

COMPLAINT UNDER ARTICLE 63(1), 67 REGULATION 2018/1725

***noyb* Case-No: C-035**

filed by

██████████, residing in ██████████ (hereinafter
“Complainant 1”),

██████████, with administrative address at ██████████
██████████,

██████████, with administrative address at ██████████
██████████,

██████████, residing in ██████████,

██████████, residing in ██████████,

██████████, residing in ██████████,

(hereinafter, the “Complainants”).

against

the European Parliament, located at Rue Wiertz 60, 1047 Bruxelles, Belgium (hereinafter the
“Parliament”)

and

Ecolog Deutschland GmbH, registered at In der Steele 14, 40599 Düsseldorf, Germany
(hereinafter “Ecolog”)

and any other controller or processor which the competent data protection authority would
identify in the context of this complaint.

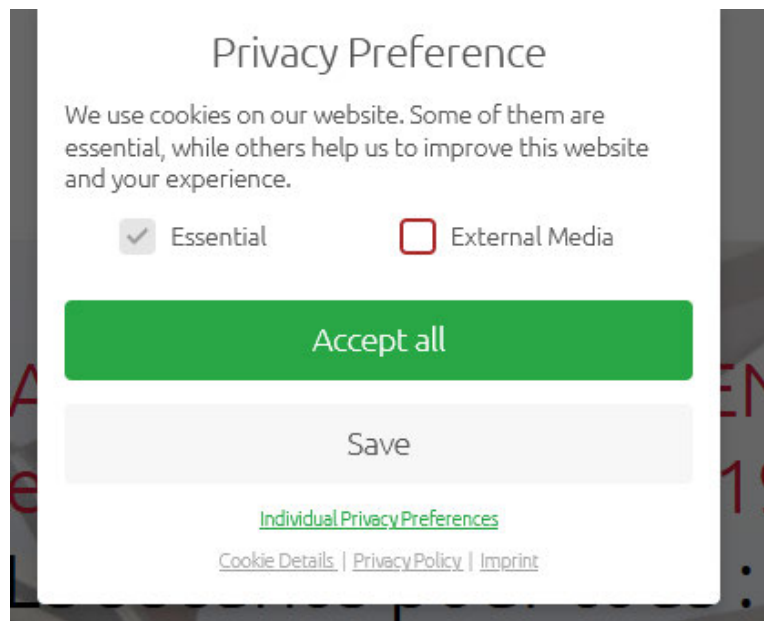
1 REPRESENTATION

1. *noyb* - European Centre for Digital Rights (hereinafter “*noyb*”) is a non-profit organisation with its registered office at Goldschlagstraße 172/4/3/2, 1140 Wien, Austria, and with registration number ZVR: 1354838270 (see Attachment 1).
2. Pursuant to Article 67 Regulation 2018/1725, the Complainants are represented by *noyb* (Attachment 2).

2 FACTUAL BACKGROUND

2.1 The Parliament’s COVID-19 testing registration website

3. On 5 October 2020, Complainant 1 visited the European Parliament’s COVID-19 testing registration website (<https://europarl.ecocare.center/registration/>) (hereinafter “Parliament’s EcoCare website” or “the website”). During her visit, Complainant 1 was presented with a cookie banner offering her to accept all of the essential cookies on the website or to save her privacy preferences (Attachment 3).



4. The Parliament’s EcoCare data protection notice, available at <https://europarl.ecocare.center/data-protection/>, states (last visited on 13 January 2021) that its website uses Google Analytics, and that “*the information regarding your usage of this website generated by the use of Google Analytics is transmitted to and stored on a Google server in the US*” (Attachment 4).
5. With the assistance of a web tool developed by the Danish NGO Dataskydd (<https://webbkoll.dataskydd.net/de>), Complainant 1 scanned the Parliament’s EcoCare website, to discover that that upon visiting the website, a total of 150 third-party requests and a cookie were placed on her browser (Attachment 5). Among these third-party requests

and cookies, we would like to highlight the following which imply a transfer of data outside of the EU:

1. A cookie from the company US-based company Stripe (page 4 of Attachment 5).
2. Requests from Google, such as gstatic and googleapis (page 5 and 6 of Attachment 5)
3. Requests from Stripe, such as js.stripe.com, m.stripe.com and m.stripe.network (page 5 and 6 of Attachment 5)
6. The fact that a Stripe Cookie was placed on the Complainant's browser, and that third-party requests from Google and Stripe were made, necessarily means that personal data was transferred to both Google and Stripe in the US. As far Google is concerned, this is even confirmed by the data protection notice mentioned under §4 above according to which *"the information regarding your usage of this website generated by the use of Google Analytics is transmitted to and stored on a Google server in the US"*.

2.2 Complaint before the European Data Protection Supervisor and exchange of emails with the European Parliament

7. On 27 October 2020, Complainant 1 sent an email (Attachment 6) to the Secretariat and the Members of Parliament ("MEPs") asking how it could be justified that the service provided by EcoCare was transferring personal data to the US despite the *Schrems II* judgement.
8. On 29 October 2020, Complainant 1 jointly filed a complaint along with 5 other MEPs before the European Data Protection Supervisor (EDPS) (Attachment 7). All complainants visited the Parliament's EcoCare site to register for a Covid-19 test. This is why they decided to join Complainant 1 in filing this Complaint.
9. Complainant 1 informed the Data Protection Officer ("DPO") of the Parliament of the complaint sent to the EDPS on 29 October 2020 (Attachment 8). The Parliament's Data Protection Service acknowledged receipt of the complaint and informed Complainant 1 that they would investigate the situation with the relevant data controller (Attachment 9).
10. On 5 November 2020, a follow-up email was sent to the Data Protection Service of the Parliament inquiring about the status of the complaint (Attachment 10). A response was issued by the Data Protection Service on 6 November, stating that an investigation was still ongoing (Attachment 11). On 13 November, the DPO of the Parliament informed the Complainants that a technical analysis was undertaken on the Parliament's EcoCare site and that the controller would provide a final answer once the technical analysis was concluded (Attachment 12).
11. On 18 November, Complainant 1 received an answer to her email sent on 27 October to the Secrétariat (Attachment 13). This email stated that Complainant 1's original email was forwarded to DG PERS, the DG responsible for the testing center. It also confirmed that according to the framework contract signed between DG PERS and Ecolog, the processing of personal data on behalf of the Parliament is subject to Regulation 2018/1725. Finally, the email also stated that Ecolog has now verified that Google Analytics and Stripe had been

disabled on the Parliament's EcoCare Site (which suggests that they had previously been enabled).

12. On 1 December, Complainant 1 sent a response email (Attachment 14), in which she inquired how long data transfers took place for, and what data was transferred.
13. The same day, Complainant 1 also sent a follow-up email to the DPO of the Parliament (Attachment 15), stating that she had received confirmation that the Google Analytics and Stripe trackers had been disabled. In this email, Complainant 1 asked the DPO how long transfers took place for, and what data was transferred.
14. On 7 December, Complainant 1 received an answer to her email to the DPO (Attachment 16) from [REDACTED] within the DG HR, acting as the "data controller for this procedure after consulting the DPO service". According to this email, the Stripe cookies had never been active since the registration for testing did not require any form of payment. However, Attachment 5 confirms that such a cookie was actually used. Furthermore, no explicit mention is made of whether a transfer of data to or from Google had taken place before the tracker had been removed from the website. In any case, the data protection policy of EcoCare stills mentioned the use of Google Analytics on 13 January 2021.

3 SUPERVISORY AUTHORITY COMPETENT TO DEAL WITH THE CASE

15. In light of the facts described above, DG HR of the European Parliament is deemed to be the controller in this instance, as confirmed by the email of 7 December. As mentioned by [REDACTED] in his email of 18 November 2020 (see Attachment 13) the processing at stake is subject to Regulation 2018/1725. For these reasons, the EDPS is competent to handle this Complaint.
16. It is however not excluded that the Parliament and Ecolog are joint controllers, according to the *EDPS Guidelines on the concepts of controller, processor and joint controllership under Regulation (EU) 2018/1725* (issued on 7 November 2019) (hereafter "the EDPS Guidelines"). After all, the data protection notice mentions that Ecolog is the data controller and entity responsible for the processing of Personal Data.
17. On the basis of the above, should the EDPS find that it does not have exclusive competence, and that it may be jointly competent with another authority, we request that the EDPS refer the case to the competent supervisory authority in order to cooperate on the matter, in accordance with Article 57(1)(e), and Article 61 of Regulation 2018/1725. Such competent authorities are presumably the Belgian SA (APD), as the data protection notice refers to the APD as its supervisory body under section 2.3, or the Landesbeauftragte für Datenschutz und Informationsfreiheit Nordrhein-Westfalen, as Ecolog has its office in Düsseldorf.

4 GROUNDS FOR THE COMPLAINT

18. This Complaint complements and provides further details on the complaint already sent to the EDPS on 29 October (Attachment 7). In particular, it is submitted that:

1. Through the installation of the cookies (such as Google and Stripe) and the further third-party requests, the Parliament's EcoCare site illegally transferred user data to the US, despite the findings of the recent Judgment of the Court of Justice of the European Union ("CJEU") in Case C-311/18 ("*Schrems II*").
2. The data protection notice of the Parliament's EcoCare website does not provide clear, concise and adequate information.
3. The legal basis (legitimate interest) mentioned for the processing of data for customer accounts is not applicable for the processing at stake.
4. The cookie banners presented to the users are deceptive and lack relevant and sufficient information, and therefore make the consent of the users invalid.

4.1 Illegal transfer of data to the US through third-party requests and cookies

19. By visiting the Parliament's EcoCare site, a total of 150 third-party requests and cookies were received on Complainant 1's browser (Attachment 5). Among these were:

1. a cookie from the company US-based company Stripe (page 4 of Attachment 5)
2. requests from Google, such as gstatic, fonts.gstatic and googleapis (page 5 and 6 of Attachment 5)
3. requests from Stripe, such as js.stripe.com, m.stripe.com and m.stripe.network (page 5 and 6 of Attachment 5).

20. The fact that a Stripe Cookie was placed and third-party requests occurred from Google and Stripe, necessarily means that personal data was transferred to both Google and Stripe in the US. This is supported by the technical analysis of the website (page 4 and 5 of Attachment 5) but also by the Parliament's EcoCare data protection notice, available at <https://europar.ecocare.center/data-protection/>, which still stated (on 13 January 2021) that its website uses Google Analytics, and that "*the information regarding your usage of this website generated by the use of Google Analytics is transmitted to and stored on a Google server in the US*" (Attachment 4).

21. This contradicts the controller's statement according to which "*no data transfers had taken place in the context of the cookie and trackers at issue*", but also the affirmation that "*the Stripe cookie (for secure payments) in the webpage had never been active since registration for testing for EU Staff and Members did not require any form of payment*" (see Attachment 16).

22. The EP's EcoCare data protection notice refers to the use of Standard Contractual Clauses ("SCCs") for the transfer of data outside of the EU (see section 2.3 of the notice). Both Google and Stripe refer to SCCs for the transfer of data from the EU/EEA to non-EU/EEA countries

(see Attachment 17 for Stripe's Privacy Policy and Attachment 18 for Google's Privacy Policy).

23. Besides SCCs, the Parliament's EcoCare data protection notice does not refer to any other basis for transfer under Chapter V of Regulation 2018/1725. Moreover, users are not asked to consent to the transfer of their data under Article 50(1)(a). The only bases for such transfers are therefore the SCCs mentioned above.
24. In *Schrems II*, the CJEU clarified that if a controller or processor wishes to base a data transfer on SCCs under on Article 46(2)(c) of the GDPR (Article 48(b) of Regulation 2018/1725), it is their responsibility to verify that the laws of the third country of destination can ensure an adequate protection for the data transferred (para. 134 of *Schrems II*). However, US law does not offer such a level of protection: the CJEU has explicitly found that transfers to companies that fall under 50 U.S. Code § 1881a ("FISA 702") not only violate the relevant Articles in Chapter 5 of the GDPR but also Article 7 and 8 of the Charter of Fundamental Rights (CFR) as well as the essence of Article 47 CFR (see C-362/14 ("*Schrems I*"), para. 94 and 95.).
25. Google in particular, qualifies as an electronic communication service provider within the meaning of 50 U.S. Code § 1881(b)(4) and as such is subject to US intelligence surveillance under 50 U.S. Code § 1881a ("FISA 702"). As apparent from the "Snowden Slides" (Attachment 21) and Google's own Transparency Report (see <https://transparencyreport.google.com/user-data/us-national-security>), Google is actively providing personal data to the US government under 50 U.S. Code § 1881a.
26. Consequently, the data transferred to Google and Stripe in the US do not receive an adequate level of protection, despite the existence of SCCs. As a result, and in line with para. 135 of *Schrems II*, the Controller must refrain from transferring the Complainants' – or any other personal data – to the USA.
27. Although the controller for the processing at stake claims that "*no data transfers had taken place in the context of the cookie and trackers at issue*" (Attachment 16):
 - the information in Attachment 5 proves that personal data was transferred to both Stripe and Google,
 - the data protection notice still mentioned on 13 January 2021 the transfer of data processed in the context of Google Analytics to Google in the US (Attachment 4),
 - loading Google fonts from a Google server, with the involvement of third-party services, implies that the IP address is transmitted as personal data,
 - the answer from the controller confirming that "*the trackers from Google analytics and Stripe were disabled by Ecolog in the days following your complaint*" necessarily means that they were enabled before the complaint (Attachment 16).
28. We therefore request that the EDPS investigate the matter and determine which cookies and requests were and are still implemented on the EcoCare website. In this respect, we also request to enforce the Complainants' right of access under Article 17 of Regulation 2018/1725, in particular to ensure that the Complainants are informed of which of their data

exactly was transferred abroad. We also request that the Complainants are made aware of what appropriate safeguards and additional measures are put in place for the transfer, as per their right in Article 17(2) of Regulation 2018/1725 and in line with the *Schrems II* judgement.

29. According to paragraph 135 of *Schrems II*, where a controller or processor established in the EU is not able to take adequate additional measures to guarantee the protection required under EU law, the competent supervisory authority is required to suspend or end the transfer of the personal data to the third country concerned. We ask that the EDPS impose an immediate ban on the processing at stake and order the suspension of data flows, as per Article 58(1)(g) and (j) of Regulation 2018/1725 respectively.

4.2 The information provided is not sufficiently clear and transparent

30. There are two different data protection notices presented to the data subject on the Parliament's EcoCare site.
31. The first data protection notice is available on the main site under the 'data protection notice' button (Attachment 4). However, this data protection notice does *not* refer to the European Parliament. It refers instead to Brussels Airport (see paragraphs 2.2.2A and 2.2.2B of Attachment 4).
32. The second data protection notice is presented to the data subjects when they reach the website go to register for a COVID-19 testing appointment (<https://europarl.ecocare.center/registration/> - Attachment 19). This data protection notice does refer to the European Parliament.
33. The presence of two differing data protection notices violates Article 14(1) of Regulation 2018/1725. In particular, the conflicting information presented in the notices do not make them "transparent and intelligible", as required by Article 14(1). In reference to the notice which mentions Brussels Airport, a data protection notice cannot be 'intelligible' or 'transparent' if it refers to the wrong entity to begin with.
34. Furthermore, *both* notices fail to mention the applicable regulatory text, which in this context is *not* the GDPR, but instead Regulation 2018/1725. Both notices refer only to the provisions of the GDPR, without any acknowledgment of the fact that they are not applicable in the context of EU Institutions. This also creates confusion for the data subjects, and constitutes a violation of Article 14(1) of Regulation 2018/1725, in particular regarding the applicable legal basis (see section 4.3 hereunder).

4.3 Invalid legal basis for the processing of data for customer accounts

35. Both data protection notices (see Attachment 4 and 19 respectively) list Article 6(1)(f) GDPR as the legal basis for processing of data for customer accounts.
36. This fails to acknowledge that processing for the purpose of legitimate interest is expressly *excluded* from Regulation 2018/1725. In fact, the GDPR itself says with reference to Article

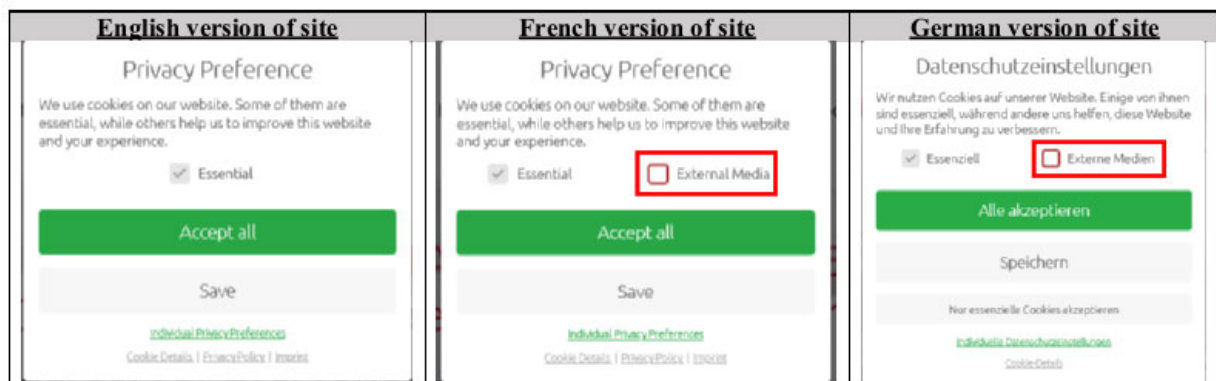
6(1)(f) that it “shall not apply to processing carried out by public authorities in the performance of their tasks”.

37. The consequence is that processing based upon legitimate interest cannot be relied upon in the context of EU Institutions. This amounts to a violation of Articles 5 and 15(1)(c) Regulation 2018/1725.

38. We therefore request that the controller refers to the correct and appropriate legal basis under Article 5 of Regulation 2018/1725, in accordance with the Complainants’ right under Article 15(1)(c) of Regulation 2018/1725.

4.4 Invalid consent and insufficient information through the cookie banner

39. When users visit the Parliament’s EcoCare site, a cookie banner is presented to them. However, this cookie banner differs depending on the language of the website. Attachment 3.1 shows that different cookie banners appear when one visits the site in English, French, and German. The English version of the site displays only an essential cookie button, while the German and French versions *also* display an “external media” cookies button (see Attachment 3.1).



40. In all three languages, the user is prompted by a bright green button to “accept all” cookies. The only alternative they have is to click on a grey button labelled “save”. Only if one makes the effort to look at the very bottom of the banner and read the small-printed grey text, will they see a button labelled “cookie details”. The site in German differs from the others since the cookie banner also offers to accept only the necessary cookies, whereas the other language versions do not give this possibility. Regarding the German version of the website, the difference between “save” (“*Speichern*”) and “accept only necessary cookies” (“*Nur essenzielle Cookies akzeptieren*”) is not clear to us.

41. Clicking the “cookie details” button brings the user to the second layer of the cookie banner. Here also, the English version of the website differs from the German and the French: on the English version of the website, *only* essential cookies are mentioned. In such a case, the difference between the “accept all” and the “save” button is not clear to us.

Second layer of cookie banner as presented in the **English** version of the website (see Attachment 3.1)

Privacy Preference

Here you will find an overview of all cookies used. You can give your consent to whole categories or display further information and select certain cookies.

[Accept all](#) [Save](#) [Back](#)

Essential (1)

Essential cookies enable basic functions and are necessary for the proper function of the website.

[Show Cookie Information](#)

powered by Borlabs Cookie [Privacy Policy](#) [Imprint](#)

42. On the French version of the website, both essential cookies and 7 “external media” cookies are mentioned. These external media cookies include cookies from: Facebook, Google Maps, Instagram, OpenStreetMap, Twitter, Vimeo, YouTube.

Second layer of cookie banner as presented in the **French** version of the website (see Attachment 3.1)

Privacy Preference

Here you will find an overview of all cookies used. You can give your consent to whole categories or display further information and select certain cookies.

[Accept all](#) [Save](#) [Back](#)

Essential (1)

Essential cookies enable basic functions and are necessary for the proper function of the website.

[Show Cookie Information](#)

External Media (7) Off ☐

Content from video platforms and social media platforms is blocked by default. If External Media cookies are accepted, access to those contents no longer requires manual consent.

[Hide Cookie Information](#)

Accept	<input type="checkbox"/> Off
Name	Facebook
Provider	Facebook
Purpose	Used to unblock Facebook content.
Privacy Policy	https://www.facebook.com/privacy/explanation
Host(s)	.facebook.com

Accept	<input type="checkbox"/> Off
Name	Google Maps
Provider	Google
Purpose	Used to unblock Google Maps content.
Privacy Policy	https://policies.google.com/privacy?hl=en&gl=en
Host(s)	.google.com

43. On the German version of the website, in addition to the essential cookie, only one “external media” cookie is mentioned, which comes from Google Maps.

Second layer of cookie banner as presented in the **German version of the website (see Attachment 3.1)**

Datenschutzeinstellungen

Hier finden Sie eine Übersicht über alle verwendeten Cookies. Sie können Ihre Einwilligung zu ganzen Kategorien geben oder sich weitere Informationen anzeigen lassen und so nur bestimmte Cookies auswählen.

Alle akzeptieren
Speichern
[Zurück](#) | [Nur essenzielle Cookies akzeptieren](#)

Essenziell (1)

Essenzielle Cookies ermöglichen grundlegende Funktionen und sind für die einwandfreie Funktion der Website erforderlich.

[Cookie-Informationen anzeigen](#)

Externe Medien (1) Aus ☐

Inhalte von Videoplattformen und Social-Media-Plattformen werden standardmäßig blockiert. Wenn Cookies von externen Medien akzeptiert werden, bedarf der Zugriff auf diese Inhalte keiner manuellen Einwilligung mehr.

[Cookie-Informationen ausblenden](#)

Akzeptieren	<input type="checkbox"/> Aus
Name	Google Maps
Anbieter	Google
Zweck	Wird zum Entsperren von Google Maps-Inhalten verwendet.
Datenschutzerklärung	https://policies.google.com/privacy
Host(s)	.google.com
Cookie Name	NID

44. Nothing can reasonably explain the difference of information and banners depending on the language versions of the website. As already mentioned, this is not the only inconsistency, as two different data protection notices are available on the website. Moreover, the mere existence of different options proves that it is possible to tailor the banner in order to be compliant with relevant data protection legislation, or at least to offer options that are more respectful of the choice of the users (see the “accept only essential cookies” button on the German version).

45. Several issues can be raised with regards to the cookie banners presented in the different languages.

a) Lack of clear, concise and intelligible information on the essential cookie

46. The information that is given on the one essential cookie (Borlabs) that is present on all three languages of the site is very vague (Attachment 3.2). The only description of the cookie refers to the following wording: “saves the visitors preferences selected in the Cookie Box of Borlabs Cookie”. It remains unclear to what preferences it is referring to, especially when it comes to the banner of the English version, where no preference regarding cookies can be selected by the users. Considering that the information provided is not intelligible and easily accessible, it violates Article 14(1) of Regulation 2018/1725.

b) No option to “reject all” cookies on the first layer of the banner

47. While the banner provides a button to accept all cookies and a button to save the current selection, no option to “reject” the non-essential cookies is offered, except in the German version. Hiding the “reject” option on the first layer has a huge impact on the behavior of the users: according to industry numbers, only 2.18% of data subjects visit the second layer of a cookie banner (*Usercentrics: “Optimizing the Opt-In Rate – A new discipline in online marketing”*, June 2020, page 5).
48. The CNIL’s recommendation 2020-092 of 17 September 2020 also confirms that the accept all and reject all buttons should be presented on the same level, so that the users can refuse the cookies as easily as they can express their consent.
49. With reference to Article 7(3) of Regulation 2018/1725 (under which consent must be as easy to withdraw, as to give) it is required that any refusals to give consent is as easy as giving consent. Without this, the data subject is forced to first consent, before being granted an easy option to withdraw this consent thereafter. This cannot reasonably be the intention of the legislator. Consequently, and by way of analogy, the refusal to give consent has to be as easy as giving said consent.
50. Under Article 14(2) of Regulation 2018/1725, the Controller must “facilitate” the exercise of the Complainants’ rights. This includes the withdrawal of consent under Article 19(1)(b) and, by way of analogy, also the possibility of refusing to give consent. The Controller has violated this obligation by not providing a “reject” option on the first layer of the banner.
51. Finally, by failing to incorporate a “reject” button, the principle of fairness and transparency under Article 4(1)(a) of Regulation 2018/1725 has also been violated.

c) The requirements for consent as a legal basis for the processing of non-essential cookies are not met

52. While the data protection notice states that Article 6(1)(b) GDPR is the legal basis for the “required cookies”, Article 6(1)(a) is the basis mentioned for the use of statistical cookies. However, the cookie banner does not fulfill the requirements of consent given in Article 3(15) of Regulation 2018/1725, according to which consent should be freely given, specific, informed, and unambiguous, for the reasons that follow.
53. Consent cannot be considered to be freely given on the basis that the user is nudged towards pressing the “accept all” cookies button. The color contrast between the bright green “accept all” button, and the grey “save” button influences the users in such a way that they are encouraged to press the green button. This has a detrimental consequence on the users especially in relation to the external media cookies, which are by default opt-out. If the user is nudged towards pressing “accept all”, they unwillingly cancel out the opt-out, and end up agreeing to the use of all of the external media cookies.
54. In this context, the CJEU has held in Paragraph 53 of C-61/19 – Orange Romania, that “*the freedom to choose to object to that collection and storage is unduly affected by [a] controller, [when] requiring that the data subject, in order to refuse consent, must complete an additional form setting out that refusal*”.

55. Therefore, it is contestable that the consent was freely given without any undue influence exerted on the user. Moreover, hiding a “reject all” option (or a similar button with the same effect) in another layer cannot be considered a genuine display of choices. This further proves that consent cannot be “freely” given and is therefore invalid.
56. Consent cannot be considered to be informed or specific, given that no information is given about what the “accept all” button entails in the cookie. For consent to be specific and informed, the user must know what they are consenting to. Consent, from the first layer of the banner, to all external media options hidden on the second layer of the banner on the German and French versions of the site, is neither specific, nor informed, as the user cannot know the purposes of the processing at stake.
57. According to the Belgian DPA Guidance Materials and FAQs on Cookies and Other Tracking Technologies (<https://www.autoriteprotectiondonnees.be/cookies>), in order for consent to be valid, information on the data controller and the purposes pursued by the cookies must be given *before* the user is asked to give consent (see section titled “*votre consentement doit être informé*”).
58. The consent is also not unambiguous, as being prompted to give consent to all processing operations is once more not an indication of the data subject’s wishes. The various buttons described above and the different labels (“Save”, “Accept all”, “Accept only necessary cookies”) are definitively confusing for the users whose consent is given without knowing exactly what the buttons presented to them entail.
59. Such consent can therefore not be considered an “indication of the data subject’s wishes”, as laid out by the CJEU in C-673/17- *Planet 49*, and is therefore invalid under Article 3(15) of Regulation 2018/1725. Consequently, consent as a legal basis under Article 5(1)(d) cannot be relied upon.

d) The design of the banners is deceptive

60. As already mentioned, in all the language versions of the website, the banners contain a bright green button to “accept all” cookies. The only alternative they have is to click on a grey button labelled “save”. Only if one makes the effort to look at the very bottom of the banner and read the small-printed grey text, will they see a button labelled “cookie details”. Several Data Protection Authorities have already confirmed that such color contrasts between buttons can unduly influence users. For instance, the Guidelines on Cookies and Trackers of the Greek Data Protection Authority (Attachment 20), states that the color of the “accept” or “consent” button can strongly urge the user to choose it. The CNIL has also noted this phenomenon, labeling it “attention diversion”. This is when attention is drawn to a point of the site or screen, such as through the use of a green button, which makes users perceive this as a preferable choice (CNIL’s 6th Innovation and Foresight Report “*Shaping Choices in the Digital World, “From dark patterns to data protection: the influence of UX/UI design on user empowerment”*” (2019)).
61. Such design leads to a clear highlight of the “accept all” button over the other available options, which indicates to a data subject that this is the expected action and the only “easy way out”, especially when taking only a short look at the banner. The Controller has deliberately set the Consent Management Platform (“CMP”) to use such colors, even when the CMP allows changing these colors to a balanced design with a simple click. There is no

logical, technical or ethical reason to use such button colors other than confusing data subjects or making refusals more burdensome.

62. The same can be said about the banner of the German version of the website, which is the only one to refer to a button by which the users can choose to only accept the necessary cookies. Such a button is even smaller than the bright green button “accept all” and the grey button labelled “save”. On the second layer, the option to access only the non-essential cookies is not even a button but a link in very small prints. In this regard, we refer by example to the [Recommendation](#) n°2020-092 of the CNIL and in particular its § 34.
63. It is common practice that links are used to indicate a mere reference to another page (like a privacy policy or other information), but do not usually indicate a choice or interactive element, like a button. By showing “accept all” as the only clearly interactive option in a button design, the data subject was consequently led to believe that there is no other option than “accept all”, especially when only taking a short look at the banner.
64. The design of the banner chosen by the Controller violates the principles of fairness and transparency of Article 5(1)(a) of Regulation 2018/1725. Moreover, considering that the data subject is clearly nudged to give consent rather than refusing it, such consent is obviously not “unambiguous” under Article 3(15) and therefore invalid under Article 5(1)(a) of Regulation 2018/1725.

e) The information is not “transparent, concise and intelligible” and not accurate

65. Considering the different layers of information, the difference in colors, fonts and links, and the lack of information on the meaning of the different buttons, an average user cannot be sufficiently informed about the existence of the cookies, their functions, and the possibilities to accept or refuse them. The existence of different cookie banners depending on the language used on the website is even more confusing.
66. The cookie banner also does not mention the Stripe Cookie that was placed on the user’s browser (as proved on page 4 of Attachment 5). Yet the statement at the top of the cookie banner pretends to give “an overview of *all* the cookies used”. This statement is clearly false since the banner contains no information on the Stripe cookie. The same can be said of the data protection notice, which only refers to Google Analytics cookies.
67. All the above constitutes a violation of Article 14(1) of Regulation 2018/1725, considering that the information provided cannot be considered as transparent, concise or even intelligible. In addition, the information given to the users was even incorrect, which violates Article 4(1)(a) of Regulation 2018/1725 (principles of lawfulness, fairness and transparency).

f) No mechanism through which the user can easily withdraw consent

68. Article 7(3) of Regulation 2018/1725 requires that the data subject have the right to withdraw their consent at any time, but also that it shall be as easy to withdraw as to give consent. There is no mention of the means through which to withdraw or even amend the consent given on the EcoCare Site. Therefore, the lack of an easy way to withdraw consent is violating Article 7(3) of Regulation 2018/1725.

5 REQUESTS

69. Given the above, it is requested that the EDPS:

1. Investigates the case at hand, and request all relevant information from both the European Parliament and Ecolog for the sake of the investigation.
2. If appropriate, transfer the complaint to the Belgian Data Protection Authority, or any other competent Supervisory Authority and cooperate on the matter, as per Article 57(1)(e) and Article 61 of Regulation 2018/1725.
3. Enforces the Complainants' rights of access under Article 17 of Regulation 2018/1725 and orders that the Complainants be informed of which data was transferred outside of the EU through the third-party requests from Google and Stripe, and the cookies placed when the website was visited.
4. Determines which cookies and third-party requests were and are still implemented on the EcoCare website.
5. Orders that the Complainants are informed of which safeguards were implemented for the transfer, if any, as per Article 17(2) of Regulation 2018/1725, but also of additional measures, as consequence of the Judgement in *Schrems II*.
6. Adopts the appropriate corrective measures, and in particular makes use of its powers under Article 58(1)(g) and (j) of Regulation 2018/1725 to order an immediate suspension or ban on the processing resulting in data transfers to the US.
7. Confirms a violation of Article 14(1) of Regulation 2018/1725 due to the lack of transparent and intelligible information, both in relation to the conflicting data protection notices and to the cookie banners.
8. Confirms a violation of Article 5 and 15(1)(c) of Regulation 2018/1725 due to the inapplicability of the legal basis for the processing operation mentioned in the data protection notice regarding the customer accounts.
9. Orders the correction of the legal basis mentioned in the data protection notice for the processing of customer accounts.
10. Confirms a violation of Article 14(1) of Regulation 2018/1725, due to the lack of sufficient information on the function of the Borlabs cookie, and more generally, having considered the general lack of clear, intelligible and accurate information on the cookies used on the website.
11. Confirms a violation of Articles 4(1)(a), 14(2) and 7(3) of Regulation 2018/1725 having regard to the lack of a "reject all" button on the cookie banners on the first layer of the banners.
12. Confirms a violation of Article 5(1)(d) of Regulation 2018/1725, on the basis that the conditions for consent under Article 3(15) and Article 7(3) were not been met in respect of the use of cookies.
13. Confirms that the design of the banners is deceptive and violates the principles of fairness and transparency under Article 5(1)(a) of Regulation 2018/1725 and,

consequently, confirms that the consent is not valid under Articles 3(15) and 5(1)(a) of Regulation 2018/1725.

14. Confirms a violation of Article 7(3) of Regulation 2018/1725 due to the absence of any easy manner for to the users to withdraw their consent.
15. Uses its sanctioning powers under Article 58 and 66 of Regulation 2018/1725 to issue an adequate sanction against Ecolog and the Parliament for the violations mentioned above.
16. Keeps the Complainants informed of any developments on the matter, as foreseen in Article 57(1)(e) of Regulation 2018/1725.

6 COMMUNICATION WITH NOYB

70. Communications with *noyb* in the course of this procedure can be done by email at [REDACTED] with reference to the Case-No. **C-035** mentioned in the title of this complaint.

Signature