> DPC’s explanation of acronym.

<sup>290</sup> <https://business.linkedin.com/content/dam/me/business/en-us/marketing-solutions/cx/2020/namer-pdfs/linkedin-marketing-solutions-updated-targeting-playbook-2020.pdf>

*second video and serve them with a more in depth content piece, like a whitepaper which opens a Lead Gen form.” (emphasis added)*

- c. At page 35 there is a heading *“Use demographics reporting to analyze your audience”* which, according to LinkedIn *“enables you to optimize the targeting of your campaigns with information on who’s responding to your offer”*. *“After you have accumulated enough campaign data, demographic reporting provides detailed insights about the professionals who have clicked on your LinkedIn ads broken down by Job Title, Job Seniority, Company Industry, Job Function, Company Size, Location. This will enable you to see how your content is performing with different subsets of your audience.”*
- A further document on LinkedIn’s website, entitled *“LinkedIn Matched Audiences”* explains how enterprise customers of LinkedIn can re-target website visitors, viewers of video ads or those who opened a lead form or submitted a lead.<sup>291</sup>
  - The ‘ad-related actions’ toggle which was active at the time of the Complaint (28 May 2018) was followed by the statement *‘see more relevant jobs and ads based on actions you took on ads’* (emphasis added) appears to indicate that if the analytics settings were switched on so that processing for the purposes of the analytics services were permitted, the intended result for the data subject is that they are served with more “relevant” (in other words more specifically targeted) ads.

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<sup>291</sup><https://business.linkedin.com/content/dam/me/business/en-us/marketing-solutions/resources/pdfs/linkedin-matched-audiences-final.pdf>. LinkedIn, in a section of their website entitled *“LinkedIn Lead Generation Forms”* describes how it collects so called ‘leads’ as follows: *“once members click your ad, they’ll see a form that’s pre filled with accurate professional information from their LinkedIn profile, such as their name, contact info, company name, seniority, job title and location. With a single click on the form-and without having to type anything by hand- members can instantly send you their info creating leads for your business.”* (<https://business.linkedin.com/marketing-solutions/native-advertising/lead-gen-ads>).

## 19. Appendix G

Figure 5

Members can opt out of their data being used for the Website Audience Insights service using the “Audience insights for websites you visit” control in the Settings Hub. Members can also opt out of their data being used for the Ad Performance Measurement service using the “Ad-related actions” control.

The image shows a screenshot of the LinkedIn 'Third-party data' settings page. The page title is 'Third-party data' with a subtitle 'Choose how you'd like data from your activity off LinkedIn to be used to show you more relevant ads'. There are four settings listed, each with a 'Change' link and a status indicator. Two settings are circled in orange: 'Audience insights for websites you visit' (status: Yes) and 'Ad-related actions' (status: Yes).

Setting Name	Description	Change Link	Status
<b>Audience insights for websites you visit</b>	Help the websites you visit better understand their professional audience	Change	Yes
<b>Ads beyond LinkedIn</b>	See more relevant ads, such as job ads, based on websites and apps off LinkedIn	Change	Yes
<b>Interactions with businesses</b>	See more relevant ads, such as job ads, based on information given to businesses	Change	No
<b>Ad-related actions</b>	Help us understand and report aggregate ad performance based on actions you took on ads	Change	Yes

## 20. Appendix H

### Advertising preferences

Choose how your data is used to show you more relevant ads

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<b>Profile data for ad personalization</b> Control how certain ads appear to you	<a href="#">Change</a> Yes
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<b>Interest categories</b> See more relevant ads, such as job ads, based on your and similar members' activities on LinkedIn and Bing	<a href="#">Change</a>
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### Data collected on LinkedIn

Choose what type of data you would like LinkedIn to use to show you more relevant ads

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<b>Connections</b> See more relevant ads, such as job ads, based on your connections	<a href="#">Change</a> Yes
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<b>Location</b> See more relevant ads, such as job ads, based on your postal code or city	<a href="#">Change</a> Yes
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<b>Demographics</b> See more relevant ads based on your demographic data	<a href="#">Change</a> Yes
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<b>Companies you follow</b> See more relevant ads, such as job ads, based on companies you follow	<a href="#">Change</a> Yes
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<b>Groups</b> See more relevant ads, such as job ads, based on groups you joined	<a href="#">Change</a> Yes
---	-------------------------------

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<b>Education</b> See more relevant ads, such as job ads, based on your education	<a href="#">Change</a>
---	------------------------

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<b>Job information</b> See more relevant ads, such as job ads, based on your job information	<a href="#">Change</a>
---	------------------------

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<b>Employer</b> See more relevant ads, such as job ads, based on your company information	<a href="#">Change</a>
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### Third-party data

Choose how you'd like data from your activity off LinkedIn to be used to show you more relevant ads

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<b>Audience insights for websites you visit</b> Help the websites you visit better understand their professional audience	<a href="#">Change</a> Yes
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<b>Ads beyond LinkedIn</b> See more relevant ads, such as job ads, on websites and apps off LinkedIn	<a href="#">Change</a> Yes
---	-------------------------------

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<b>Interactions with businesses</b> See more relevant ads, such as job ads, based on information given to businesses	<a href="#">Change</a> No
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<b>Ad-related actions</b> Help us understand and report aggregate ad performance based on actions you took on ads	<a href="#">Change</a> Yes
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## 21. Appendix I

### Location

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**Location** Close

See more relevant ads, such as job ads, based on your postal code or city Yes

Can LinkedIn show you more relevant ads, such as job ads, based on your postal code or city? Your postal code is not provided.

Yes

If you turn this setting off, you'll see the same number of ads but they may be less relevant. Changes typically take up to 48 hours to take effect, and afterwards, you may continue to see (1) ads that are targeted to you based on other criteria and (2) opt-out options in ads.

[Learn more about LinkedIn ads](#)

### Demographics

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**Demographics** Close

See more relevant ads based on your demographic data Yes

Can LinkedIn show you more relevant ads based on demographic data (such as age or gender) provided by you or inferred from your profile?

[Learn more](#)

Yes

If you turn this setting off, you'll see the same number of ads but they may be less relevant. Changes typically take up to 48 hours to take effect, and afterwards, you may continue to see (1) ads that are targeted to you based on other criteria and (2) opt-out options in ads.

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