

Global Witness Facebook Advertising DPIA Briefing Paper

Background

On 7 September 2021, the DPIA team received a submission from a representative of AWO (a data rights law firm – involved in a previous complaint to the ICO regarding AdTech; BRAVE). AWO were acting under instruction from their client, Global Witness, a Human Rights Organisation NGO that focus on the environment, human rights, and the online world.

AWO submitted a DPIA from Global Witness as a Prior Consultation as per Article 36 UK GDPR, with drafting assisted by AWO, about the proposal of GWO placing job advertisements using Facebook's ad services (Facebook Audiences).

The DPIA looked to assess the impact and risk of doing so and ran parallel to ongoing Global Witness campaigns looking at digital threats to society whereby Global Witness had become aware of reports about the discriminatory effects of the advertising mechanisms available on Facebook.

Global Witness have also instructed Ms. Schona Jolly QC of Cloisters Chambers, to assist with a submission to the Equality and Human Rights Committee (this has also been included in the DPIA Annexes for reference).

Global Witness have also released this into the media, stating that they have lodged a complaint with the ICO please see the following links:

<https://www.bbc.co.uk/news/technology-58487026>

<https://www.globalwitness.org/en/campaigns/digital-threats/how-facebooks-ad-targeting-may-be-in-breach-of-uk-equality-and-data-protection-laws/>

We have notified the Digital Economy Team, who have not had contact from Facebook.

We have informed comms, in response to press enquiries, that this submission to us is not a complaint, and that we are assessing it to see if their assessment meets the definition of a DPIA under Article 35, and therefore if their submission engages the requirement for the Commissioner to provide advice under Article 36.

Comms have issued the following holding line:

An ICO spokesperson said: *"We have been contacted by Global Witness and will be discussing the matter further with them in due course."*

The DPIA Team's normal procedure will be to review the submission and provide a response within 10 days of receipt. AWO's submission acknowledged this, expecting a response by **17 September**.

It should be noted that the DPIA submission to the ICO has been made public and is downloadable at the bottom of the Global Witness article.

In the event the request for consultation is rejected, it is possible we will see a revised submission, which may resolve any technical deficiencies in the document.

Conclusion

- While Global Witness' media statements suggest they have lodged a complaint with the ICO, in reality they have declared an intention to use Facebook, which can't proceed due to identified risk.
- Their submission relies on Facebook being a joint controller for the processing, a position which may be supported by recent caselaw.
- While their intention to use Facebook for this purpose may be in doubt, their submission may require a substantive response – even if our initial review suggests that this iteration of their submission does not meet the criteria.
- Any response for advice would be time-bound, should the requirement be engaged.

Recommendations for actions

1. Notify ET of receipt of this DPIA, and current plan of action as outlined below.
2. Establish whether this meets the criteria for Prior Consultation to engage a written response from the DPIA team. This must be established and confirmed to the stakeholder no later than 17 September 2021. Based on our initial review, we are looking to engage with policy legal on the question of deficient DPIAs as expressed in Bridges v SWP. (**See below for legal advice**).
3. Continue to monitor media in relation to this issue, this issue has already been made widely public and their DPIA has been published.
4. Consider (alongside DET and other colleagues) if Facebook should be made aware of this approach, and whether as joint controller they would be a party to our advice.
5. If the requirement for advice is engaged, consideration is required on our response, and what technical expertise can be secured to support, given the possible deadline.

We stand ready to meet with you to discuss this issue further, we hope to come to a view early next week on the nature of the DPIA.

Annex 1: Reasons for the DPIA and previous engagement with AWO

Reasons for Prior Consultation

The DPIA has completed due to the GWO proposal meeting the following criteria for high-risk processing:

- *Denial of service*: denial of opportunities through discrimination in contravention of the Equality Act.
- *Data matching*: Facebook Audiences involve data matching with Global Witness' data.
- *Tracking*: the products track individual behaviour to select and segment them for advertising.

The reasons for Prior Consultation are as follows:

- Infringement of Article 5(1)(a) (Fairness) – DPIA deems from evidence, historical accounts, and legal advice that there is a likely risk of discrimination using Facebook's advertising tools. Through a violation of the Equality Act. (This will be explained in more detail below).
- Infringement of Article 22 – Facebook's delivering of advertisements is automated, and it is Global Witness' opinion that natural persons being denied an opportunity to know of a job they are suitable for based on this automation amount to a '*significant affect*'.
- Article 22 UK GDPR: '*The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*'.
- Global Witness also stipulate that it is not immediately apparent whether Facebook have a lawful basis pursuant to Article 6 UK GDPR and Article 9 UK GDPR.

Residual risks remain due to a lack of realistic technical mitigation to these issues. Global Witness explain that Facebook alone controls the advertising delivery system. They also expressed that when raising these issues with Facebook (March/April 2021) they did not provide a substantive response. (Facebook refused to comment on the report supplied).

Global Witness also cited legal cases that had been undertaken in the US against Facebook's job advertising platform whereby this case law suggests that even where an advertiser attempted to ensure they are not discriminating, the system may in turn lead to discriminatory outcomes. Furthermore, previous amendments made by Facebook because of legal cases in the US only apply in the US and Canada, and so as a British business Global Witness are not protected from these amendments to avoid discrimination.

Current/historic ICO engagement

AWO have previously been involved in complaints to the ICO: BRAVE. AWO also worked on the prosecution of Cambridge Analytica.

Following contact with Tech, specifically Peter Brown the following was established:

The specific focus on Facebook's targeting algorithm is not something the ICO has looked at and can be considered a gap in knowledge.

Analysis of recent social media guidelines for EDPB 902/2021) has been undertaken however this largely focused on the issue of controllership - the 'targeter' (the advertiser, in this case Global Witness) would be a joint controller with the platform they operate on (in this case Facebook). – This is also a position that Global Witness take.

Audience segmentation as part of Operation CEDERBERG has been considered in some detail and is covered in the ICO's political campaign guidance.

It has not yet been confirmed by Investigations, but it is not believed that any investigative work into this has been conducted in the ICO.

Contact with the Digital Economy Team confirmed that the scope of work they had undertaken focused on consent and default settings.

Annex 2: Understanding the discrimination case being presented

This is based on two factors:

1) History of discriminatory advertising on the platform

- 2016 Propublica article found Facebook exclude users by Race. Washington State Attorney General investigation discovered the platform allowed advertisers to exclude African American, Latinx and other ethnic affinities from seeing ads. Facebook agreed to make significant changes to roll out in US – no longer provide advertisers with tools to discriminate based on race, creed, national origin, veteran or military status, sexual orientation, and disability status.
- Lawsuits that Facebook settled 2019 e.g., ACLU and National Fair Housing Alliance.
- US Dept. of Housing and Urban Development ('HUD') brought proceeding against Facebook alleging that their advertising delivery and audience targeting algorithms permitted discrimination. HUD also alleged that if advertisers try to circumvent these systems by targeting adverts at an unrepresented group, Facebooks algorithm will not deliver the ad to those people. – Case ongoing.

2) Contemporaneous evidence of discriminatory practices

- Facebook advert for 10,000 to join Facebook product and engineering team - data made available by Facebook for that advert provides age breakdown and metrics show highest demographic to see ad was men aged between 25 and 34. – Not

[REDACTED]

[REDACTED]

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When complete please send to DCU@ico.org.uk

Requestor	<i>Matt Cotton</i>	Position/Department	<i>Senior Policy Officer/Innovation</i>
Date referred	<i>14 September 2021</i>	ICO-Unique Ref Number	<i>Case ref etc</i>
Overview of issue being referred	<p><i>Please try to cover: who, what, when, why, where and how. Any gaps in this will help us with the scoping stage.</i></p> <p>Who and when?</p> <p>The DPIA team received a DPIA from a representative of AWO (a data rights law firm – involved in a previous complaint to the ICO regarding AdTech; BRAVE). AWO are acting under instruction from their client, Global Witness ('GW'), a Human Rights Organisation NGO that focus on the environment, human rights, and the online world.</p> <p>AWO submitted the DPIA from GW as a Prior Consultation as per Article 36 UK GDPR, about the prospect of GW placing job advertisements using Facebook's advertisement services (Facebook Audiences).</p> <p>We need to be in a position to provide a response to GW no later than Friday 17 September 2021.</p> <p>What</p> <ul style="list-style-type: none"> • GW haven't sent anything to any other part of the ICO • This is part of a public campaign/ EHRC submission has been made • DPIA has been published • Joint controller point – looking for ICO view on issue which is linked to recent jurisprudence and has significant implications for DP compliance and the digital economy <p>Why – is this going to DCU</p> <ul style="list-style-type: none"> • Because it isnt a DPIA [REDACTED] • Need to establish an appropriate response. • Parallels/learning from handling of BRAVE. • Engages questions set out in our AI guidance. <p><u>Significance of not being prior consultation</u></p> <p>Prior consultation not being engaged circumvents the requirement to provide written advice within an 8 week period on two</p>		

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	<p>significant issues: joint controllership in this context and the fairness of Facebook advertising tools.</p> <p>However, this technicality must not detract from the significance of addressing these issues. It would not be credible for the ICO to not consider these issues through another means.</p> <p><u>Joint controller position</u></p> <p>GW explained that they considered themselves to be joint controller with Facebook when placing job adverts on the platform. GW cite ICO guidance from the political campaigning guidance which stipulates that:</p> <ul style="list-style-type: none">- "Although the social media platform may undertake the majority of the processing activities, you are the organisation that instigated this processing and provided the platform with the initial dataset (ie your original list-based audience). Both you and the platform are joint controllers for the resulting targeting activity."
Strategic and regulatory significance	<p><i>Is this work aligned to ICO strategy and objectives (as set out in the Information Rights Strategic Plan and regulatory priorities)?</i></p> <p>IRSP:</p> <p>Goal #1: To increase the public's trust and confidence in how data is used and made available</p> <ul style="list-style-type: none">- Discriminatory output from the advertising tools infringe the fairness principle, and hampers trust and confidence in how individuals personal data used on social media may impact opportunity and exposure to relevant job advertisements.- This presents an opportunity to promote transparency of digital processing, in particular the use of opaque practices with AI.- This also presents an opportunity to create a culture of accountability, ensuring that privacy is embedded into innovative uses of personal data. <p>Goal #2: Improve standards of information rights practice through clear, inspiring and targeted engagement and influence.</p> <ul style="list-style-type: none">- This is an opportunity to demonstrate the ICO as an authoritative arbiter of information rights, ensuring those

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	<p>we regulate achieve the highest possible standards in their information rights practice.</p> <p>Goal #4: Stay relevant, provide excellent public service and keep abreast of evolving technology</p> <ul style="list-style-type: none"> - This is an opportunity to influence data protection and privacy considerations as a central component in the use of AI capabilities within this context. <p>Goal #5: Enforce the laws we help shape and oversee</p> <ul style="list-style-type: none"> - In the scenario where unlawful practice has been determined, this may present a opportunity to initiate timely and proportionate regulatory action to enforce the laws we regulate, taking into account our broader work on AI guidance. - This should be considered a priority issue due to the significant impact it may have on a wide scope of individuals. <p>Regulatory priorities:</p> <ul style="list-style-type: none"> • Enabling good practice in Artificial Intelligence
<p>Legislative significance</p>	<p><i>Which areas of the legislation does this have the potential to impact?</i></p> <p>Article 5(1)(a)</p> <p>Article 22</p> <p>Article 26</p>
<p>Subject matter experts</p>	<p><i>Are there any subject matter experts in or outside the ICO that cover the issue being highlighted?</i></p> <p>The Digital Economy Team haven't started engagement with Facebook on this, however the following quote from a Telegraph article on the issues raised in the media by GW suggest that they are aware of and will respond to the issues:</p> <ul style="list-style-type: none"> - "In response Facebook has said that it is reviewing the Group's findings and preparing to update its system within weeks". <p>In particular, Facebook's use of AI and the allegations that have been raised by GW would appear to engage many of the considerations in the ICO's AI framework with regard to</p>

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	<p>compliance and fairness. This supports the proposition that an investigation is required, however it is important to establish whether technical experts currently exist within the ICO to support this.</p> <p>Finally, the joint controllership issue will likely require legal support.</p>
Any other relevant information	<p><i>For example, has this resulted in any media or political attention?</i></p> <p>This has generated large media attention. For example;</p> <p>https://www.bbc.co.uk/news/technology-58487026</p> <p>Facebook accused of discrimination after mechanic and pilot jobs targeted at men (telegraph.co.uk)</p>

Briefing paper including legal advice on status of DPIA and prior consultation



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From: [Stephen Almond](#)
To: [Elizabeth Baxter](#); [James Hayward](#); [Stephen Bonner](#); [James Dipple-Johnstone](#); [Angela Balakrishnan](#); [Anulka Clarke](#); [Stephen Eckersley](#); [Steve Wood](#); [Anthony Luhman](#)
Cc: [Lynne Currie](#); [Ian Deasha](#); [Richard Nevinson](#); [Ali Shah](#); [Jack Harvey](#); [Sophia Ignatidou](#); [Alister Pearson](#)
Subject: For info - Global Witness campaign regarding Facebook job advertising
Date: 16 September 2021 15:04:19
Attachments: [image001.gif](#)

All,

For info – you may recall that the civil society group [Global Witness last week accused Facebook of discriminatory practices](#) in the way that its algorithms target job adverts to certain users, noting that it had submitted 'complaints' to the ICO and EHRC on this matter.

In parallel, their legal representatives submitted a DPIA for prior consultation seeking our advice in relation to a series of 'test adverts' placed by them via Facebook Audiences in April 2021. They contend that the proposed usage of Facebook Audiences meets the following criteria for 'high risk' processing:

- *Denial of service*: denial of opportunities through discrimination in contravention of the Equality Act.
- *Data matching*: Facebook Audiences involve data matching with Global Witness' data.
- *Tracking*: the products track individual behaviour to select and segment them for advertising.

We have confirmed with colleagues across the organisation that this is the only 'complaint' the ICO has received on the matter. If accepted for prior consultation, this DPIA would have required the ICO to provide advice on the issue of the alleged discriminatory bias in Facebook Audiences in the area of recruitment.

On review, [REDACTED] we are confident that this submission does not engage the requirement for prior consultation with the Commissioner. This is because the processing has already occurred. We do not consider that this matter is best examined via the DPIA process and timelines and instead have agreed with HPI colleagues ([@Elizabeth Baxter](#) and [@James Hayward](#)) that they will examine this case further and determine next steps.

In keeping with our published service standards we will respond to Global Witness's legal representatives tomorrow to confirm our position in relation to prior consultation and inform them that a further review is underway. We will also share a link to our open call for views on our recruitment practices code, which remains open until 21 October.

A line to take on this case is already in place following the media coverage last week:

An ICO spokesperson said: "We have been contacted by Global Witness and will be discussing the matter further with them in due course."

We have agreed with comms that we will continue to use this line should Global Witness publicise our response to their prior consultation request, or look to frame this as the ICO 'rejecting' their complaint. Please let me and

[@Ian Deasha](#) know should you have any queries in relation to this matter.

Thanks,
Stephen



Stephen Almond
Director of Technology and Innovation

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