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By E-mail: edps@edps.europa.eu

Vienna, 16 November 2023

noyb Case-No: [REDACTED]

Complainant:

[REDACTED]
[REDACTED]
[REDACTED]

represented pursuant to
Article 67 of the EU GDPR by:

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

Respondent:

European Commission
Directorate-General for Migration & Home Affairs
Rue du Luxembourg 46 / Luxemburgstraat 46
(Postal Office Box: 1049)
B-1000 Brussels, Belgium

Regarding:

Articles 10(1) and 4(1)(a) of Regulation (EU) 2018/1725 (EU
GDPR)

COMPLAINT UNDER ARTICLE 63 OF REGULATION (EU) 2018/1725

1. REPRESENTATION

1. *noyb* – European Center for Digital Rights is a not-for-profit organisation active in the field of the protection of data subjects’ rights and freedoms with its registered office in Goldschlagstraße 172/4/2, 1140 Vienna, Austria, registry number ZVR: 1354838270 (hereinafter: “*noyb*”) (**Annex 1**).
2. The complainant is represented by *noyb* pursuant to Article 67 of Regulation (EU) 2018/1725 (hereinafter: “EU GDPR”) (**Annex 2**).

2. FACTS PERTAINING TO THE CASE

3. On [REDACTED] during a visit to the online platform X (formerly known as Twitter), the complainant was shown an advertisement of the respondent. The advertisement was promoted by the respondent’s @EUHomeAffairs account on X.¹ (**Annex 3**, line 159426)
4. The advertisement contained the following text about the proposed EU Child Sexual Abuse Prevention Regulation (COM/2022/209 final, “chat control regulation”):

“Misbruikers verbergen zich achter hun beeldschermen terwijl kinderen in stilte lijden. Het is hoog tijd om een einde te maken te maken aan seksueel kindermisbruik #online. De meerderheid van de burgers ondersteunen het voorstel #EUvsChildSexuelAbuse. En jij? Lees hier ↓”

[Translation: Abusers hide behind their screens while children suffer in silence. It is high time to end child sexual abuse #online. The majority of citizens support proposal #EUvsChildSexuelAbuse. And you? Learn more here ↓]

5. A video of 47 seconds was integrated in this advertisement, with the following text:

“Wist u dat? 95% van de Nederlanders zegt dat detectie van kindermisbruik belangrijker of net zo belangrijk is als het recht op online privacy. 84% van de Nederlanders steunt automatische detectie door internetbedrijven van foto’s en video’s van seksueel kindermisbruik en gevallen van grooming in online berichten, zelfs die verstuurd zijn met end-to-end versleuteling (80%). In Nederland steunt 78% het EU wetgevend voorstel voor preventie en bestrijding van seksueel kindermisbruik. We hebben nu een EU wet nodig, de tijd dringt #EuvsChildSexualAbuse. European Commission DG Migration & Home Affairs. ec.europa.eu/eu-vs-child-sexual-abuse ©European Union 2023”

[Translation: Did you know? 95% of Dutch people say that detection of child abuse is more or as important as the right to online privacy. 84% of Dutch support automatic detection by internet companies of photos and videos of child sexual abuse and cases of grooming in online messages, even those sent with end-to-end encryption (80%). In the Netherlands, 78% support the EU legislative proposal to prevent and combat child sexual abuse. We need an EU law now, time is running out #EuvsChildSexualAbuse. European Commission DG Migration & Home Affairs. ec.europa.eu/eu-vs-child-sexual-abuse ©European Union 2023]

6. The complainant downloaded an archive of his personal data through X’s platform, using the “Download an archive of your data” functionality (**Annex 3a**). This data archive contains

¹ <https://twitter.com/EUHomeAffairs>.

information about ads displayed to the complainant (in a file called ad-engagements.js²) and shows that the complainant saw the advertisement that was described above and that the complainant was therefore targeted by the respondents' advertisement campaign (**Annex 3**).

7. The complete advertisement the complainant saw, with tweet ID 1703693679297220882, can still be accessed via this link: <https://twitter.com/EUHomeAffairs/status/1703693679297220882>. **Image 1** is a screenshot from the advertisement that was shown to the complainant. Image 1 is also attached to this complaint as **Annex 4**.



Image 1.

8. A general report downloaded from X's Ads repository – "where you can search for advertisers and see the ad details including all creatives, targeting information, and reach"³ – shows the advertisements from the respondent that targeted X users from the Netherlands during the last quarter through the @EUHomeAffairs account on X (**Annex 5**) ("general ads report").
9. This general ads report shows that with this chat control regulation advertisement campaign, the respondent targeted X users between September 18 2023 and September 27 2023 that

² The cryptographic SHA256-hashes shown in the video for the downloaded file ad-engagements.js (**Annex 3**) is:

³ <https://ads.twitter.com/ads-repository>.

were speaking Dutch, that were from the Netherlands and were over 18 years old (column F “Targeted Segments” in **Annex 5**). Moreover, 44 “Targeting Segments” were explicitly excluded by the respondent (column G “Excluded Targeting Segments” in **Annex 5**). Of these 44 “Excluded Targeting Segments”, 36 segments refer to political parties (such as AfD, Vox, Sinn Féin and English Defence League), politicians (such as Viktor Orbán, Marine Le Pen and Giorgia Meloni) or terms regarding eurosceptic and/or nationalistic political opinions (such as brexit, nexit and #EUCorruption) and 6 segments refer to religious beliefs (such as Christian, FEMYSO and anti-Christian). The complainant has created an overview of the excluded targeting segments in **Annex 6**. The advertisements were shown over 600.000 times (column H “Impressions” in **Annex 5**).

10. Additionally, the complainant was shown the ad campaign at least thirteen times more in both Dutch and English:

Date and time:	Line in Annex 3:	Dutch or English:
██████████	158114	English
██████████	170059	Dutch
██████████	191042	English
██████████	220540	Dutch
██████████	221346	Dutch
██████████	235159	English
██████████	235842	Dutch
██████████	246982	English
██████████	251278	Dutch
██████████	256423	English
██████████	264898	Dutch
██████████	270361	English
██████████	320288	Dutch

3. CONTEXT: ONLINE MICROTARGETING

11. X offers its clients several targeted advertising possibilities, including “*Keyword targeting*”. According to X:

“Keyword targeting allows you to reach people on X based on keywords in their search queries, recent posts, and posts they recently engaged with. This targeting option puts you in the best position to reach the most relevant people, drive engagements, and increase conversions.”⁴

12. Advertisers can select audiences for ad placements on X based on the keywords they “add” (the “Targeted Segments” in **Annex 5**) or “exclude” (the “Excluded Targeting Segments” in **Annex 5**).
13. The exclusion of targeting segments works in two ways according to X: “1. It prevents your campaign from serving to users who have engaged with the excluded word(s). 2. It prevents your campaign from serving in Search results for excluded word(s).”⁵
14. X uses “[...] signals such as link clicks, expands, likes, replies, and more to consider someone having interacted with a keyword, as well as searches containing the keyword.”⁶
15. Because of this, it is possible to offer targeted advertising based on certain individual characteristics, such as behavior. This practice is known as microtargeting.⁷
16. Microtargeting makes it possible to, inter alia, advertise political views that match the interests of the people being targeted. For example, political demands for more student grants for students.⁸ Indirect identification of individual persons is also possible.⁹
17. 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.¹⁰ After the Brexit referendum in the UK, microtargeting was investigated by the UK *Information Commissioner's Office* and several companies and parties were sanctioned.¹¹
18. As a result of such controversy, targeting based on sensitive categories of “*Political affiliation and/or beliefs*” or “*Religious or philosophical affiliation and/or beliefs*” is also prohibited under X's own ads policy.¹² This also follows from X's keyword targeting FAQ: “*Are there any prohibited keywords? Yes. Per our Ads Policies, advertisers will be prohibited from targeting keywords that involve sensitive categories.*”¹³
19. In 2018 even the EU Commission stated that microtargeting techniques pose:

⁴ <https://business.twitter.com/en/help/campaign-setup/campaign-targeting/keyword-targeting.html>.

⁵ <https://business.twitter.com/en/help/campaign-setup/campaign-targeting/keyword-targeting.html>.

⁶ <https://business.twitter.com/en/help/campaign-setup/campaign-targeting/keyword-targeting.html>.

⁷ 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. 82, accessed 19 October 2023 at <https://doi.org/10.18352/ulr.420>.

⁸ 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 19 October 2023 at <https://doi.org/10.18352/ulr.420>.

⁹ José González Cabañas, Ángel Cuevas, Rubén Cuevas, 'Facebook Use of Sensitive Data for Advertising in Europe', 2018, p. 1 & p. 12, accessed 19 October 2023 at <https://doi.org/10.48550/arXiv.1802.05030>.

¹⁰ Channel 4, 'Exposed: Undercover secrets of Trump's data firm', 2018, accessed 19 October 2023 from <https://www.channel4.com/news/exposed-undercover-secrets-of-donald-trump-data-firm-cambridge-analytica>.

¹¹ Information Commissioner's Office (ICO), 'Investigation into the use of data analytics in political campaigns', 2018, pp. 7-12, accessed 19 October 2023 at <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf>.

¹² <https://business.twitter.com/en/help/ads-policies/campaign-considerations/targeting-of-sensitive-categories.html>.

¹³ <https://business.twitter.com/en/help/campaign-setup/campaign-targeting/keyword-targeting.html>.

*"[...] a serious threat to a fair, democratic electoral process and has the potential to undermine open debate, fairness and transparency which are essential in a democracy. The Commission considers that it is of utmost importance to address this issue to restore public trust in the fairness of the electoral process. [...] [The GDPR] provides the Union with the tools necessary to address instances of unlawful use of personal data in the electoral context. However, only a firm and consistent application of the rules will help to protect the integrity of democratic politics."*¹⁴ (emphasis added)

20. In 2021, the European Commission also explicitly proposed banning the use of targeting techniques in political advertising that involve the processing of special categories of personal data. The proposed article reads as follows:

*"Targeting or amplification techniques that involve the processing of personal data referred to in Article 9(1) of Regulation (EU) 2016/679 and Article 10(1) of Regulation (EU) 2018/1725 in the context of political advertising are prohibited."*¹⁵

21. In the press release of the Council of the EU of the 7th of November 2023 about this regulation proposal, is written:

*„[...] there will be a blanket ban on profiling using special categories of personal data, such as data revealing racial or ethnic origin or political opinions."*¹⁶

22. It is therefore striking that in this case the respondent uses microtargeting techniques trying to influence the public opinion in relation to a legislative process.

23. The microtargeting campaign of the respondent tries to influence users in favor of the Chat control regulation. Many stakeholders have expressed serious concerns about the current proposal regarding the incompatibility with EU fundamental rights, such as (inter alia) the EDPB and the EDPS, the Council of the EU and the EPs LIBE committee.^{17,18} Also national governments and parliaments expressed their concerns, including MPs in the Dutch parliament.¹⁹

¹⁴ European Commission, 'Commission guidance on the application of Union data protection law in the electoral context A contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018', 2018, COM/2018/638 final, accessed 19 October 2023 at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0638>.

¹⁵ Article 12(1) of EC proposal COM/2021/731 final, 25 November 2021.

¹⁶ <https://www.consilium.europa.eu/en/press/press-releases/2023/11/07/transparency-and-targeting-of-political-advertising-eu-co-legislators-strike-deal-on-new-regulation/>.

¹⁷ EDPB-EDPS, Joint Opinion 04/2022 on the Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse, [link](#); Council of the EU, 'Opinion of the Legal Service - Proposal for a Regulation laying down rules to prevent and combat child sexual abuse – detection orders in interpersonal communications – Articles 7 and 8 of the Charter of Fundamental Rights – Right to privacy and protection of personal data – proportionality', 8787/23, [link](#); EPRS (requested by LIBE committee), 'Proposal for a regulation laying down the rules to prevent and combat child sexual abuse - Complementary impact assessment', [link](#); see also <https://edri.org/our-work/most-criticised-eu-law-of-all-time/>.

¹⁸ <https://www.volkskrant.nl/columns-opinie/opinie-europese-commissie-misleidt-burgers-met-desinformatiecampagne-en-illegale-advertenties~b86cae2c/>.

¹⁹ <https://www.tweedekamer.nl/kamerstukken/moties/detail?id=2023Z07239&did=2023D17019>.

4. COMPETENT AUTHORITY

24. This complaint is addressed to the EDPS, since the respondent is a EU body that falls within its competence.
25. The complainant also considers filing a separate complaint against X with a national supervisory authority, such as the Dutch data protection authority (Autoriteit Persoonsgegevens). We will inform the EDPS if this step is taken.
26. The cooperation between the EDPS and other (national) data protection authorities, such as the Autoriteit Persoonsgegevens, is still unclear. This also follows from the recent EDPB-EDPS joint opinion 01/2023:

*"[...] data protection authorities ('DPAs') have encountered several obstacles to efficient cooperation and enforcement. Such obstacles have resulted, in particular, from a lack of clarity on the terms of cooperation between the EDPS and national SAs. Moreover, the current legal framework governing cooperation between the national SAs and the EDPS is fragmented, and national SAs and the EDPS are currently not able to use the same IT tools to securely exchange information."*²⁰

27. This complaint might serve as an example for good and sincere cooperation between the EDPS and other data protection authorities.

5. GROUNDS FOR THE COMPLAINT

5.1. Violations

28. The respondent has infringed the EU GDPR as follows:
- (a) The respondent processed special categories of personal data of the complainant without a legal basis under Article 10 EU GDPR.
 - (b) The respondent unlawfully processed the complainant's data in breach of Article 4(1)(a) EU GDPR.

5.2. Unlawful processing of special categories of personal data (Article 10 EU GDPR)

5.2.1. The respondent has processed special categories of personal data

29. Article 10(1) EU GDPR prohibits "*Processing of personal data revealing [...] political opinions, religious or philosophical beliefs [...]*." Consequently, the information listed in this article are special categories of personal data.

²⁰ EDPB-EDPS, Joint opinion 01/2023 on the Proposal for a Regulation of the European Parliament and of the Council laying down additional procedural rules relating to the enforcement of Regulation (EU) 2016/679, [link](#), para. 184.

30. As stated in Recital 5 EU GDPR, the provisions of the EU GDPR and the GDPR should be interpreted homogenously. Therefore, further references to the GDPR shall be duly taken into account for the interpretation of the EU GDPR.

31. Sensitive personal data derived from other information is also covered by the (EU) GDPR. The European Data Protection Board (EDPB) specifically holds:

*"If a social media provider or a targeter uses observed data to categorise users as having certain religious, philosophical or political beliefs – regardless of whether or not this categorization is correct/true - this categorisation of the users must obviously be seen as processing of special category of personal data in this context."*²¹ (emphasis added)

32. 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.²² For example, the classification of a user under "interested in Euroscepticism", which results from repeated visits to websites dedicated to the topic of brexit, is a special category processing of personal data. Such correlations are a common way of generating data about data subjects. Inferring from a user's online behavior that they are "not interested in Euroscepticism" is likewise a classification that amounts to the processing of special category personal data. In both cases the evaluation of the political view of a user is a previous requirement for the following categorization. The same is true for religious beliefs.

33. The term "political opinions" is also to be interpreted broadly, since data which "reveal" these opinions are already covered by Article 10(1) EU GDPR:

*"Die Kategorie der ‚Daten, aus denen politische Meinungen hervorgehen‘ will jegliche Form von Informationsgrundlage privilegieren, die einen Rückschluss auf die politische Einstellung einer Person zulässt - dies umfasst sowohl die Zustimmung als auch die Ablehnung einer politischen Idee [...]."*²³

[Translation: 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 [...].]

*"In Zweifelsfällen ist ein weites Verständnis des Begriffs ‚politische Meinung‘ angezeigt, um die Grundlagen der politischen Meinungsbildung nicht zu gefährden."*²⁴

[Translation: 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.]

34. The use of the 36 segments that refer to political parties, politicians or political terms and the 6 segments that refer to religious beliefs for the purpose of showing a targeted advertisement based on the complainant's political opinion and religious beliefs, is therefore a processing of special categories of personal data (cf. **Annex 6**).

²¹ EDPB, Guidelines 8/2020 on the targeting of social media users, para. 123.

²² EDPB, Guidelines 8/2020 on the targeting of social media users, para. 125 and example 13.

²³ Albers/Veit in BeckOK DatenschutzR, 42nd Ed. 1.11.2021, DS-GVO Art. 9, margin number 36.

²⁴ Schiff in Ehmman/Selmayr, 2nd Ed. 2018, DS-GVO Art. 9, margin number 19.

35. Since the data processed relates in particular to the complainant and was processed in the context of a microtargeting campaign on his X account, personal data of an identified natural person was processed (Article 3(1) EU GDPR).

5.2.2. *The respondent is a controller*

36. Pursuant to Article 3(8) EU GDPR, a “controller” is a “Union institution or body or the directorate-general or any other organisational entity which, alone or jointly with others determines the purposes and means of the processing of personal data [...]”.

37. According to the Court of Justice, the operator of a fan page on Facebook is to be classified as a controller and:

*“[...] must be regarded as taking part, by its definition of parameters depending in particular on its target audience and the objectives of managing and promoting its activities, in the determination of the purposes and means of processing the personal data of the visitors to its fan page. [...]”*²⁵

38. The Court of Justice adopted a similar stance in *Fashion ID*.²⁶

39. The EDPB has also confirmed that targeting users based on their interests by advertisements on social media, leads to a situation of joint controllership for both the social media provider and the advertiser.²⁷

40. Analogously to the cited case law and accordingly to the EDPB, the body commissioning a tailored advertising campaign on X relying on the use of personal data for such, is to be classified as a controller.

41. In the present case, the respondent determined the purposes of the data processing, the displaying of online advertisements according to certain parameters: the respondent chose by “adding” or “excluding” the keywords (segments) (see **Annex 5** and **Annex 6**), which political interests or religious beliefs the advertising audience should have and what kind of advertisements would be displayed to the audience.

42. It also determined the means: specifically, the choice of the corresponding advertising tool and the “*Keyword targeting*” on the X platform. The contested processing on X took place in particular because the respondent commissioned it.

43. The controller does not need to have actual access to the data processed in order to be considered a controller.²⁸ Whether the respondent had access to X’s databases is therefore irrelevant.

44. Finally, the role of X is irrelevant, as this complaint is directed exclusively against the respondent.

²⁵ CJEU 5 June 2018, C-210/16 (*Wirtschaftsakademie*), para. 39.

²⁶ CJEU 29 July 2019, C-40/17 (*Fashion ID*), para. 68.

²⁷ EDPB Guidelines 08/2020 on the targeting of social media users, para. 81.

²⁸ CJEU 5 June 2018, C-210/16 (*Wirtschaftsakademie*), para. 38.

5.2.3. No legal basis for processing

45. In principle, Article 10(1) EU GDPR prohibits the processing of special categories of personal data. The processing of such data is only permissible in the case of an exceptional circumstance pursuant to Article 10(2) EU GDPR.

46. However, none of the relevant exemptions under Article 10(2) EU GDPR are met. In detail:

- No explicit consent was obtained from the complainant (Article 10(2)(a) EU 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 10(2)(d) EU GDPR is not applicable as the respondent is not a non-profit seeking body integrated in a Union institution with a political or religious aim (also the complainant is not a member or former member of such a body).
- The complainant has not made his political opinion or religious beliefs manifestly public (Article 10(2)(e) EU GDPR). It should be emphasized that derived information was not manifestly made public.²⁹

47. None of the other exceptions under Article 10(2) EU GDPR are relevant either.

48. Consequently, the respondent infringed Article 10(1) EU GDPR.

5.3. Unlawful data processing (Article 4(1)(a) EU GDPR)

49. According to Article 4(1)(a) EU GDPR, personal data must be "*processed lawfully, fairly and in a transparent manner in relation to the data subject.*"

50. The respondent processed the complainant's special category personal data without a legal justification under Article 10(2) EU GDPR and the processing was therefore unlawful (see 5.2).

51. Consequently, the respondent is also in breach of the principle of lawfulness under Article 4(1)(a) EU GDPR.

5.4. Burden of proof

52. A controller, such as the respondent, has the burden of proof regarding the lawfulness of data processing.³⁰ This already follows from the general accountability principle set out in Article 4(2) EU GDPR.

53. Moreover, this follows from the general principles on the burden of proof.³¹ According to these principles, the party bears the burden of proof for aspects that are part of a legal norm that are favorable to them. Article 10(1) EU GDPR contains a prohibition on processing special

²⁹ EDPB, Statement 2/2019 on the use of personal data in the course of political campaigns, p. 2, footnote 1.

³⁰ Schantz in BeckOK DatenschutzR, 42nd Ed. 1.11.2021, DS-GVO Art. 5, margin number 39.

³¹ Schulz in Gola/Heckmann, 3rd Ed. 2022, DS-GVO Art. 7, margin number 63.

categories of personal data. An exception can only be made if one of the conditions listed in Article 10(2) EU GDPR is met. In this respect, the exceptions are favorable for the respondent and it is therefore for the respondent to prove that the requirements of such an exception are met.

6. REQUESTS AND SUGGESTIONS

6.1. Request for comprehensive investigation

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

6.2. Requests for declaratory decision and exercise of corrective powers

55. In view of the above, the complainant requests the EDPS to find that the respondent has:

(a) infringed Article 10(1) EU GDPR by processing special categories of personal data of the complainant without a legal basis.

(b) infringed Article 4(1)(a) EU GDPR by unlawfully processing special categories of personal data of the complainant.

56. Furthermore, the complainant requests that the respondent be prohibited from further processing of this personal data of the complainant pursuant to Article 58(2)(g) EU GDPR.

6.3. Suggestion to impose a wider ban

57. The complainant suggests that the respondent be prohibited from processing any special categories of personal data for online advertisement campaigns on X pursuant to Article 58(2)(g) EU GDPR.

6.4. Suggestion to impose a fine

58. The complainant suggests to impose a fine for the infringements. In this regard, it must be taken into account in particular that:

(a) the data processing for the purpose of influencing a democratic legislative process did not concern the complainant alone, but also concerned a large number of other individuals (Article 66(1)(a) EU GDPR);

(b) special categories of personal data have been processed (Article 66(1)(f) EU GDPR).

7. CONTACT

59. Communication between *noyb* and the EDPS in the context of this complaint may be made by e-mail to reference to the case number mentioned in the title of this complaint.

60. We will be happy to assist you if you require further factual or legal details to deal with this complaint. Please contact us at [REDACTED]