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Berlin Commissioner for Data Protection and Freedom of
Information Alt-Moabit 59-61
10555 Berlin

By e-mail: mailbox@datenschutz-berlin.de

Vienna, 21 March 2023

noyb case number: C061-06

Complainant:



represented according to
Article 80(1) of the GDPR by:

noyb - European Centre for Digital Rights
Goldschlagstr. 172/4/3/2, 1140 Vienna, Austria

Respondent:

Party DIE LINKE
Kleine Alexanderstraße 28
10178 Berlin
Germany

because of:

Articles 9(1) and 5(1)(a) GDPR

COMPLAINT UNDER ARTICLE 77 DSGVO

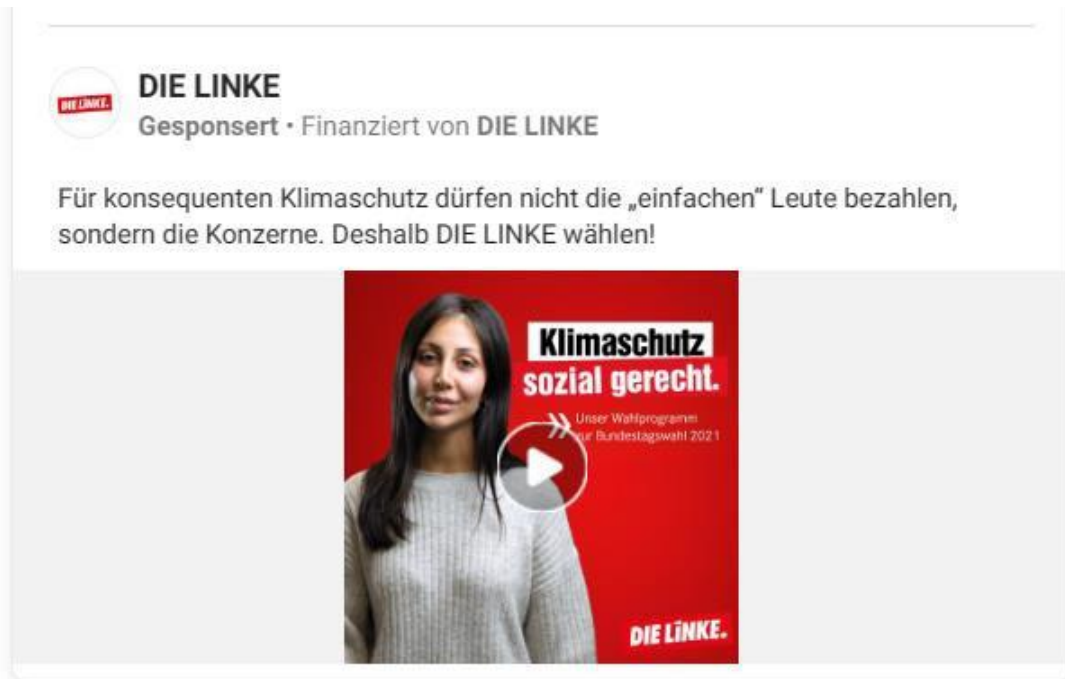
1. REPRESENTATION

1. *noyb* - European Centre for Digital Rights is a non-profit organisation active in the protection of the rights and freedoms of data subjects in relation to the protection of their personal data, with its registered office at Goldschlagstraße 172/4/2, 1140 Vienna, Austria, and with registration number ZVR: 1354838270 (hereinafter: "*noyb*") (**Annex 1**).
2. The complainant is represented by *noyb* pursuant to Article 80(1) of the GDPR (**Annex 2**).

2. CONTENT

3. At [REDACTED] umU [REDACTED], during a visit to the online platform Facebook, the complainant was shown an advertisement by the respondent.
4. The advertisement contained the following text:

"It is not the "ordinary" people who should pay for consistent climate protection, but the corporations. Therefore vote DIE LINKE!"
5. Further media content was integrated ("postMedia").
6. The complainant recorded this and other information from the website visit (**Annex 3**).
7. According to this recorded information, the respondent's advertisement was targeted at female voters, for whom there was data that they lived in *Germany* (i.e. Germany), were aged between 6 and 53 and had an interest in "Alliance '90/The Greens" (i.e. "Bündnis 90/Die Grünen").
8. Via the Facebook advertising library (<https://www.facebook.com/ads/library/>), the complete ad of the respondent (<https://www.facebook.com/ads/library/?id=4446756018716978>) can still be accessed:



9. The respondent has placed other similar advertisements (**Annex 4**).

3. CONTEXT: ONLINE MICROTARGETING

10. Facebook offers its clients an online tool ("Core Audiences") for serving ads (<https://www.facebook.com/business/ads/ad-targeting>). Advertisers can select audiences for ad placements based on, for example, location (e.g. cities, countries or GPS location), behaviour (e.g. previous purchases, clicks on content and device usage), demographics (e.g. age, gender, education, occupation), connections (e.g. with Facebook pages or other users who have certain characteristics), interests (e.g. organic food or action movies). Advertising targeting based on existing interactions with an advertiser ("Custom Audiences") or to people who resemble other people ("Lookalike Audiences", e.g. men of a certain age with certain interests) is also possible.
11. Through the use of such tools, it is possible to offer targeted advertising based on certain individual characteristics. This practice is known as microtargeting.¹
12. Microtargeting also makes it possible, for example, to advertise political views that match the interests of the people being targeted: For example, political demands

¹Frederik Zuiderveen Borgesius et. al, 'Online Political Microtargeting: Promises and Threats for Democracy', 2018, *Utrecht Law Review*, Vol. 14, Issue 1, pp. 82-96, p. 82, accessed 30 December 2022 at <https://doi.org/10.18352/ulr.420>

for more student aid for students.² Indirect identification of individuals is also possible in this process.³

13. Microtargeting was reportedly used by Cambridge Analytica during the 2016 US presidential election, for example, and enabled Donald Trump's narrow victory in several US states.⁴ Following the Brexit referendum in the UK, microtargeting was investigated by the UK *Information Commissioner's Office* and several companies and parties were sanctioned.⁵
14. For the EU Commission, micro-targeting techniques pose a "[...] *serious threat to a fair and democratic electoral process [...]*". "To preserve the integrity of the democratic order [...]", "consistent and uniform application" of the General Data Protection Regulation is needed.⁶

4. COMPETENT AUTHORITY

15. This complaint is addressed to Berlin's Commissioner for Data Protection and Freedom of Information, as the respondent is based in the jurisdiction of this authority.

5. GROUNDS FOR APPEAL

5.1. Infringements

16. The respondent has infringed the GDPR as follows:
 - (a) The respondent processed special categories of personal data of the complainant without a legal basis under Article 9 of the GDPR.
 - (b) The respondent unlawfully processed the complainant's data in breach of Article 5(1)(a) of the GDPR.

² Frederik Zuiderveen Borgesius et. al, 'Online Political Microtargeting: Promises and Threats for Democracy', 2018, *Utrecht Law Review*, Vol. 14, Issue 1, pp. 82-96, p. 83, accessed 30 December 2022 at <https://doi.org/10.18352/ulr.420>

³ José González Cabañas, Ángel Cuevas, Rubén Cuevas, 'Facebook Use of Sensitive Data for Advertising in Europe', 2018, p. 1 & p. 12, accessed 30 December 2022 at <https://doi.org/10.48550/arXiv.1802.05030>

⁴ Channel 4, 'Exposed: Undercover secrets of Trump's data firm', 2018, retrieved 30 December 2022 from <https://www.channel4.com/news/exposed-undercover-secrets-of-donald-trump-data-firm-cambridge-analytica>

⁵ Information Commissioner's Office (ICO), 'Investigation into the use of data analytics in political campaigns', 2018, pp. 7-12, accessed 10 January 2023 at <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>

⁶ European Commission, 'Commission Guidance on the Application of EU Data Protection Law in the Context of Elections A European Commission contribution to the Leaders' Meeting in Salzburg on 19/20 September 2018', 2018, COM/2018/638 final, accessed on 11 January 2023 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0638>

5.2. Unlawful processing of special categories of personal data Data (Article 9 GDPR)

5.2.1. The respondent has processed special categories of personal data

17. Article 9(1) of the GDPR prohibits "[t]he processing of personal data revealing [...] political opinions, religious or philosophical beliefs [...]". Consequently, these data listed in the article are special categories of personal data.

18. Sensitive personal data derived from other information is also covered by the GDPR. The European Data Protection Board (EDSA) specifically represents:

"If a social media provider or a targeter uses observed data to categorise user:s as having certain religious, ideological or political beliefs - whether or not this categorisation is accurate/true - this categorisation of the user:s is obviously to be considered as processing of special categories of personal data in this context." (emphasis added)

(EDSA, Guidelines 8/2020 on targeting social media users, version 2.0, 13 April 2021, para 123).

19. Accordingly, a derived interest - i.e. calculated or extrapolated from other information - in a particular political trend is to be considered as a special category of personal data (EDSA, Guidelines 8/2020 on the targeting of social media users, version 2.0, 13 April 2021, para. 125 and example

13). For example, the classification of a user under "interest in conservative nationalist politics", which results from repeated visits to websites dedicated to the topic of immigration (e.g. under the keyword "illegal immigration"), is a processing of personal data of a special category. Such correlations are a common way of generating data about data subjects.

20. The term "political opinions" is also to be interpreted broadly, since data from which these "emerge" are already covered by Article 9(1) of the GDPR:

"The category of 'data from which political opinions emerge' seeks to privilege any form of information base that allows an inference to be drawn about a person's political views - this includes both approval and disapproval of a political idea [...]."

(Albers/Veit in BeckOK DatenschutzR, 42nd ed. 1.11.2021, DS-GVO Art. 9, marginal no. 36)

"In cases of doubt, a broad understanding of the term 'political opinion' is indicated in order not to jeopardise the foundations of political opinion-forming."

(Schiff in Ehmann/Selmayr, 2nd ed. 2018, GDPR Art. 9, para. 19)

21. The processing of interest in the political party "Bündnis 90/Die Grünen" for the purpose of playing an advertisement is therefore a processing of special categories of personal data.

22. A personal reference, according to Article 4(1) of the GDPR, obviously exists, since the interest processed relates specifically to the complainant and was processed in the context of an advertisement targeting her in her Facebook account.

5.2.2. Respondent is the responsible party

23. According to Article 4(7) of the GDPR, a "controller" is a person who "[...] alone or jointly with others, determines the purposes and means of the processing of personal data [...]".

24. The operator of a fan page on Facebook is to be classified as a responsible person on the basis of the "[...] parameterisation carried out by him in accordance with, inter alia, his target audience and the objectives of controlling or promoting his activities [...]" (ECJ judgment of 5 June 2018, *Wirtschaftsakademie*, C-210/16, para 39).

25. Analogously, the respondent is responsible for the playout of advertisements.

26. In the present case, the respondent determined the purposes of the data processing, the playing of online election advertisements according to certain parameters: the respondent chose which political interests the advertising audience should have and what kind of advertisements would be displayed to the audience.

27. It also determined the means: specifically, the choice of the relevant advertising tool on the Facebook platform. The contested processing on Facebook took place in particular because the respondent so decided.

28. The controller does not need to have actual access to the data processed in order to be considered a controller (ECJ judgment of 5 June 2018, *Academy of Economics*, C-210/16, para 38). Whether the respondent had access to Facebook's databases is therefore irrelevant.

29. Finally, the role of Facebook is irrelevant, as this complaint is directed exclusively against the respondent.

5.2.3. No legal basis available

30. In principle, Article 9(1) of the GDPR prohibits the processing of special categories of personal data. Only in the case of an exceptional circumstance pursuant to Article 9(2) of the GDPR is processing permissible.

31. However, none of the relevant exemptions under Article 9(2) of the GDPR are met. In detail:

- No explicit consent was obtained from the complainant (Article 9(2)(a) GDPR). In particular, the respondent did not approach the complainant to obtain and establish this explicit consent as a legal basis.

- The ground for justification under Article 9(2)(d) of the GDPR is not given if only because the respondent has carried out the data processing by means of Facebook and therefore the factual element "*not disclosed to the outside without consent [...]*" is not present. Furthermore, the complainant is not a (former) member of the respondent and the purpose of the standard is clearly to enable communication/interaction with its own members, not broadly distributed online advertising using data specifically protected under Article 9 of the GDPR.
- The complainant did not manifestly make her political opinion public (Article 9(2)(e) GDPR). It should be emphasised that derived information was not manifestly made public (EDSA, Statement 2/2019 on the use of personal data in the course of political campaigns [English version], Version 1, 13 March 2019, p. 2, footnote 1).

32. None of the other exceptions under Article 9(2) of the GDPR are relevant either.

33. Consequently, the respondent infringed Article 9(1) of the GDPR.

5.3. Unlawful data processing (Article 5 GDPR)

34. According to Article 5(1)(a) of the GDPR, personal data must be "*lawfully*" and "*processed in a way that is comprehensible to the data subject*".

35. The respondent processed the complainant's data without a legal basis (see 5.2).

36. Consequently, the respondent is also in breach of the principle of lawfulness under Article 5(1)(a) of the GDPR.

5.4. Burden of proof

37. The burden of proof for the lawfulness of the processing lies with the respondent.

38. In principle, a controller has the burden of proof for the lawfulness of data processing (Schantz in BeckOK DatenschutzR, 42nd ed. 1.11.2021, DS-GVO Art. 5, para. 39).

39. This already follows from the general accountability standardised in Article 5(2) of the GDPR.

40. Moreover, this follows from the general principles on the substantive burden of proof (Schulz in Gola/Heckmann, 3rd ed. 2022, GDPR Art. 7, marginal no. 63). According to these principles, the party bears the burden of proof for facts that are part of the facts of a legal norm that is favourable to him. Article 9(1) of the GDPR contains a prohibition on processing special categories of personal data. According to the standard (Article 9(2) GDPR), an exception can only be made if one of the conditions listed there is fulfilled ("prohibition with reservation of consent"). In this respect, the facts for the reservation of permission are favourable for the controller.

6. MOTIONS AND REQUESTS

6.1. Request for comprehensive investigation

41. In view of the above, the complainant requests the Authority to fully investigate this complaint in accordance with the powers conferred on it under Article 58(1) of the GDPR.

6.2. Requests for declarations and benefits

42. In view of the above, may the Authority find that the respondent has

(a) infringed Article 9(1) of the GDPR by processing special categories of personal data of the complainant without a legal basis.

(b) has infringed Article 5(1)(a) of the GDPR by unlawfully processing the data.

43. Furthermore, the complainant requests that the respondent be prohibited from further processing the complainant's personal data pursuant to Article 58(2)(f) of the GDPR.

6.3. Suggestion of the imposition of a fine

44. The complainant suggests the imposition of an effective, proportionate and dissuasive fine for the infringements to be established. In this regard, it must be taken into account in particular that


(a) the authority has a duty to impose an "effective, proportionate and dissuasive" fine,



(b) the data processing for the purpose of influencing democratic elections was not designed for the complainant alone, but concerned a large number of other individuals (Article 83(2)(g) GDPR),

(c) special categories of personal data have been processed (Article 83(2)(g) GDPR) and

(d) the respondent intended to gain advantages in the election campaign through the data processing (Article 83(2)(k) GDPR).

7. COMMUNICATION WITH *NOYB*

45. Communication between *noyb* and the Authority in the context of this procedure can be made by  with reference to the case number mentioned in the title of this complaint

46. We will be happy to assist you if you require any further factual or legal details regarding the handling of this complaint. Please contact us  ator at + .

