

Global Witness
Data Protection Impact Assessment

INDEX

A. Data Protection Impact Assessment

Document	Page
Data Protection Impact Assessment ('DPIA') (7 September 2021)	A001

B. Annexes

Document	Page
Annex 1 - Advert by Facebook on Facebook (posted from 9 – 13 April 2020)	B001
Annex 2 - Graph setting out the demographics of the people in the UK shown the advert by Facebook on Facebook	B002
Annex 3 - Test job adverts on Facebook with neutral metrics: a. Mechanic (B003) b. Nursery nurse (B004) c. Pilot (B005) d. Psychologist (B006)	B003
Annex 4 - Screenshots of Facebook's Ad Manager showing the demographics of the people in the UK shown the test adverts with neutral metrics: a. Mechanic (B007) b. Nursery nurse (B008) c. Pilot (B009) d. Psychologist (B010)	B007

<p>Annex 5 - Email correspondence between Global Witness and Facebook (23 March 2021 – 14 April 2021):</p> <ul style="list-style-type: none"> a. Email from Global Witness to Facebook on 23 March 2021 (B011 – B014) b. Facebook’s email response on 14 April 2021, inclusive of earlier email chain (B014 – B019) 	B011
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C. Submissions to the Equality and Human Rights Commission (EHRC)

Document	Page
Submissions to the EHRC (7 September 2021)	C001
Annexes to the EHRC Submissions	
Annex 1	C033
Annex 2	C035
Annex 3 (Also contained in the DPIA – to avoid duplication it is not reproduced here. Please find at B011)	
Annex 4 (Also contained in the DPIA – to avoid duplication it is not reproduced here. Please find at B001)	
Annex 5 (Also contained in the DPIA – to avoid duplication it is not reproduced here. Please find at B002)	
Annex 6	C037
Annex 7	C038
Annex 8 (Also contained in the DPIA – to avoid duplication it is not reproduced here. Please find at B003 – B006)	
Annex 9 (Also contained in the DPIA – to avoid duplication it is not reproduced here. Please find at B007 – B010)	
Annex 10 (The DPIA is contained at A001 – to avoid duplication it is not reproduced here.)	

Global Witness
Data Protection Impact Assessment

I. Details of data controller

- Name of controller: Global Witness
- Name of controller contact: Asif Sarwar
- Name of Data Protection Officer: N/A

II. Introduction and summary

1. This Data Protection Impact Assessment (DPIA) assesses the impact and risk of advertising on the Facebook platform. Global Witness are considering using social media and networking platforms for the purpose of recruitment. Facebook is the predominant platform. Owing to Facebook's predominance and the processing of personal data involved in advertising on Facebook, Global Witness has conducted a DPIA about such data processing on Facebook. Global Witness is in particular running a campaign that looks at digital threats to society which makes them aware of reports about the discriminatory effects of the advertising mechanisms available on Facebook. Those reports gave rise to concerns about the use of those advertising tools. Global Witness wrote to Facebook in respect of those concerns. Facebook did not substantively respond to correspondence.
2. This DPIA was therefore deemed necessary in order to identify risks involved in using Facebook's advertising tools before using the platform. Moreover, as the Information Commissioner's Office state, "it is also good practice to do a DPIA for any other major project which requires the processing of personal data."¹ Such an advertising campaign would be a "major project" for Global Witness. Global Witness have accordingly conducted this DPIA in order to understand and address those concerns. Global Witness instructed AWO, the data rights agency, to assist with drafting this DPIA.

¹ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-impact-assessments>

3. This DPIA is completed in accordance with Article 35 of the UK General Data Protection Regulation (UK GDPR) and related guidance and policies.
4. **Summary outcome:** This DPIA concludes that the processing in Global Witness' potential use of Facebook's suite of advertising products will result in a high-risk to the rights and freedoms of natural persons. In particular, that processing operation may discriminate against individuals on the basis of characteristics that are protected by equalities legislation. Any such discriminatory practice would be contrary to the fairness principle in Article 5(1)(a) UK GDPR.
5. Global Witness have attempted to mitigate those risks, as set out in this DPIA. This includes writing to Facebook to ask for their views on the identified risks and concerns. However, as detailed further below, that risk cannot be appropriately mitigated such that Global Witness will need to consult with the Information Commissioner's Office, pursuant to Article 36 UK GDPR.
6. This DPIA is filed with supporting documents, made up of:
 - i Annex 1 – Advert by Facebook on Facebook
 - ii Annex 2 – Metrics from Facebook's advert
 - iii Annex 3 – Test job adverts
 - iv Annex 4 – Metrics from those test adverts
 - v Annex 5 – Email from Global Witness to Facebook and response

These documents are contained at **Section B** of the supporting bundle.

7. In addition to this DPIA, Global Witness have instructed leading Counsel, Schona Jolly QC of Cloisters Chambers, to assist with the preparation of a submission to the Equality and Human Rights Commission (EHRC) relating to these discriminatory practices. That submission is enclosed at **Section C** of the supporting bundle.

8. An index is provided to help navigate through the documents in the supporting bundle.

III. Background facts and data flows

9. Facebook is a digital platform on which adverts are routinely placed, including for recruitment purposes. Its website claims to “offer advertising solutions for every level of expertise.”² It expressly states that “more than two billion people use Facebook every month – so no matter what kind of audience you want to reach, you’ll find them here.”³ Its size affords recruiters access to a vast range of people.

10. Global Witness intend to recruit a number of positions over the coming months. In order to maximise the reach of their adverts – and in order to ensure a deep and diverse pool of applications – Global Witness are considering using Facebook’s advertising products. Those products are, in summary, as follows:

10.1. Core Audiences – Core enables an advertiser to manually select a target audience for a particular advert or advert campaign based on various characteristics, using Facebook’s data as collected and processed about individuals. Facebook lists five characteristics for such targeting: (i) location (ii) demographics (iii) interests (iv) behaviour, and (v) connections.

10.2. Custom Audiences – Custom allows those advertising to target their existing customers on Facebook. The Custom Audience is created using existing data about an individual possessed by the advertising organisation, which is then matched with Facebook data. The Custom Audience service allows an advertiser to target adverts to individuals via multiple methods, the most common being to upload a list of email addresses, phone numbers or user IDs that they and the advertiser already possess to Facebook. If Facebook is able to match information in its database with that uploaded by the advertiser, then those individuals may see an advert from that advertiser the next time they log into their account.

² <https://www.facebook.com/business/ads>

³ *Ibid*

10.3. Lookalike Audiences – “Lookalike Audiences” are based on users who have similar interests to those within a Custom Audience. As Facebook explain, *“All you need to do is create a source audience of people you know. Your ads will then reach people with common interests and traits.”*⁴ These Lookalike Audiences are created on the basis of a pre-existing Custom Audience, where the characteristics of that Custom Audience (such as location, age, gender, interests etc.) are chosen by advertisers to create a larger group of other individuals who share the same characteristics but who are not yet engaged with the advertiser through Facebook. They are then targeted with adverts that appear on their Facebook pages in the same way as the Custom Audience.

11. We refer to these mechanisms collectively as Facebook’s Audiences herein.
12. The method by which Facebook delivers adverts to platforms users has two stages: ad creation and ad delivery. Facebook is actively involved at both stages.
13. During the ad creation stage, the advertiser submits their advert to Facebook. This stage involves three components⁵: Firstly, the advertiser provides the content for the advert (the ad creative) as well as the link where the platform should send users who click on it. Secondly, advertisers select which of the Facebook Audiences they would like to see the advert. Thirdly, there is the bidding strategy whereby advertisers specify how much they are willing to pay to have their adverts shown.
14. While the advertiser has some control and agency over this stage of the process by generating and bidding for adverts, Facebook plays an active role in how the advertising content is created on its platform. This is because Facebook sets the rules for how advertisers can target adverts to users, and it designs the products which advertisers use. In particular, through Facebook Audiences, Facebook

⁴ <https://en-gb.facebook.com/business/ads/ad-targeting>

⁵ See the definition of “ad creation” provided in Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), [‘Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes.](#)

provides specific tools to advertisers that allow them to set parameters for their adverts and specify the type of users they would like to see them.

15. Each of the Facebook Audiences permits the advertiser to target adverts in a specific and highly-curated way that is controlled by Facebook. For example, in the case of Lookalike Audiences, Facebook enables and even *encourages* advertisers to target their adverts by characteristics such as location or even protected characteristics like gender and age. Categories such as “interests” or geographic location can also act as proxies for protected characteristics. In the case of the other Audiences, Facebook similarly makes select targeting options available to advertisers and defines the terms on which advertisers can target users.
16. The advertising delivery stage refers to the process by which Facebook shows the adverts to users.⁶ This involves running an advert auction to determine, from among all the adverts that include the current user in the audience, which specific advert should be shown to that user. Provided the advert wins at the auction, those users identified by Facebook as being the target audience for the advert will then be shown it. The exact process of how Facebook identifies the relevant users to show the advert to is opaque but essentially Facebook uses its automated systems to deliver the adverts by *“employ[ing] thousands of inputs to send an ad to the people Facebook calculates are most likely to engage with that ad”*.⁷
17. By using its systems to target adverts in order to optimise the audience reach during the advert delivery stage, Facebook plays an active role in the selection and distribution of advertising content to users on its platform. At the stage of advert delivery, the advertiser has no control over the advert and how it is delivered to users. This process is dictated entirely by Facebook’s own systems.
18. Facebook’s Audiences are marketed as providing access to a wide and diverse audience. As such, the products are an ideal place for Global Witness to meet

⁶ See the definition of “ad delivery” provided in Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), [‘Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes.](#)

⁷ <https://www.motherjones.com/politics/2021/06/facebook-discrimination-lawsuit-ads/>

their aims of seeking a wide and diverse applicant pool. However, before engaging in such advertising, Global Witness are concerned about the potential for job adverts on those platforms to be discriminatory. Those concerns arise from (a) the history of discriminatory advertising on the platform, and (b) contemporaneous evidence of discriminatory practices. Those issues are addressed in turn below.

IV. Substantive identifiable risks

a. *Past practice of discriminatory advertising*

19. Global Witness had initial concerns about advertising on Facebook following widespread reports of discriminatory practices using Facebook’s advertising tools. Those practices are set out in more detail in the EHRC submission in **Section C** of the supporting bundle. In summary:

19.1.A *Propublica* article from 2016 found that “Facebook lets advertisers exclude users by race”.⁸ As a result of that article, the Washington State Attorney General conducted an investigation into these practices, to determine whether and the extent to which third-party advertisers with Facebook could “exclude ethnic and religious minorities, immigrants, LGBTQ individuals and other protected groups from seeing their ads.”⁹ The AG “discovered that the social network service’s platform allowed advertisers to exclude African-American, Latinx and other ethnic affinities from seeing ads.”¹⁰ Following that investigation, Facebook signed an agreement with Attorney General Ferguson to make significant changes to its advertising platform that is legally binding in Washington State and that Facebook agreed to roll out in the US.¹¹ In particular, Facebook agreed that advertiser would “no longer provide advertisers with tools to discriminate based on race, creed, color, national origin, veteran or military status, sexual orientation and disability status. These exclusion options will not be

⁸ <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>

⁹ <https://www.atq.wa.gov/news/news-releases/aq-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit>

¹⁰ *Ibid*

¹¹ https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/2018_07_23%20AOD.pdf

present on any advertisement for employment, housing, credit, insurance and/or places of public accommodation.”¹²

19.2. Nevertheless, Facebook found itself subject to a number of lawsuits in the US for its discriminatory practices. In particular, its advertising tools permitted advertisers to discriminate by excluding people from seeing adverts for housing, employment and credit opportunities based on gender on the basis of protected characteristics like gender, race and age. Claims were brought by a coalition of interested parties, including the ACLU and the National Fair Housing Alliance. In March 2019, Facebook settled some of those lawsuits.¹³

19.3. Despite settling these cases, in March 2019, the US Department of Housing and Urban Development (HUD) brought proceeding against Facebook alleging that their advertising delivery and audience targeting algorithms permitted discrimination. In particular, HUD alleged that even if advertisers try to circumvent these systems by targeting adverts at an unrepresented group, then Facebook’s algorithm will not deliver the ad to those people¹⁴:

Even if an advertiser tries to target an audience that broadly spans protected class groups, [Facebook’s] ad delivery system will not show the ad to a diverse audience if the system considers users with particular characteristics most likely to engage with the ad. If the advertiser tries to avoid this problem by specifically targeting an unrepresented group, the ad delivery system will still not deliver the ad to those users, and it may not deliver the ad at all. This is so because Respondent structured its ad delivery system such that it generally will not deliver an ad to users whom the system determines are unlikely to engage with the ad, even if the advertiser explicitly wants to reach those users regardless.

¹² *Ibid*

¹³ <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/facebook-settles-civil-rights-cases-making-sweeping>

¹⁴ <https://www.vice.com/en/article/59x79k/researchers-find-facebook-ad-targeting-algorithm-is-inherently-biased>

The case is ongoing.

19.4. Facebook has committed to improvements in their system “so advertisers running US housing, employment, and credit ads will no longer be allowed to target by age, gender, or zip code — and Facebook agreed to a much smaller set of targeting categories overall.”¹⁵ It claims to have “delivered on its commitment and gone above and beyond the settlement with additional transparency and targeting measures”, within its July 2020 Audit Report.¹⁶ Within that report, Facebook claims to “also make all active ads for job opportunities or credit offers (e.g., credit card or loan ads) available to everyone, including non-Facebook users. Facebook reports that it is actively building the employment and credit sections of the Ad Library now, and plans to launch them by the end of the year.” However, those commitments are focused on the US and Canadian markets only.

20. The practices above are illustrative of wider concerns that Global Witness have. In this context and in light of Facebook’s amendments to the advertising system are said to apply to the US and Canada only, Global Witness remains concerned that advertising on the platform in the UK may result in discrimination.

b. Contemporaneous evidence of discrimination

21. Global Witness considered an advert that was posted by the Facebook Careers page and ran from 9 - 13 April 2020, by which Facebook sought to hire an additional 10,000 people for its product and engineering teams by the end of 2020. The advert was shown and available in the UK. The advert was classified as being on 'social issues, elections or politics' and was available on Facebook's Ad Library via this [link](#). However, shortly after Global Witness sent an email to Facebook on 23 March 2021 in order to give them the opportunity to comment on their findings about this advert, the advert was removed from the Facebook Ad Library. It is now not available online. No explanation was provided by Facebook about the removal of the advert. When Global Witness asked Facebook, they declined to comment in general on the issue of discriminatory

¹⁵ <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>

¹⁶ *Ibid*

advertising. The Ad Library has a record of all adverts shown in the UK that are classified as being on 'social issues, elections or politics' and all other adverts that are currently running. Global Witness therefore assume that Facebook re-classified the advert as not being of a political nature after they received the email from Global Witness that raised questions about this ad. The ad data which accompanied it suggests that there were about 500k-600k impressions, with a potential reach of 500k-1million people. The potential reach was said to be “based on targeting criteria, ad placements and how many people were shown ads on Facebook apps and services in the past 30 days.” That advert and the accompanying data is enclosed as **Annexes 1 and 2**.

22. The data that was made available by Facebook for that advert provides the age and gender breakdowns of people who saw the advertisement in the UK. This demonstrates that a higher proportion of men in almost every age group saw the advert, and that a far greater proportion of younger people saw the advertisement. In fact, only 1% of people who saw the advertisement were in the 55-64 age group (of whom all were men) and 1% of men and women who saw the advert were over 65. Global Witness understands that over 20% of Facebook users in the UK were in this age bracket at the time¹⁷. By contrast, the majority (52%) of people who saw it were in the 25-34 age group (of which 58% who saw it were men, compared with 40% women and 2% unknown), followed by the 35-44 age group (26%) (of which 62% who saw it were men, 35% women and 4% unknown). The highest demographic to see the advertisement was men aged between 25 and 34.
23. It is not clear to Global Witness how or whether this advert was specifically targeted at a younger (and male) demographic by Facebook, as the employer-recruiter, or whether such demographic targeting was caused or delivered by an algorithm. There was no easily accessible information on the optimisation algorithm used for advertisements, and extremely limited information about how the targeting parameters deployed, including by reference to protected characteristics.

¹⁷ https://napoleoncat.com/stats/facebook-users-in-united_kingdom/2020/04/

24. In order to understand whether these practices remain a live issue when advertising in the UK, Global Witness attempted to elicit further information concerning what was permissible by way of advertising on Facebook.
25. Information from within Facebook was limited. Global Witness note that Facebook have a self-regulatory and self-certified non-discrimination policy, which reads

Our Advertising Policies prohibit advertisers from using our ads products to discriminate against individuals or groups of people. Ads are discriminatory when they deny opportunities to individuals or groups of people based on certain personal attributes, such as race, ethnicity, national origin, religion, age, sex, sexual orientation, gender identity, family/marital status, disability, or medical or genetic condition.

Whenever you run Facebook ads, you're already agreeing to follow our [Non-discrimination Policy](#). However, to help maintain the integrity of Facebook advertising, we may periodically ask you to review the policy and certify your understanding of and compliance to it.

This is especially important for advertisers who are running housing, employment or credit ads, or who have included a multicultural affinity segment in their audience. Opportunities presented in these types of ads must be inclusive and extended to all groups of people, regardless of certain personal attributes such as those listed above. Many locations have laws that specifically prohibit discrimination in these categories.

If we ask you to certify your compliance to our Non-discrimination Policy, you'll have to complete the process in order for your ads to be approved. If you don't certify that your ads comply with our policies and other applicable laws, they may be rejected. If you receive a rejection notification, you'll have the opportunity to certify compliance then.

26. This section is from the following page on Facebook: <https://www.facebook.com/business/help/136164207100893>. This policy cross refers to Facebook's Advertising Policies, which has a specific section on "Discriminatory practices".¹⁸ The policy is that

Ads must not discriminate or encourage discrimination against people based on personal attributes such as race, ethnicity, colour, national origin, religion, age, sex, sexual orientation, gender identity, family status, disability, medical or genetic condition.

27. Despite these policies and procedures, Global Witness remained concerned that, in practice, Facebook's automated systems may result in discriminatory outcomes. In particular, the policy states "This guide is not a substitute for legal advice. Consult a legal professional for specific advice about your situation."¹⁹ In addition, Facebook makes clear that certain aspects of the policy only apply to the US and Canada, as follows:

Any United States advertiser or advertiser targeting the United States or Canada that is running credit, housing or employment ads, must self-identify as a [special ad category](#), as it becomes available, and run such ads with approved targeting options.²⁰

28. Furthermore, research conducted by Global Witness highlights a failure by Facebook's automated review systems to recognise and reject problematic content, even in circumstances where those adverts directly and overtly breach Facebook's Policies and Procedures. For instance, Global Witness submitted political advertisements to Facebook in the context of the sectarian divide in Northern Ireland. These adverts were flagged by Global Witness as political and "targeted in a variety of polarising ways and included content that breached Facebook's rules on hate speech and inciting violence". Nevertheless, Facebook allowed Global Witness to "target inflammatory political ads across

¹⁸ https://www.facebook.com/policies/ads/prohibited_content/discriminatory_practices

¹⁹ *Ibid*

²⁰ *Ibid*

the sectarian divide”.²¹ After being alerted by Global Witness about those allegations, Facebook acknowledged that the adverts had violated Facebook’s policies against hate speech and incitement of violence. Nonetheless, they had been accepted for publication by Facebook until Global Witness withdrew them from circulation before Facebook could publish them.²² Moreover, when Global Witness queried Facebook about these adverts, Facebook responded that *“People’s interests are based on their activity on Facebook -- such as the pages they like and the ads they click on -- not their personal attributes.”*²³ However, Global Witness’ concern is that the “activity on Facebook” does reveal individual attributes – including special category data such as religious beliefs. Indeed, the adverts prepared as part of the research could be targeted on the basis of metrics revealing of individual religious beliefs. As such, the existence of policies does not guard against problematic outcomes when the flaw lies in the automated systems and targeting metrics themselves.

29. With this context in mind, before using the platform to present their own adverts, Global Witness ran a series of test adverts to see the results. Global Witness published four job adverts on Facebook - one for mechanics, one for nursery nurses, one for pilots and one for psychologists. All contained links to real job vacancies for all jobs fitting those search terms on uk.indeed.com. Screenshots of those adverts are contained within **Annex 3**.

30. In order to understand the impact of Facebook’s algorithm on selection of the audience, Global Witness placed these adverts in as neutral a way that Facebook would allow. There were no targeting preferences placed on the adverts, other than that they go to adults in the UK. All the adverts were accompanied by a relevant image that was chosen to be gender-neutral. Of the different mandatory ad delivery objectives offered by Facebook, Global Witness selected their ‘traffic/links’ objective which is purported to “deliver your ads to the people who are most likely to click on them.”²⁴ Thus, the results were due to Facebook’s automated systems as to who to show them to.

²¹ <https://www.globalwitness.org/en/campaigns/digital-threats/big-tech-business-model-poses-threat-democracy/>

²² *Ibid*

²³ *Ibid*

²⁴ <https://www.facebook.com/business/help/416997652473726>

31. Global Witness recorded the information provided by Facebook as to the age and gender of the people shown the adverts. Those graphs are set out at **Annex 4**. The figures confirm that adverts are delivered in a manner that will result in discrimination based on protected characteristics. From this investigation, Global Witness remain concerned that that audience selection will result in discriminatory practices.
32. To be sure, we have considered wider research into this area. Global Witness' investigation matches the findings of others:
- [Algorithm Watch](#) has shown that Facebook's ad optimisation algorithm is highly discriminatory in delivering job adverts in France, Germany and Switzerland.
 - [Academics](#) have also shown that Facebook's ad optimisation algorithm is highly discriminatory in delivering job adverts in the US.
 - [Recent investigations](#) in the US have shown that Facebook's ad delivery system excludes women from seeing job opportunities *even when the women are equally qualified as the men*.

V. The relevant legal regulations

33. Article 35(1) UK GDPR sets out the framework for DPIA's as follows

Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks.

34. Thus, Global Witness are required to conduct a DPIA "prior to the processing", if that processing is likely to result in "a high risk to the rights and freedoms of

natural persons”. The matters to be covered in the DPIA, at a minimum, are set out in Article 35(7) UK GDPR.

35. Article 36 UK GDPR establishes the requirements and mechanisms for “prior consultation” with the GDPR. Article 36(1) UK GDPR requires:

The controller shall consult the Commissioner prior to processing where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk.

36. Article 36(2) UK GDPR provides that where “the Commissioner is of the opinion that the intended processing referred to in paragraph 1 would infringe this Regulation, in particular where the controller has insufficiently identified or mitigated the risk, the Commissioner shall, within period of up to eight weeks of receipt of the request for consultation, provide written advice to the controller.”

VI. Specific risks to individuals

37. Global Witness are concerned that the advertising delivery system within Facebook will lead to discriminatory outcomes. Global Witness have accordingly conducted a DPIA to address those risks prior to engaging in the processing. This section of the DPIA contains an analysis of the risks to individuals. The DPIA then considers whether they can be mitigated.

37.1. Is personal data being processed?

In order for the audience to be selected for the advert, personal data of individuals will be processed. Some of that data will include data for which Global Witness is a data controller. Indeed, two of the three advertising options do use Global Witness’ data, namely the Custom Audience and Lookalike Audience tools. Relevant ICO guidance also suggests that Global Witness would be a data controller for the use of Facebook Audience tools.²⁵

²⁵ <https://ico.org.uk/for-organisations/guidance-for-the-use-of-personal-data-in-political-campaigning/political-campaigning-in-the-online-world/>

Global Witness are also likely to be a joint controller with Facebook for all three Facebook Audiences.²⁶ To this end, we note the following ICO guidance on the use of Facebook Audience tools²⁷:

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.

...

When using a third party like a social media platform for the purposes of targeting ... messaging to individuals, in most circumstances you and that third party are jointly responsible for the processing. This is because you are both deciding the purposes and the means.

While this guidance is taken from the ICO guidance on political messaging, the guidance on joint controllership is applicable to the use of Facebook Audiences generally. The ICO Draft Code of Direct Marketing Guidance²⁸ similarly suggests that a social media company offering “Custom”, or “Lookalike” Audiences are likely to be joint controllers with the advertiser.

37.2. Is the processing likely to result in a high-risk to individuals?

a. Scope

The UK GDPR states that the risks to be considered are wider than just possible infringements of the UK GDPR. Rather, Global Witness should consider “the rights and freedoms of natural persons.”²⁹ It is clarified in the relevant ICO guidance that:³⁰

²⁶ Per, *inter alia*, Case C-40/17 (*Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV*)

²⁷ *Supra* footnote 25

²⁸ <https://ico.org.uk/media/about-the-ico/consultations/2616882/direct-marketing-code-draft-guidance.pdf>

²⁹ Article 35(1) UK GDPR.

³⁰ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-impact-assessments/>

DPIAs should consider compliance risks, but also broader risks to the rights and freedoms of individuals, including the potential for any significant social or economic disadvantage. The focus is on the potential for harm – to individuals or to society at large, whether it is physical, material or non-material.

That same ICO guidance also refers to the relevant guidelines from the Article 29 Working Party,³¹ and, in particular, the nine criteria used to determine whether processing is likely to result in “high risk”. The criteria include:

Matching or combining datasets, for example originating from two or more data processing operations performed for different purposes and/or by different data controllers in a way that would exceed the reasonable expectations of the data subject.

That criterion is of direct affect to Global Witness’ proposed use of Facebook’s advertising tools.

Global Witness also note the ICO’s illustrative list of examples of processing ‘likely to result in high risk’.³² This includes:

- **Denial of service** – Decisions about an individual’s access to a product, service, opportunity or benefit which are based to any extent on automated decision-making (including profiling) or involves the processing of special- category data.
- **Data matching** – Combining, comparing or matching personal data obtained from multiple sources.

³¹ Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679 <https://ec.europa.eu/newsroom/article29/items/611236>

³² <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/data-protection-impact-assessments-dpias/examples-of-processing-likely-to-result-in-high-risk/>

- **Tracking** – Processing which involves tracking an individual’s geolocation or behaviour, including but not limited to the online environment.

These considerations all arise in respect of the proposed use of Facebook’s Audiences, as follows:

- **Denial of service** – Global Witness have well-founded concerns that advertising on Facebook will lead to the denial of opportunities to individuals. Indeed, the extent of the denial of service within Facebook’s Audiences may lead to discrimination in contravention of the Equality Act (as to which, see the submissions to the EHRC at **Section C** of the supporting bundle).
- **Data matching** – Facebook’s Audiences involve data matching with Global Witness’ data.
- **Tracking** – In order for Facebook’s Audiences to operate, the products track individual behaviour in order to select and segment them for advertising.

Thus, Global Witness have conducted this DPIA in order to expand on these considerations and understand the application of our concerns to the requirements of Article 35 UK GDPR. In doing so, Global Witness have also considered relevant case law, such as the case of *Bridges v the Chief Constable of South Wales Police*.³³ That case confirms that the relevant considerations for “the rights and freedoms of natural persons” are wider than possible infringements of the UK GDPR but also include consideration of human rights infringements.

³³ [2020] EWCA Civ 1058

Global Witness have therefore considered the wider issues that are presented from the facts about Facebook's Audiences and as set out in this DPIA.

b. Discrimination

The facts found by Global Witness, as set out in this DPIA, give rise to concerns regarding discriminatory affects that such advertising on Facebook's Audiences will have. As set out in detail above, we have concerns about the historic practice of Facebook. That evidence was aggravated by the contemporaneous evidence Global Witness have gathered. That evidence points to at least a likely risk of discrimination through the use of Facebook's advertising tools. Facebook's failure to assuage those concerns in response to our correspondence was also of concern to Global Witness.

Global Witness consider that such a risk of discrimination may violate the Equality Act. To that end, Global Witness have sought the advice of senior counsel, Schona Jolly QC, about the history of discriminatory affects and the evidence Global Witness had found. Ms Jolly QC confirmed that there is a high risk of discrimination when using Facebook's advertising tools.

Global Witness have accordingly referred the matter to the Equality and Human Rights Commission for their input and guidance on the Equality Act. Rather than rehearse those concerns herein, that submission to the Equality and Human Rights Commission is enclosed at **Section C** of the supporting bundle. We will update the ICO with the progress of that submission to the Equality and Human Rights Commission.

c. Infringements of the UK GDPR

In addition to the risks of discrimination, Global Witness are concerned that the advertising mechanisms on Facebook's Audiences may infringe Article 22 UK GDPR, which provides that individuals "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.”

The manner in which Facebook delivers adverts is automated. Being denied an opportunity to know of a job that you are suitable for on the basis of this automation would, in Global Witness’ view, amount to a “significant affect”. As such, the processing within Facebook’s Audiences may also lead to an infringement of Article 22 UK GDPR.

Further, any such discriminatory processing would not be “fair” and in turn, contrary to Article 5(1)(a) UK GDPR. To this end, we note the ICO’s guidance on AI³⁴ states as follows about the interaction between discrimination and data protection laws:

Data protection law addresses concerns about unjust discrimination in several ways.

First, processing of personal data must be ‘fair’. Fairness means you should handle personal data in ways people reasonably expect and not use it in ways that have unjustified adverse effects on them. Any processing of personal data using AI that leads to unjust discrimination between people, will violate the fairness principle.

Second, data protection aims to protect individuals’ rights and freedoms– with regard to the processing of their personal data. This includes the right to privacy but also the right to non-discrimination. Specifically, the requirements of data protection by design and by default mean you have to implement appropriate technical and organisational measures to take into account the risks to the rights and freedoms of data subjects and implement the data protection principles effectively. Similarly, a data protection impact assessment should contain measures

³⁴ <https://ico.org.uk/for-organisations/guide-to-data-protection/key-data-protection-themes/guidance-on-ai-and-data-protection/what-do-we-need-to-do-to-ensure-lawfulness-fairness-and-transparency-in-ai-systems/#howshouldweaddress>

to address and mitigate those risks, which include the risk of discrimination.

Third, the UK GDPR specifically notes that processing personal data for profiling and automated decision-making may give rise to discrimination, and that you should use appropriate technical and organisational measures to prevent this.

In addition, it is not immediately apparent to Global Witness whether Facebook have a lawful basis for processing data pursuant to Article 6 GDPR and special category data pursuant to Article 9 UK GDPR. To this end, Global Witness are aware that Facebook's legal bases for processing remain subject to legal challenge.³⁵ Moreover, Global Witness have considered the guidance from the ICO on the use of Facebook Audiences that:³⁶

Although your creation of a list for uploading to the platform may not by itself represent the processing of special category data, the further use of the list by you and the platform to target political messaging may be.

While this guidance is directed at political messaging, the same concern arises if the processing results in targeting on the basis of any other characteristic protected by Article 9 UK GDPR such as "data revealing racial or ethnic origin". As such, Global Witness are concerned as to Facebook's ability to comply with the UK GDPR in practice.

Taken together, Global Witness are concerned that the discriminatory outcomes of Facebook's Audiences will also breach the UK GDPR. This concern reflects the ICO's own views on how data protection law interacts with "unjust discrimination".³⁷

- **Is the processing necessary and proportionate?**

³⁵ See, *inter alia*, <https://noyb.eu/sites/default/files/2020-05/complaint-facebook.pdf>

³⁶ *Supra* footnote 25

³⁷ *Supra* footnote 34

There are two aspects to this consideration.

- a) Firstly, the processing by Global Witness. We consider that the processing would be necessary and proportionate, as Global Witness wish to reach a wide audience to ensure sufficient breadth of job advertising. The quantity of personal data involved would be sufficiently small to reach those audiences, such that our direct processing would be proportionate. We also consider that reaching out to as wide an audience as possible, which Facebook have access to, will ensure that Global Witness are able to recruit from a wide and diverse selection.
- b) Secondly however, the processing involved by Facebook would be disproportionate if the target selection is discriminatory. Indeed, Global Witness consider that no processing could be necessary or proportionate if it leads to discriminatory outcomes.

Taken together, the processing may be necessary and proportionate. However, any such analysis has to involve a consideration of the processing by Facebook as well as the processing by Global Witness.

VII. Mitigation

38. The primary consideration is whether Global Witness are a data controller. Given the manner in which the majority of Facebook Audiences operate, Global Witness would be a data controller. Moreover, Global Witness are likely to be a joint controller for some if not all of the processing operations within Facebook Audiences.
39. The second consideration is factual – does Facebook Audiences result in potential discrimination. In order to understand the reality of the outputs, as an initial step, Global Witness have tested the Facebook Audiences tools to ascertain whether the risks are real or illusory. That experiment showed that the risks are very likely to arise. Thereafter, Global Witness have sought advice from legal experts to understand whether these practices may result in discrimination. That advice confirms that there is a very real risk of discrimination.

40. In addition to the risk of discrimination under the Equality Act 2010, Global Witness are concerned by potential infringements of Articles 22 and 5(1)(a) UK GDPR.
41. In light of these concerns, Global Witness are anxious about what technical mitigation could realistically be achieved by Global Witness alone. That practical shortfall is due to Facebook's proprietary system and the knowledge imbalance between Facebook and Global Witness as a third-party advertiser. Facebook alone control the advertising delivery system. Global Witness have no control over that system yet may have to process personal data in order to use Facebook's Audiences as it is designed to be used.
42. In order to mitigate against those technical and practical shortfalls, Global Witness wrote to Facebook. That email is enclosed in **Annex 5**. Facebook did not provide a substantive response to that email.
43. As the legal cases in the US suggest, even when an advertiser attempts to ensure that they are not discriminating, the system may in turn lead to discriminatory outcomes. Moreover, some of the amendments that Facebook have put in place to cure those problems (however flawed), are said on Facebook's policies to only apply in the US and Canada. As a British organisation, Global Witness do not have the comfort of those technical improvements made by Facebook.
44. It is not clear to Global Witness why those same policies do not apply elsewhere, including the UK. Those amendments only address potential discrimination via the targeting applied by the advertiser; they do nothing to address the potential discrimination occasioned by Facebook's Tools.

VIII. Outcome

45. Global Witness are concerned that they are unable to further mitigate the risks than through the steps that have been taken to date. The Article 29 WP Guidance confirms that:³⁸

Whenever the data controller cannot find sufficient measures to reduce the risks to an acceptable level (i.e. the residual risks are still high), consultation with the supervisory authority is required.

46. Global Witness have therefore concluded that the ICO must be consulted, pursuant to Article 36 UK GDPR. A submission under Article 36 UK GDPR to the ICO has been prepared under separate cover.

7 September 2021

³⁸ *Supra* footnote 31



Facebook Careers

Sponsored

ID: 210908276862633



We expect to hire an additional 10,000 people for our product and engineering teams by the end of 2020. Want to join us? Browse our current openings here: <https://www.facebook.com/careers>



CNBC.COM

Facebook expects to add 10,000 workers in product and engineering this year, says COO Sheryl Sandberg

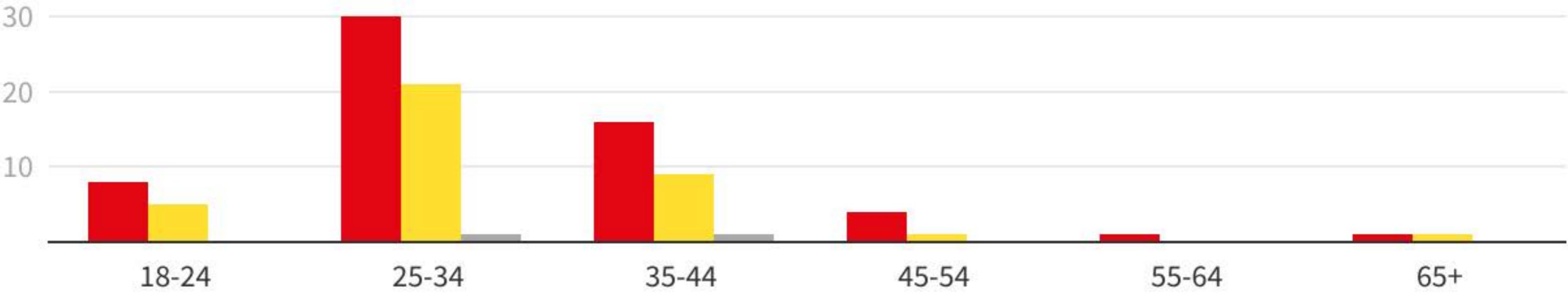
"Our hiring is keeping at a very, very aggressive clip," Sandberg said. The pledge comes as the country braces for a massive spike in unemployment. Earlier on...

B001

JOB OPPORTUNITIES AT FACEBOOK - WHO WAS SHOWN THE AD?

Reach (percentage of people shown the ad) by age and gender

Men Women Unknown



Source: Facebook ad library



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Great job opportunities for mechanics!



UK.INDEED.COM

Mechanic Jobs - April 2021 |
Indeed.com

LEARN MORE

B003



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Office jobs

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Great job opportunities for nursery nurses!



UK.INDEED.COM

**Nursery Nurse Jobs - April
2021 | Indeed.com**

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B004



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Great job opportunities for pilots!



UK.INDEED.COM

**Flying Pilot Jobs - April
2021 | Indeed.com**

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B005



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Comment



Share

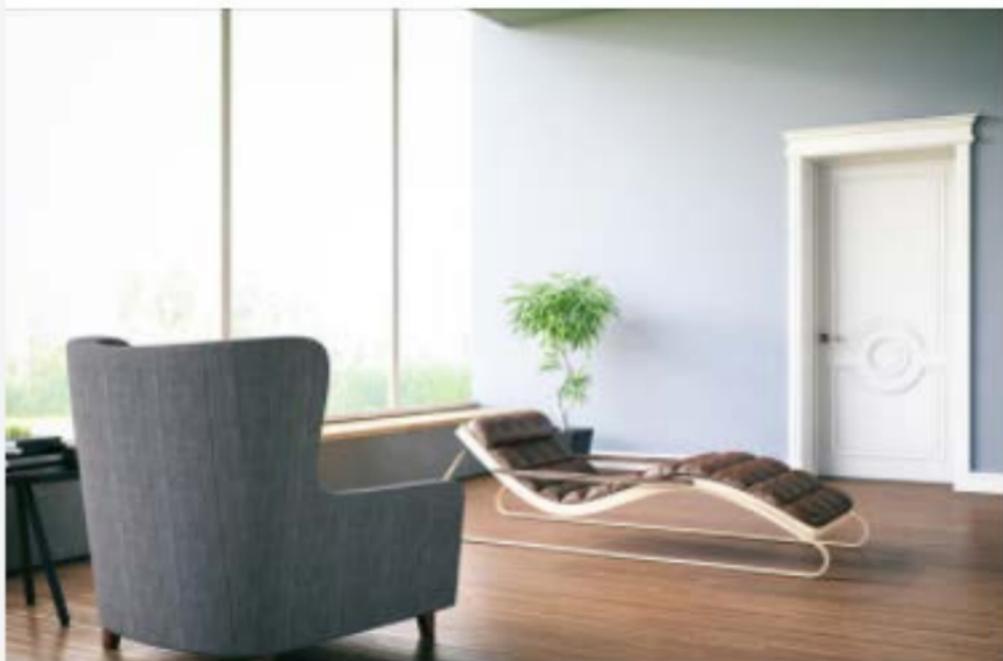


Office jobs

Sponsored · 



Great job opportunities for psychologists!



UK.INDEED.COM

**Psychologist Jobs - April
2021 | Indeed.com**

LEARN MORE

B006



Like



Comment



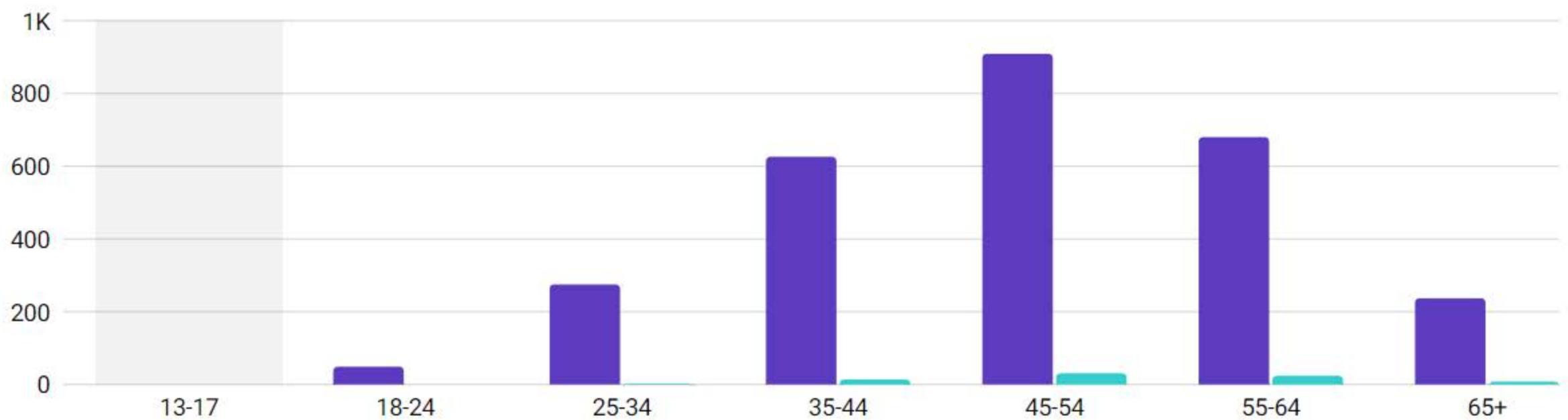
Share

This month: 1 Apr 2021-22 Apr 2021

Performance **Demographics** Placement Delivery

Age and gender distribution

All Reach



Men
96% (2,776)
Cost per result: £0.05

Women
3% (80)
Cost per result: £0.04

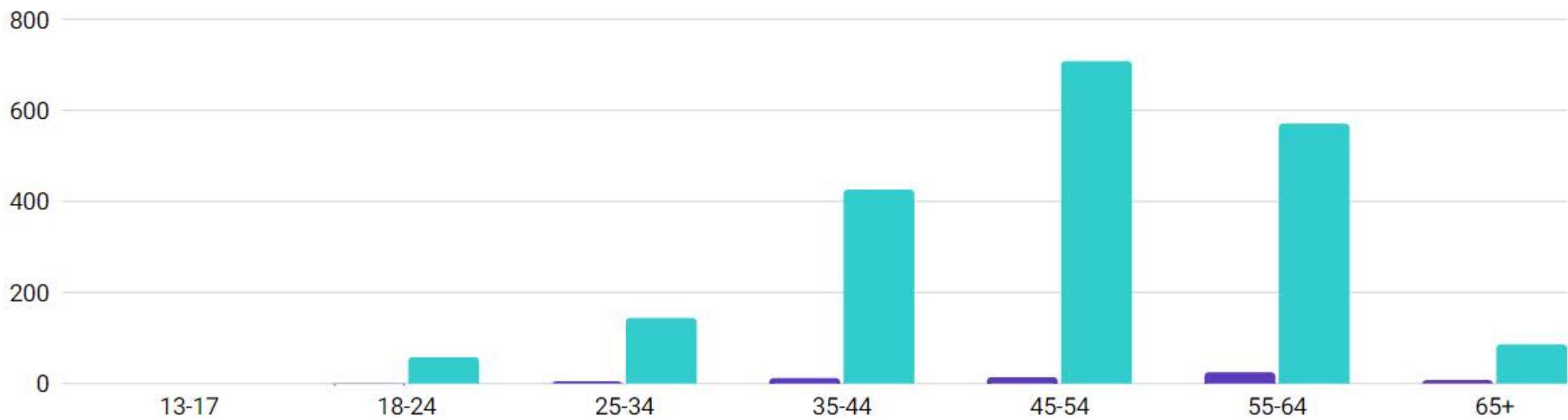
B007

This month: 1 Apr 2021-22 Apr 2021

Performance **Demographics** Placement Delivery

Age and gender distribution

All Reach



Men
3% (65)
Cost per result: £0.06

Women
95% (1,993)
Cost per result: £0.04

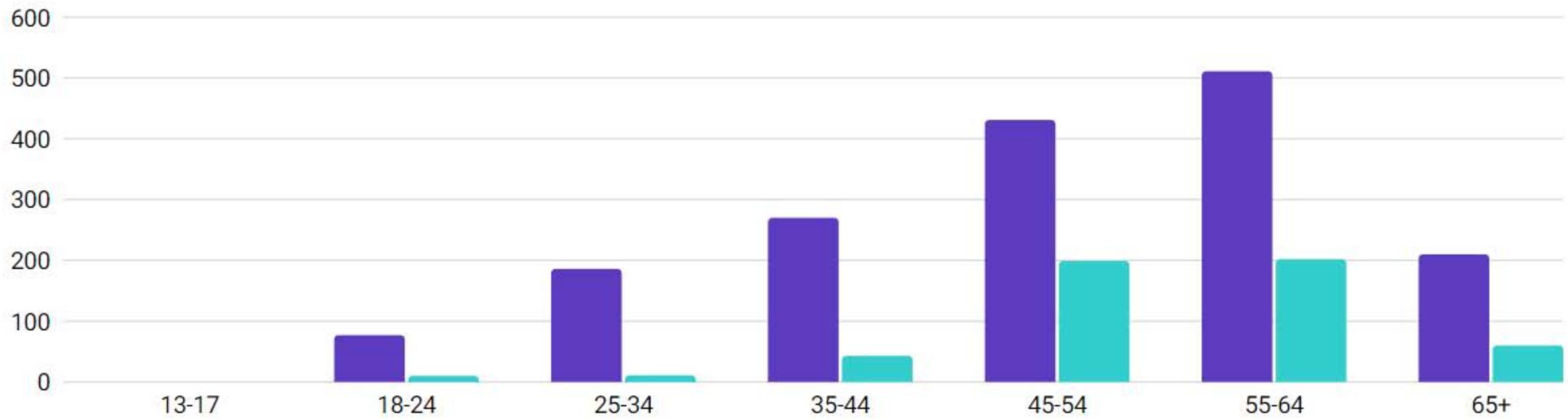
B008

This month: 1 Apr 2021-22 Apr 2021

Performance **Demographics** Placement Delivery

Age and gender distribution

All Reach



Men
75% (1,685)
Cost per result: £0.06

Women
23% (525)
Cost per result: £0.07

B009

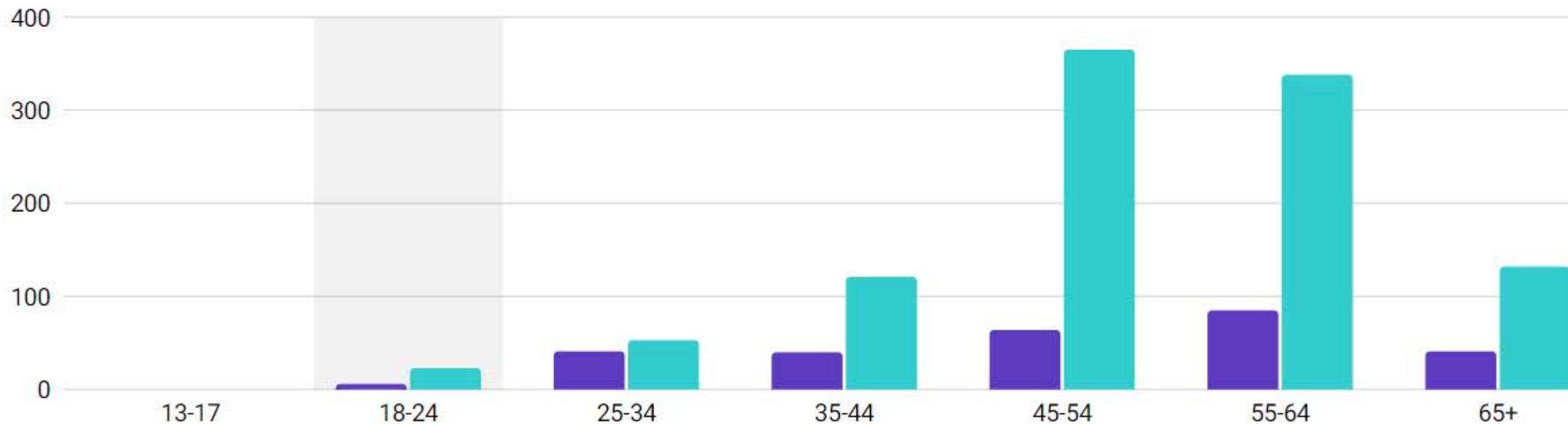
This month: 1 Apr 2021-22 Apr 2021

Performance Demographics Placement Delivery

Age and gender distribution

All

Reach



Men
21% (277)
Cost per result: £0.34

Women
77% (1,032)
Cost per result: £0.33

B010

Global Witness' email to Facebook

From: Rosie Sharpe

Sent: 23 March 2021 12:06

To: dkearns@fb.com

CC: press@fb.com

Subject: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Dear Devon Kearns,

Global Witness is a non-governmental organisation that works to protect human rights and secure the future of our planet.

We are currently working on a report on the legality of job adverts on Facebook. We believe these matters are in the public interest and we are investigating them with the intention of publishing in the near future.

We are writing to you in your professional capacity as a policy communications advisor for Facebook. Please let us know if we should write to someone else instead.

We would welcome your comments on the following statements. If any of these are inaccurate, we would be grateful if you would say in what way.

- Many current job adverts published on Facebook may breach the UK's *Equality Act*, both in the way that advertisers can target the ads and the way that Facebook's ad optimisation algorithm determines who sees them. This can lead to employers discriminating against prospective employees as a result of persons of particular age or gender not being shown advertisements for employment.
- Indeed, there is evidence that Facebook itself has breached the Act, both as an employer and service provider. The Facebook Careers page posted an advert in the UK that ran from 9-13 April 2020 for jobs at Facebook (see attached). Only 3% of the people who were shown the ad were over 55 and only 37% were women according to data in the [Facebook ad library](#). It appears that either the algorithm or the targeting criteria applied by Facebook acted as a proxy for targeting the ad on the basis of age and gender.
- In addition, it must follow that many current job adverts on Facebook breach Article 5.1 of the EU General Data Protection Regulation (*GDPR*) because the use of the ad optimisation algorithm, where data based on protected characteristics is processed, produces advertising based on unfair processing.
- It must also follow that many job adverts on Facebook breach Article 22 of *GDPR* because the use of the ad optimisation algorithm is a wholly automated process that can have a significant effect on a person by depriving them of being shown an employment opportunity.

- Facebook’s system for posting job adverts using the ad optimisation algorithm has been found to operate in discriminatory ways in a host of countries, including USA, Germany, Spain, France, Poland and Switzerland.¹

We would also welcome your comments on the following questions:

- What has Facebook done to reassure itself that its ad optimisation algorithm is compatible with its requirements under the *Equality Act*? Has Facebook investigated the extent to which the ad optimisation algorithm discriminates with respect to a) job adverts and b) all adverts? If so, what did you find?
- Do any of Facebook’s algorithms infer characteristics that are protected by the *Equality Act*, such as race or sexual orientation? Do any of these algorithms determine whether users are shown job ads?
- Does Facebook consider that the targeting options it makes available to employers and recruiters are compatible with its obligations under the *Equality Act*?
- Has Facebook considered rolling out the targeting restrictions applied to jobs, housing and credit ads in the US and Canada to other countries? Why hasn’t Facebook implemented these targeting restrictions in the UK?
- How many job adverts in the UK (by number and percentage) are targeted by advertisers using criteria that have been banned to job advertisers in the US?
- What targeting criteria did Facebook use to target the job advert attached below (which is [here](#) in the Facebook ad library)?
- Does Facebook consider that the way that the job advert attached below (which is [here](#) in the Facebook ad library) was targeted is consistent with its obligations under the *Equality Act* as an employer?
- Does Facebook consider that the way that the Facebook ad optimisation algorithm decided who should be shown the job advert attached below (which is [here](#) in the Facebook ad library) is consistent with its obligations under the *Equality Act*?
- Does Facebook consider that using its ad optimisation algorithm to decide who gets to see job adverts in the UK is fair under the *GDPR*? Article 5.1 of the *GDPR* requires that personal data shall be processed “lawfully, fairly and in a transparent manner in relation to the data subject”. The UK Information Commissioner’s Office describes ‘fairness’ in this context as meaning that a data processor “should only handle personal data in ways that people would reasonably expect and not use it in ways that have unjustified adverse effects on them.”² Not being shown a job advert that you might be qualified to do as a result of your age, gender, race or other protected characteristic is likely to constitute unfair processing.

¹ <https://algorithmwatch.org/en/automated-discrimination-facebook-google/>; <https://www.propublica.org/article/facebook-is-letting-job-advertisers-target-only-men>; <https://www.aclu.org/press-releases/aclu-and-workers-take-facebook-gender-discrimination-job-ads>; <https://www.aclu.org/cases/facebook-ecoc-complaints?redirect=node/70165>; <https://www.theguardian.com/technology/2018/oct/28/how-target-ads-threaten-the-internet-giants-facebook>; <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting>; <https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads>; https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; <https://arxiv.org/pdf/1904.02095.pdf> and <https://www.economist.com/business/2019/04/04/facebooks-ad-system-seems-to-discriminate-by-race-and-gender>.

² <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/lawfulness-fairness-and-transparency/>

- Does Facebook consider that its ad optimisation algorithm is in compliance with Article 22 of the *GDPR*? Article 22 gives data subjects the right not to be subject to a decision based solely on automated processing, including profiling, if the decision produces legal effects concerning him or her or similarly significantly affects him or her. Not being shown a job advert that you might be qualified to do as a result of your age, gender, race or other protected characteristic constitutes having a significant effect on a person. Does Facebook do anything to mitigate the potential effect of these automated decisions? Can Facebook demonstrate that neither targeting by advertisers nor targeting by the ad optimization algorithm apply to automated decision-making regarding the showing of adverts for employment to Facebook users based on protected characteristics?
- Has Facebook conducted a Data Protection Impact Assessment for its ad optimisation algorithm? If so, please provide us with a copy. If not, please provide an explanation as to why, with reference to Article 35 of the *GDPR*.
- How does Facebook justify the adverse impacts that the use of its ad optimisation algorithm have on women and older people searching for jobs?
- Is it possible for a Facebook user to withdraw their consent from being subject to the ad optimisation algorithm while still being able to access Facebook's services? How would a user do this?

We wanted to give you the opportunity to respond to these points so that we can take into account what you say before we finalise our report and can consider including the gist of your reply in our report where appropriate.

We look forward to hearing from you and would be grateful if you could let us have your response by 30 March 2021. Please send your response to rsharpe@globalwitness.org.

If you are unable to respond by this time, please let us know. If we have not heard from you by this date, we will assume that you do not wish to comment.

Yours sincerely,



Rosie Sharpe
Global Witness

Advert posted on the Facebook Careers page alerting people to a series of job openings at Facebook

 **Facebook Careers**
Sponsored
ID: 210908276862633

We expect to hire an additional 10,000 people for our product and engineering teams by the end of 2020. Want to join us? Browse our current openings here: <https://www.facebook.com/careers>



CNBC.COM
Facebook expects to add 10,000 workers in product and engineering this year, says COO Sheryl Sandberg
"Our hiring is keeping at a very, very aggressive clip," Sandberg said. The pledge comes as the country braces for a massive spike in unemployment. Earlier on...

Facebook's response

From: John Nolan <jno@fb.com>

Sent: 14 April 2021 14:58

To: Rosie Sharpe

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi Rosie

I just wanted to let you know we won't be commenting on the report. Please do send on a copy to us when it's ready to be shared.

Kind regards,

John

From: Rosie Sharpe <RSharpe@globalwitness.org>

Date: Tuesday, 13 April 2021 at 09:57

To: John Nolan <jno@fb.com>

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi John,

Apologies for the slight delay.

On sharing our report with you - I'm afraid we can't do that as the report isn't yet finalised for external release and also because it's not GW policy to provide pre-publication copies of any of its reports.

On sharing further examples of ads with you - The examples of job ads that we have found where questions can be raised about discrimination are limited to the one ad by the Facebook Careers page that we included in the original letter to you. We assume there to be more examples of job ads that were shown to a biased distribution of people but we have not found any because Facebook's API only allows us to interrogate the data on political and social ads, which most job ads are not. However, because advertisers in the UK can target job ads by age and gender and by using criteria that are correlated with age, gender and other protected characteristics, and because there is a slew of work showing that Facebook's ad optimisation algorithm discriminates (indeed there was [new academic research](#) published on this just the other day), we infer that the problem is widespread. In addition, as a result of a settlement of a US lawsuit, Facebook no longer allows job advertisers in the US (and Canada) to target by age, gender, zip code or criteria correlated with protected characteristics - yet those changes have not been rolled out in the UK.

Unlike us, Facebook has access to all the data on how job ads are targeted in the UK, who they're shown to, and how its ad optimisation algorithm works. So in effect what we're asking is: does Facebook have any evidence to disprove the theory that job adverts on Facebook in the UK regularly breach the Equality Act and therefore also GDPR?

If you've any further questions, please do ask.

Best wishes,

Rosie

From: John Nolan <jno@fb.com>

Sent: 12 April 2021 17:20

To: Rosie Sharpe

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi Rosie,

Following up to see if you can share anything further with us in terms of the report itself or any ads we can review?

Thanks,

John

John Nolan

Industry Communications, UK
10 Brock Street, London NW1 3FG
[Facebook](#) | Mobile +44 77793 29187

From: John Nolan <jno@fb.com>

Date: Friday, 9 April 2021 at 08:57

To: Rosie Sharpe <RSharpe@globalwitness.org>

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Thank you Rosie.

Is there any chance you can share the full report with us? Ideally we would like to review other ads you have included in the report too.

Many thanks,

John

John Nolan

Industry Communications, UK
10 Brock Street, London NW1 3FG
[Facebook](#) | Mobile +44 77793 29187

From: Rosie Sharpe <RSharpe@globalwitness.org>

Date: Thursday, 8 April 2021 at 10:28

To: John Nolan <jno@fb.com>

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Yes, totally OK!

Rosie

From: John Nolan <jno@fb.com>

Sent: 08 April 2021 11:12

To: Rosie Sharpe

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Thanks Rosie, I'll work to that deadline -- is end of day ok?

John

John Nolan

Industry Communications, UK

10 Brock Street, London NW1 3FG

[Facebook](#) | Mobile +44 77793 29187

From: Rosie Sharpe <RSharpe@globalwitness.org>

Date: Thursday, 8 April 2021 at 10:09

To: John Nolan <jno@fb.com>

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi John,

We had problems with our mail server yesterday, so I'm re-sending the message below in case you didn't receive it. Please let me know if a deadline of 14 April works for you.

Best wishes,

Rosie

From: Rosie Sharpe

Sent: 07 April 2021 12:31

To: John Nolan

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi John,

Thanks for your reply, and no problem about extending our deadline to give you a chance to respond - we're genuinely interested in hearing what you have to say about these allegations. How does a week from today (14 April) sound?

B017

Devon's out of office message said to email that press@ account, which I did on 6 April. Is there a phone number for the press office that I can have so I can more easily chase up in the future please?

Best wishes,

Rosie

From: John Nolan <jno@fb.com>

Sent: 06 April 2021 19:39

To: Rosie Sharpe

Subject: Re: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

Hi Rosie,

Your email was shared with me via our press@ team. It's always best use that address when contacting us than reach out to individuals to ensure a faster response. Devon was unfortunately out of the office the week you got in touch. Is there any scope to extend your deadline so we can provide a response?

Best,

John

From: Rosie Sharpe <RSharpe@globalwitness.org>

Sent: Tuesday, April 6, 2021 9:55 AM

To: Devon Kearns <dkearns@fb.com>; Press (No-Reply) <press-noreply@fb.com>

Subject: [External] RE: Opportunity to comment on report by civil society organisation on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR

This message is from an EXTERNAL SENDER - be CAUTIOUS, particularly with links and attachments.

Dear Devon Kearns and the Facebook press team,

I wrote to you a while ago to see if you would like to comment on a report on the potential for job adverts on Facebook to breach the UK Equality Act and GDPR (see below). I have not heard back from you.

Please can you let me know if you are intending to reply.

B018

Best wishes,

Rosie Sharpe

Dear Baroness Falkner,

Request to conduct a formal s.20 investigation into Facebook in respect of breaches of the Equality Act 2010 with regard to job advertisements

1. This submission, made by and on behalf of Global Witness, requests the Equality and Human Rights Commission (EHRC), in line with its strategic aims and relevant enforcement powers pursuant to the Equality Act 2006, to open an investigation into discriminatory job advertisement practices by Facebook, in Great Britain.
2. This submission is set out as follows:

A	Introduction
B	Background Facts (a) Facebook Audiences (b) Past practice of discriminatory advertising (c) Anti-discrimination advertising policies in Great Britain
C	Contemporaneous evidence of discriminatory acts or practices
D	Applicable Legal Framework (a) Equality Act 2010 (b) UK GDPR
E	Conclusions

3. This submission is filed with supporting documents, made up of:
 - (1) Annex 1 – Screenshots of Facebook’s Ad Manager showing that Facebook requires advertisers placing ads in the US to self-certify that they are posting housing, employment or credit ads, but does not do so in the UK

- (2) Annex 2 – Screenshots of Facebook’s Ad Library showing that there are sections for employment, housing and credit ads shown in the US, but not in the UK.
- (3) Annex 3 – Global Witness’ email to Facebook to give them the opportunity to comment on the advert for employment at Facebook, and Facebook’s response to the letter
- (4) Annex 4 – Facebook Advert for employment at Facebook
- (5) Annex 5 – Graph showing the age and gender of people in the UK shown the Facebook advert for employment at Facebook
- (6) Annex 6 - Test job advert, with targeted metrics
- (7) Annex 7 - Screenshots of the Facebook Ad Manager showing that Facebook accepted the ads with discriminatory targeting for publication
- (8) Annex 8 - Test job adverts with neutral metrics
- (9) Annex 9 - Metrics from those test adverts

These documents are contained at Section B of the supporting bundle.

4. In addition, Global Witness has instructed AWO, the data rights agency, to assist with drafting a Data Protection Impact Assessment (DPIA) under Article 35 of the UK GDPR for the Facebook advertising tools. That DPIA is contained at Section C of the supporting bundle.
5. An index is provided to help navigate through the documents in the supporting bundle.

A. INTRODUCTION

6. Global Witness is an international NGO, with offices in London, Washington DC and Brussels, whose broad aims include the holding of powerful corporations to account as part of its programme to ‘challenge abuses of power to protect human rights and secure the future of the planet’. One of the topics they investigate and campaign on concerns digital threats to society.¹ Through this campaign work, it is aware of extensive reports

¹ <https://www.globalwitness.org/en/campaigns/digital-threats/>

concerning the discriminatory impact and effects of the advertising mechanisms on Facebook, which are the subject matter of this submission.

7. Online advertising platforms have become increasingly powerful, both due to their prevalence in daily life and the precise targeting features which they offer. The Centre for Data Ethics and Innovation reports:

“Online targeting systems are used to promote content in social media feeds, recommend videos, target adverts, and personalise search engine results. Online targeting is already an important driver of economic value and is a core element of the business models of some of the world’s biggest companies. It enables individuals and organisations to find a bigger audience for their stories or point-of-view, and businesses to find new customers. Automated systems now make decisions about a significant proportion of the information seen by people online.”²

8. Whilst digital platforms (and the algorithms they employ) may be considered by many employers as an efficiency tool, they also permit or enable advertisers to target a specific audience by specifying the criteria against which an advert should be seen. Based on those chosen parameters, the platforms then use optimisation algorithms to determine who is shown the advert. This permits, or enables, the specific targeting of adverts on the basis of protected characteristics. In addition, irrespective of such direct targeting intention, digital platforms can deliver a discriminatory outcome based on algorithms used in ad delivery systems optimised against different preferences, including where an outcome is set ‘neutrally’ without express parameters.³ Both the targeting and delivery of ads can “skew” the viewing of such adverts to an audience defined by its protected characteristics.⁴ Plainly any such “skew” on the basis of a

² Centre for Data Ethics and Innovation: Online Targeting: Final Report and Recommendations², 4 Feb 2020 <https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations>

³ Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), ‘[Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes](#)’; Lambrecht, Anja and Tucker, Catherine E., Algorithmic Bias? An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads (March 9, 2018). See here. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2852260

⁴ See, for example, “Review into bias in algorithmic decision-making”, 2020, Centre for Data Ethics and Innovation.”

protected characteristic has the potential to screen out many groups of individuals, defined by their protected characteristic, from recruitment pools.

9. Facebook is a pervasive digital platform on which advertisements are routinely placed, including for recruitment purposes.⁵ Its website claims to “offer advertising solutions for every level of expertise”.⁶ It expressly states that “more than two billion people use Facebook every month – so no matter what kind of audience you want to reach, you’ll find them here.”⁷ Its size affords recruiters access to a vast range of people. In the United States, the Communications Workers of America have argued that online platforms such as Facebook are the dominant force for recruiting in the national labour market.⁸ As ProPublica has stated:

*“The precision of Facebook’s ad delivery has helped it dominate an industry once in the hands of print and broadcast outlets. The system, called microtargeting, allows advertisers to reach essentially whomever they prefer, including the people their analysis suggests are the most plausible hires or consumers, lowering the costs and vastly increasing efficiency.”*⁹

10. There are numerous studies now available in which there is evidence of “skewed” delivery to audiences defined by their protected characteristics, whether consciously or inadvertently, and which may constitute unlawful discrimination in practice.¹⁰ A very recent study confirms that “Facebook’s ad delivery can result in skew of job ad delivery by gender beyond what can be legally justified by possible differences in qualifications...”.¹¹ As highlighted below, Facebook has been the subject of legal

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957259/Review_into_bias_in_algorithmic_decision-making.pdf

⁵ <https://en-gb.facebook.com/business/pages/post-job>

⁶ <https://www.facebook.com/business/ads>

⁷ <https://www.facebook.com/business/ads>

⁸ Amended Complaint ¶ 9, Bradley v. T-Mobile US, Inc., No. 17-cv-07232-BLF (N.D. Cal. May 29, 2018),

<https://www.onlineagediscrimination.com/sites/default/files/documents/og-cwa-complaint.pdf>

[<https://perma.cc/NSM8-UPG9>]

⁹ Angwin, J, Scheiber, N, Tobin, A (2017), ‘[Dozens of Companies Are Using Facebook to Exclude Older Workers From Job Ads](#)’

¹⁰ Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), ‘[Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes](#)’

¹¹ Auditing for Discrimination in Algorithms Delivering Job Ads: Basileal Imana, Aleksandra Korolova, and John Heidemann: <https://doi.org/10.1145/3442381.3450077>, 19 April 2021

challenges in the United States. Whilst there has been considerable ethical debate about the need for more effective tools to combat data bias, both on Facebook and more broadly, within the United Kingdom at least, there has been little progress made in terms of securing legal protection.

11. The Equality Act 2010 provides for discrimination to be unlawful in the fields of employment, covering recruitment, and in the provision of services. Whilst there is not yet any specific legal structure in Great Britain governing unlawful discrimination through algorithms, discrimination that takes place in either the employment or services field is rendered unlawful by the provisions already *in situ*. Job applicants are protected by the provisions of the Equality Act 2010 in respect of the defined protected characteristics set out within the legislation.
12. Global Witness has collated evidence that, through its practices and algorithms, Facebook appears to be deploying unlawful discriminatory practices in respect of job advertisements in Great Britain, in breach of the Equality Act 2010.
13. The Equality and Human Rights Commission (EHRC) is empowered by statute, *inter alia*, to work towards the elimination of unlawful discrimination, to promote awareness and understanding of the rights under the Equality Act 2010 and to enforce that Act. It has a specific strategic aim relating to the application of equality law in untested or new areas such as in respect of AI or predictive technology. In that capacity, and pursuant to its powers under s.20 Equality Act 2006, Global Witness requests the EHRC to conduct a formal investigation into Facebook's discriminatory practices in respect of recruitment advertising, both through ad targeting and through ad delivery. Global Witness seeks to ensure that enforcement action by the EHRC will require Facebook to cease any discriminatory practices and to make necessary changes to prevent future discrimination or non-compliance.
14. Global Witness and AWO have instructed leading Counsel, Schona Jolly QC of Cloisters Chambers, to draft this submission. As outlined, it also has instructed AWO,

the data rights agency, to draft a Data Protection Impact Assessment on its behalf, which was deemed necessary in order to identify risks involved in using Facebook's advertising tools before using the platform. That Data Protection Impact Assessment is attached in Section C of the supporting bundle to this submission.

B. BACKGROUND FACTS

a) Facebook Audiences

15. Facebook's relevant advertising products are, in summary, as follows:

- (1) Core Audiences – Core enables an advertiser to manually select a target audience for a particular advert or advertising campaign based on various characteristics, using Facebook's data as collected and processed about individuals. Facebook lists five characteristics for such targeting: (i) location (ii) demographics (iii) interests (iv) behaviour, and (v) connections.
- (2) Custom Audiences – Custom allows those advertising to target their existing customers on Facebook. A Custom Audience is created using existing data about an individual possessed by the advertising organisation, which is then matched with Facebook data. The Custom Audiences service allows an advertiser to target adverts to individuals via multiple methods, the most common being to upload to Facebook a list of email addresses, phone numbers or user IDs that they and the advertiser already possess. If Facebook is able to match information in its database with that uploaded by the advertiser, then those individuals may see an advert from that advertiser the next time they log into their account.
- (3) Lookalike Audiences – Lookalike Audiences are based on users who have similar interests to those within a Custom Audience. As Facebook explain, "*All you need to do is create a source audience of people you know. Your ads will*

then reach people with common interests and traits."¹² These Lookalike Audiences are created on the basis of a pre-existing Custom Audience, where the characteristics of that Custom Audience (such as location, age, gender, interests etc) are chosen by advertisers to create a larger group of other individuals who share the same characteristics but who are not yet engaged with the advertiser through Facebook. They are then targeted with adverts that appear on Facebook in the same way as the Custom Audience.

16. In this Submission, these advertising mechanisms/products are referred to collectively as Facebook Audiences.
17. The method by which Facebook delivers adverts to platform users has two stages – ad creation and ad delivery. Facebook is actively involved at both stages.
18. During the ad creation stage, the advertiser submits their advert to Facebook. This stage involves three components¹³: Firstly, the advertiser provides the content for the advert (the ad creative) as well as the link where the platform should send users who click on it. Secondly, advertisers select which of the Facebook Audiences they would like to see the advert. Thirdly, there is the bidding strategy whereby advertisers specify how much they are willing to pay to have their adverts shown.
19. Whilst the advertiser has some control and agency over this stage of the process by generating and bidding for adverts, Facebook plays an active role in how the advertising content is created on its platform. This is because Facebook sets the rules for how advertisers can target adverts to users and it designs the products which advertisers use. In particular, through Facebook Audiences, Facebook provides specific tools to advertisers that allow them to set parameters for their adverts and specify the type of users they would like to see them.

¹² <https://www.facebook.com/business/ads/ad-targeting>

¹³ See the definition of "ad creation" provided in Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), '[Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes](#)'.

20. Each of the Facebook Audiences permits the advertiser to target adverts in a specific and highly-curated way that is controlled by Facebook. For example, in the case of Lookalike Audiences, Facebook enables and encourages advertisers to target their adverts by protected characteristics such as gender and age, or other categories such as “interests” or geographic location, which can act as proxies for protected characteristics. In the case of the other Audiences, Facebook similarly makes select targeting options available to advertisers and defines the terms on which advertisers can target users.
21. The advertising delivery stage refers to the process by which Facebook shows the adverts to users.¹⁴ This involves running an advert auction to determine, from among all the adverts that include the current user in the audience, which specific advert should be shown to that user. Provided the advert wins at the auction, those users identified by Facebook as being the target audience for the advert will then be shown it. The exact process of how Facebook identifies the relevant users to show the advert to is opaque but essentially Facebook uses its automated systems to deliver the adverts by *“employ[ing] thousands of inputs to send an ad to the people Facebook calculates are most likely to engage with that ad”*.¹⁵
22. By using its systems to target adverts in order to optimise the audience reach during the advert delivery stage, Facebook plays an active role in the selection and distribution of advertising content to users on its platform. At the stage of advert delivery, the advertiser has no control over the advert and how it is delivered to users. This process is dictated entirely by Facebook’s own systems.
23. Global Witness’ research and investigations leads them to be concerned about the potential for job adverts on those platforms to be discriminatory. Those concerns arise from (i) the past practice of discriminatory advertising on the platform, (ii) the lack of relevant anti-discrimination policies in Great Britain and (iii) contemporaneous evidence of discriminatory practices. Those issues are addressed in turn below.

¹⁴ See the definition of “ad delivery” provided in Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), [‘Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes.](#)

¹⁵ <https://www.motherjones.com/politics/2021/06/facebook-discrimination-lawsuit-ads/>

b) Past practice of discriminatory advertising

24. The use of targeted advertising on digital platforms means that very large subsets of people, potentially millions of people, may never see a job advert that is intended for a particular cohort. Unlike traditional forms of advertising, which can be viewed by a range of people, including those from different demographics, advertising on digital platforms can result in there being no opportunity for such adverts to be seen outside of particular demographic cohorts.

25. Targeted advertising may be viewed as inherently discriminatory. Solon Barocas states: “Facebook doesn’t so much allow advertisers to discriminate against groups, it is designed to do exactly that.”¹⁶ He explains:

“By definition, data mining is always a form of statistical (and therefore seemingly rational) discrimination. Indeed the very point of data mining is to provide a rational basis upon which to distinguish between individuals and to reliably confer to the individual qualities possessed by those who seem statistically similar. Nevertheless, data mining holds the potential to unduly discount members of legally protected classes and to place them at systematic relative disadvantage. Unlike more subjective forms of decision making, data mining’s ill effects are often not traceable to human bias, conscious or unconscious.”¹⁷

26. Facebook collects data from its users, which includes information on some protected characteristics, such as age or gender. As noted in a recent lawsuit against Facebook, it “collects millions of data points about its users, draws inferences about each user based on this data, and then charges advertisers for the ability to microtarget ads to users based on [its] inferences about them.”¹⁸ The inferences attached to the collection of data by

¹⁶ <https://www.theguardian.com/technology/2018/oct/28/how-target-ads-threaten-the-internet-giants-facebook>

¹⁷ Solon Barocas & Andrew Selbst “Big Data’s Disparate Impact” 104 CALIF L REV 671 (2016): <http://www.californialawreview.org/wp-content/uploads/2016/06/2Barocas-Selbst.pdf> at p677.

¹⁸ USA Department of Housing and Urban Development, on behalf of Complainant Asst. Secretary for Fair Housing and Equal Opportunity v Facebook Inc: https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf

digital platforms, including Facebook, include users' protected characteristics such as race and sexual orientation, which are then used for targeted advertising.¹⁹

27. There is considerable evidence to suggest that Facebook has, or may have, permitted job adverts to selectively target the demographics of its audience, directly or indirectly, on the basis of protected characteristics, some of which is set out below.
28. A New York Times/ProPublica study showed that many companies were advertising jobs only to specific age groups.²⁰ For example, Verizon placed an ad on Facebook to recruit applicants for a unit focused on financial planning and analysis. The ad showed a smiling, millennial-aged woman seated at a computer and promised that new hires could look forward to a rewarding career. The ad was programmed to run on the Facebook feeds of 25 to 36 year olds who lived in the capital, or had recently visited there, and had demonstrated an interest in finance. Facebook reportedly defended the practice, stating: "Used responsibly, age-based targeting for employment purposes is an accepted industry practice and for good reason: it helps employers recruit and people of all ages find work."²¹
29. A ProPublica article from 2016 found that "Facebook lets advertisers exclude users by race".²² As a result of that article, the Washington State Attorney General, Bob Ferguson, conducted an investigation into these practices, to determine whether and the extent to which third-party advertisers with Facebook could "exclude ethnic and religious minorities, immigrants, LGBTQ individuals and other protected groups from seeing their ads." The AG "discovered that the social network service's platform allowed advertisers to exclude African-American, Latinx and other ethnic affinities from seeing ads."²³ Following that investigation, Facebook signed an agreement with Attorney General Ferguson to make significant changes to its advertising platform that

¹⁹ *A right to reasonable inferences: re-thinking data protection law in the age of Big Data and AI*, Dr Sandra Wachter and Brent Mittelstadt. See also *The Right to Privacy (Article 8) and the Digital Revolution*, Third Report of Session 2019, Parliamentary Joint Committee on Human Rights

<https://publications.parliament.uk/pa/jt201919/jtselect/jtrights/122/12208.htm>

²⁰ <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting>

²¹ Rob Goldman, a Facebook Vice-President as reported here: <https://www.propublica.org/article/facebook-ads-age-discrimination-targeting>

²² <https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race>

²³ <https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit>

is legally binding in Washington State and that Facebook agreed to roll out in the US.²⁴ In particular, Facebook agreed that advertisers would “no longer provide advertisers with tools to discriminate based on race, creed, color, national origin, veteran or military status, sexual orientation and disability status. These exclusion options will not be present on any advertisement for employment, housing, credit, insurance and/or places of public accommodation.”²⁵

30. ProPublica also has reported that Facebook has allowed adverts that target only men.²⁶

In 2018, ProPublica found that 15 employers in the preceding year, including Uber, had advertised jobs on Facebook exclusively to one sex, with many of the ads playing to stereotypes: *‘The Pennsylvania State Police, for example, boosted a post targeted to men with text saying: “Pennsylvania State Troopers earn a starting salary of \$59,567 per year. Apply now.” A Michigan-based truck company took out ads targeting not just men, but men interested in college football. And a community health center in Idaho sought nurses and certified medical assistants — and limited its audience to women.’*²⁷

31. In the United States, targeting job adverts by personal status such as sex, age, race is unlawful under federal, State and local civil rights laws. A number of discrimination lawsuits have been filed against Facebook in recent years, claiming that its ad tools have permitted advertisers to choose who received their adverts, thereby allowing advertisers to discriminate by excluding people from seeing ads for housing, employment, or credit opportunities based on protected characteristics. Claims have been brought by a number of interested parties including by the National Fair Housing Alliance, Communications Workers of America, the American Civil Liberties Union, and other private parties.

32. In 2017, a major class action filed against Facebook and other large employers including T-Mobile and Amazon.com by the Communications Workers Union, and individual workers, specifically alleged the practice of targeted advertising based on

²⁴ https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/2018_07_23%20AOD.pdf

²⁵ <https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-leads-facebook-making-nationwide-changes-prohibit>

²⁶ <https://www.propublica.org/article/facebook-is-letting-job-advertisers-target-only-men>

²⁷ <https://www.propublica.org/article/facebook-is-letting-job-advertisers-target-only-men>

age.²⁸ The claim alleged that that “companies eliminate older workers from receiving job ads by specifically targeting their employment ads to younger workers via Facebook’s ad platform.” The claim specifically alleges that Facebook’s involvement in this practice was not that of a mere third-party provider as it “is not simply that of an intermediary that operates a platform to develop, sell, and deliver ads to Facebook users.” It alleged that “Facebook has used its own ad platform to recruit job applicants to work at Facebook, and Facebook routinely used the same discriminatory age filters to exclude older workers from seeing Facebook’s own employment ads for a range of positions at Facebook’s operations throughout the nation, upon information and belief.”

33. In 2019, a group of job-hunters in the US filed claims with the Equal Employment Opportunity Commission against Facebook and 10 individual employers for discriminating against women and older workers or both, by targeting certain job advertisements only at men.²⁹ The charges were filed on behalf of three named female workers, the Communications Workers Union, and a class of millions of women allegedly denied information on job opportunities due to their gender. Most of the employers’ male-targeted ads highlighted jobs in male-dominated fields. The charges asserted³⁰ that Facebook could be held legally responsible for: (1) creating and operating the system that allows and encourages employers to select the gender and age of the people who get their job ads, including providing employers with data on users’ gender and age for targeting purposes; (2) delivering the gender- and age-based ads based on employers’ preferences; and (3) acting as a recruiter connecting employers with prospective employees. The case against Facebook was settled in March 2019.³¹ In July 2019, the EEOC found reasonable cause that several of the individual employers that had posted discriminatory ads had violated federal law.³²

²⁸ Class Action Complaint & Demand for Jury Trial, *Communications Workers of Am. v. T-Mobile, Inc.*, No. 17-cv-07232 (Dec. 20, 2017):

<https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2629&context=historical>

See also Ifeoma Ajunwa, *Age Discrimination by Platforms*: Berkeley Journal of Employment and Labor Law, Vol 40:1 (2019). See <https://doi.org/10.15779/Z38GH9B924>

²⁹ <https://www.aclu.org/news/aclu-and-workers-take-facebook-gender-discrimination-job-ads>; <https://www.theguardian.com/technology/2018/oct/28/how-target-ads-threaten-the-internet-giants-facebook>; <https://www.nytimes.com/2018/09/18/business/economy/facebook-job-ads.html>

³⁰ <https://www.aclu.org/cases/facebook-eoc-complaint-0?redirect=node/70165>

³¹ <https://www.aclu.org/legal-document/exhibit-describing-programmatic-relief-facebook-settlement>

³² <https://www.aclu.org/press-releases/historic-decision-digital-bias-eoc-finds-employers-violated-federal-law-when-they>

34. In March 2019, Facebook settled some of the discrimination lawsuits brought against it.³³
35. Subsequently, Facebook has committed to *“implement a new advertising system so advertisers running US housing, employment, and credit ads will no longer be allowed to target by age, gender, or zip code — and Facebook agreed to a much smaller set of targeting categories overall.”* It claims to have *“delivered on its commitment and gone above and beyond the settlement with additional transparency and targeting measures”*, within its most recent July 2020 Audit Report.³⁴ It also claims that *“Facebook agreed to also make all active ads for job opportunities or credit offers (e.g., credit card or loan ads) available to everyone, including non-Facebook users. Facebook reports that it is actively building the employment and credit sections of the Ad Library now, and plans to launch them by the end of the year.”*
36. It is important to note that this commitment applies expressly to the United States, and subsequently also to Canada.³⁵ Global Witness is not aware of any similar commitment having been made in respect of advertising systems in Great Britain: it has been unable to find record of any such commitment on Facebook’s website. Nor is there is any option for advertisers to tick a box to self-declare that they are advertising housing, employment or credit for ads targeted at Britain, as exists for ads targeted at the US (see screenshots in **Annex 1**). Nor does the Facebook Ad Library contain any specific section for employment and credit ads for British ads, as it does within the United States (see screenshots in **Annex 2**). Perhaps most pertinently, when Facebook was invited by Global Witness to comment on its anti-discrimination policies on job adverts in Britain, it declined to do so (see **Annex 3**).
37. In any event, and notwithstanding such commitment in the United States, there remains cause for concern as to whether Facebook is able to implement this system of non-

³³ For example, see: <https://nationalfairhousing.org/wp-content/uploads/2019/03/FINAL-SIGNED-NFHA-FB-Settlement-Agreement-00368652x9CCC2.pdf>; also see Facebook’s Civil Rights Audit – Final Report, July 8 2020: <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>

³⁴ <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>

³⁵ <https://www.facebook.com/business/news/helping-prevent-discrimination-in-ads-that-offer-housing-employment-or-credit-opportunities>

discriminatory advertisement practices³⁶ since its own algorithms are designed in such a way as to ensure targeted advertising.

38. Indeed, this was alleged specifically by the US Department of Housing and Urban Development in its lawsuit³⁷ against Facebook³⁸ which alleged that Facebook's advertisement targeting tools permit discrimination in housing:

“Even if an advertiser tries to target an audience that broadly spans protected class groups, Respondent’s ad delivery system will not show the ad to a diverse audience if the system considers users with particular characteristics most likely to engage with the ad. If the advertiser tries to avoid this problem by specifically targeting an unrepresented group, the ad delivery system will still not deliver the ad to those users, and it may not deliver the ad at all. This is so because Respondent structured its ad delivery system such that it generally will not deliver an ad to users whom the system determines are unlikely to engage with the ad, even if the advertiser explicitly wants to reach those users regardless.”

39. In this regard, it is worth pausing to understand the difference between ad creation and ad delivery. In respect of the former, Facebook appear to have made some amendments to their policies and practices in the US and Canada, although not in Great Britain. In respect of the latter, it is not clear to Global Witness that any policies have been implemented by Facebook anywhere to counter discriminatory outcomes caused by the algorithm's delivery system itself.

40. Ali & ors (2019)³⁹ define ad creation as follows:

³⁶ <https://themarkup.org/ask-the-markup/2020/08/25/does-facebook-still-sell-discriminatory-ads>

³⁷ https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf

³⁸ To the best of our current knowledge that lawsuit remains outstanding and has not been settled. Further enquiries are pending at the time of writing.

³⁹ Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), ‘[Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes](#)

Ad creation refers to the process by which the advertiser submits their ad to the advertising platform. At a high level, the advertiser has to select three things when doing so:

(1) Ad contents: Advertisers will typically provide the ad headline, text, and any images/videos. Together, these are called the ad creative. They will also provide the link where the platform should send users who click.

(2) Audience Selection/Targeting: Advertisers need to select which platform users they would like to see the ad (called the audience).

(3) Bidding strategy: Advertisers need to specify how much they are willing to pay to have their ads shown. This can come in the form of a per-impression or per-click bid, or the advertiser can simply place an overall bid cap and allow the platform to bid on their behalf.

Once the advertiser has entered all of the above information, they submit the ad for review; once it is approved, the ad will move to the ad delivery phase.

41. Ali & ors (2019)⁴⁰ also provide a helpful definition of ad delivery, which is worth setting out in full:

Ad delivery refers to the process by which the advertising platform shows ads to users. For every opportunity to show a user an ad (e.g., an ad slot is available as the user is browsing the service), the ad platform will run an ad auction to determine, from among all of the ads that include the current user in the audience, which ad should be shown.

In practice, however, the ad delivery process is somewhat more complicated. First, the platforms try to avoid showing ads from the same advertiser repeatedly in quick succession to the same user; thus, the platforms will sometimes disregard bids for recent winners of the same user. Second, the platforms often wish to show users relevant ads; thus, rather than relying solely on the bid to determine the winner of the auction, the platform may incorporate a relevance score into consideration,

⁴⁰ Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), '[Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes](#)'

occasionally allowing ads with lower bids but more relevance to win over those with higher bids. Third, the platforms may wish to evenly spread the advertiser budget over their specified time period, rather than use it all at once, which introduces additional complexities as to which ads should be considered for particular auctions. The exact mechanisms by which these issues are addressed are not well-described or documented by the platforms.

42. It appears to Global Witness, therefore, that whilst there may be some limited attempt contemporaneously in the US and Canada to limit the discriminatory outcomes of targeting ad creation, no policies are in place to deal with discriminatory outcomes caused by the algorithm itself in its process of ad delivery.

c) Anti-discrimination advertising policies in Great Britain

43. In order to understand the extent to which these practices remain a live issue in Great Britain, Global Witness attempted to elicit further information concerning what was permissible by way of advertising on Facebook. Information from within Facebook was limited. At **Annex 3**, the correspondence between Global Witness and Facebook in March/April 2021 shows that the company refused to provide comment when asked specifically to address this issue.

44. Global Witness has done its own investigation into the extent of such policies as are claimed to exist or apply. It notes that Facebook has a self-regulatory and self-certified non-discrimination policy, which reads:

Our Advertising Policies prohibit advertisers from using our ads products to discriminate against individuals or groups of people. Ads are discriminatory when they deny opportunities to individuals or groups of people based on certain personal attributes, such as race, ethnicity, national origin, religion, age, sex, sexual orientation, gender identity, family/marital status, disability, or medical or genetic condition.

Whenever you run Facebook ads, you're already agreeing to follow our [Non-discrimination Policy](#). However, to help maintain the integrity of Facebook advertising, we may periodically ask you to review the policy and certify your understanding of and compliance to it.

This is especially important for advertisers who are running housing, employment or credit ads, or who have included a multicultural affinity segment in their audience. Opportunities presented in these types of ads must be inclusive and extended to all groups of people, regardless of certain personal attributes such as those listed above. Many locations have laws that specifically prohibit discrimination in these categories.

If we ask you to certify your compliance to our Non-discrimination Policy, you'll have to complete the process in order for your ads to be approved. If you don't certify that your ads comply with our policies and other applicable laws, they may be rejected. If you receive a rejection notification, you'll have the opportunity to certify compliance then.

45. This section is from the following page on Facebook: <https://www.facebook.com/business/help/136164207100893>. This policy cross-refers to Facebook's Advertising Policies, which has a specific section on "Discriminatory practices"⁴¹. The policy is that:

"Ads must not discriminate or encourage discrimination against people based on personal attributes such as race, ethnicity, colour, national origin, religion, age, sex, sexual orientation, gender identity, family status, disability, medical or genetic condition."

Such policy is plainly worded in line with the perceived requirements of US equality legislation, rather than the Equality Act 2010.

⁴¹ https://www.facebook.com/policies/ads/prohibited_content/discriminatory_practices

46. Global Witness remained concerned that, in practice, Facebook’s automated systems may result in discriminatory outcomes. In particular, the policy states “*This guide is not a substitute for legal advice. Consult a legal professional for specific advice about your situation.*”⁴² Facebook makes clear that certain aspects of the policy only apply to the US and Canada, as follows:⁴³

“Any United States advertiser or advertiser targeting the United States or Canada that is running credit, housing or employment ads, must self-identify as a [special ad category](#), as it becomes available, and run such ads with approved targeting options.”

47. Additional research conducted by Global Witness highlights a failure by Facebook’s automated review systems to recognise and reject inflammatory advertising content, even in circumstances where those adverts directly and overtly breach Facebook’s policies. Bearing in mind the above context, Global Witness sought to test the application and rigour of Facebook’s policies by submitting political advertisements to Facebook in the context of the sectarian divide in Northern Ireland. These adverts were flagged by Global Witness as political and were “*targeted in a variety of polarising ways and included content that breached Facebook’s rules on hate speech and inciting violence*”. All ads posted by Global Witness were set to publish at a future date and deleted immediately after being approved by Facebook, meaning they were neither intended to be seen, and they were never able to be seen by any Facebook users. After the fact, Facebook acknowledged that the adverts had violated Facebook’s policies against hate speech and incitement of violence. Nonetheless, they had been accepted for publication by Facebook until Global Witness withdrew them from circulation before Facebook could publish them.⁴⁴ This appears to demonstrate that the mere existence of Facebook’s policies will not guard against or prevent potentially unlawful outcomes where the flaw may lie in the automated systems themselves.

⁴² https://business.facebook.com/policies/ads/prohibited_content/discriminatory_practices

⁴³ https://business.facebook.com/policies/ads/prohibited_content/discriminatory_practices

⁴⁴ <https://www.globalwitness.org/en/campaigns/digital-threats/big-tech-business-model-poses-threat-democracy/>

C. CONTEMPORANEOUS EVIDENCE OF DISCRIMINATORY ACTS OR PRACTICES

48. Given the history and context of discriminatory advertising and contemporaneous concerns raised above, Global Witness has sought to collate evidence as to how the platform would deal with adverts in and relating to Great Britain. In the example at (i) below, it found evidence that Facebook, in its own capacity as an employer, itself appeared to be acting in breach of the Equality Act 2010. It subsequently ran a series of adverts, in (ii) and (iii) to test the likely impact on employers or organisations seeking to place recruitment adverts or job postings with Facebook, and the impact on the likely pool of applicants for such jobs. These are likely to be evidence of ongoing or continuing acts or practices by Facebook in respect of both advert targeting and advert delivery.

(i) Facebook as employer

49. An advert was posted by the Facebook Careers page and ran from 9-13 April 2020, by which Facebook sought to hire an additional 10,000 people for its product and engineering teams by the end of 2020. The advert is attached in **Annex 4**. The ad was shown and available in the UK.

50. The data which accompanied the advert on Facebook's Ad Library stated that there were about 500k-600k impressions, with a potential reach of 500k-1 million people in the UK. Facebook states that the potential reach of adverts is "*based on targeting criteria, ad placements and how many people were shown ads on Facebook apps and services in the past 30 days.*"⁴⁵ A graph showing the gender and age of the people who were shown the advert in the UK is attached in **Annex 5**.

51. The ad data that was available provides the age and gender breakdowns of people who saw the advertisement in the UK. This demonstrates that a higher proportion of men in

⁴⁵ This is true for all ads on the Facebook Ad Library, for example, see [https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=GB&view_all_page_id=25749647410&sort_data\[direction\]=desc&sort_data\[mode\]=relevancy_monthly_grouped&search_type=page&media_type=all](https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=GB&view_all_page_id=25749647410&sort_data[direction]=desc&sort_data[mode]=relevancy_monthly_grouped&search_type=page&media_type=all)

almost every age group saw the ad, and that a far greater proportion of younger people saw the advertisement. In fact, only 1% of people who saw the advertisement were in the 55-64 age group (of whom all were men) and 1% of men and women who saw the advertisement were over 65. Global Witness understands that over 20% of Facebook users in the UK were in this age bracket at the time⁴⁶. By contrast, the majority (52%) of people who saw it were in the 25-34 age group (of which 58% who saw it were men, compared with 40% women and 2% unknown), followed by the 35-44 age group (26%) (of which 62% who saw it were men, 35% women and 4% unknown). The highest demographic to see the advertisement was men aged between 25 and 34.

52. It is not clear to Global Witness how or whether this advert was specifically targeted at a younger (and male) demographic by Facebook, as the employer-recruiter, or whether such demographic targeting was caused or delivered by an algorithm created by Facebook as the service provider. There was no easily accessible information on the optimisation algorithm used for advertisements, and extremely limited information about how the targeting parameters deployed, including by reference to protected characteristics.
53. The advert was classified as being on ‘social issues, elections or politics’ and was available on Facebook’s Ad Library via [this link](#). However, shortly after Global Witness sent an email to Facebook on 23rd March 2021 in order to give them the opportunity to comment on their findings about this advert, the advert was removed from the Facebook Ad Library. It is now not available online. No explanation was provided by Facebook who declined to comment in general on the issue of discriminatory advertising. The Ad Library has a record of all adverts shown in the UK that are classified as being on ‘social issues, elections or politics’ and all others adverts that are currently running⁴⁷. Global Witness reasonably assumes that Facebook re-classified the advert as not being of a political nature after they received the email from them that raised questions about this advert.

⁴⁶ https://napoleoncat.com/stats/facebook-users-in-united_kingdom/2020/04/

⁴⁷

https://www.facebook.com/ads/library/?active_status=all&ad_type=political_and_issue_ads&country=DK&media_type=all

(ii) Facebook as the provider of services for targeted ad creation

54. In order to test its understanding of how Facebook handled potentially discriminatory adverts, Global Witness submitted to Facebook a general job advert, attached in **Annex 6**. The adverts were never intended to be published and did not represent any actual job opportunity. They were targeted (a) to men in the UK only, and (b) to people aged 18-55 in the UK only. In both instances, Facebook accepted these adverts for publication.
55. Global Witness scheduled both adverts to be published two weeks after they submitted them to Facebook. Facebook changed the status of both ads from ‘pending’ to ‘active’ in the Facebook Ad Manager within three hours of Global Witness submitting them. Global Witness then deleted the adverts before they could be published, since they were test adverts only and to ensure that it did not publish any adverts that were potentially unlawful. Screenshots of the Facebook Ads Manager, showing that Facebook accepted these ads for publication are attached in **Annex 7**.

(iii) Facebook as the provider of services for targeted ad delivery

56. Global Witness then published four job adverts on Facebook, attached in **Annex 8**. Again, these were test adverts. Each of these contained links to real job vacancies for all jobs fitting those search terms on uk.indeed.com. The jobs advertised were for a range of trades and professions – a mechanic, a nursery nurse, a pilot and a psychologist. All of these were “neutral” advertisements, such that no targeting was placed on them, other than they should go to adults in the UK. All the ads were accompanied by a relevant image that was chosen to be gender-neutral. All contained links to real job vacancies for all jobs fitting those search terms on uk.indeed.com.
57. Of the different mandatory ad delivery objectives offered by Facebook, Global Witness selected their ‘traffic/links’ objective which is purported to “deliver your ads to the people who are most likely to click on them.” Thus, the results were due to Facebook’s automated systems as to who to show them to.

58. Global Witness recorded the information provided by Facebook as to the age and gender of the people shown the ads. Those graphs are set out at **Annex 9**. The figures confirm that adverts are delivered in a manner that will result in discrimination based on protected characteristics. From this investigation, Global Witness remain concerned that the audience selection will result in discriminatory practices.

59. This short investigation conducted by Global Witness matches the findings of others, as set out in this submission, and including the following:

- [Algorithm Watch](#) has shown that Facebook’s ad optimisation algorithm is highly discriminatory in delivering job ads in France, Germany and Switzerland⁴⁸.
- [Academics](#) have also shown that Facebook’s ad optimisation algorithm is highly discriminatory in delivering job ads in the US⁴⁹.
- [Recent investigations](#) in the US have shown that Facebook’s ad delivery system excludes women from seeing job opportunities *even when the women are equally qualified as the men*⁵⁰.

D. APPLICABLE LEGAL FRAMEWORK

(a) Equality Act 2010

60. Global Witness considers that the evidence it has uncovered, both through its own investigations and those of others, demonstrates that it is likely that Facebook is acting in breach of either the Part III or Part V provisions in the Equality Act 2010. Job applicants are protected by the provisions of the Equality Act 2010 in respect of the defined protected characteristics set out within the legislation.

Protected characteristics

61. The evidence gathered by Global Witness strongly indicates that the protected characteristics of both sex and age are engaged. The EHRC is invited to consider, as part of its investigation, whether any unlawful conduct extends to other protected

⁴⁸ <https://algorithmwatch.org/en/automated-discrimination-facebook-google/>

⁴⁹ <https://arxiv.org/pdf/1904.02095.pdf>

⁵⁰ <https://ant.isi.edu/datasets/addelivery/Discrimination-Job-Ad-Delivery.pdf>

characteristics, such as race, for which statistical information has not been made publicly available by Facebook. There are good grounds to believe that other protected characteristics are engaged since the character of both ad creation/targeting, as well as ad delivery, intrinsically pinpoints an audience defined – at least in part – by those characteristics,⁵¹ and/or can be inferred by the algorithms. As recognised in numerous academic studies, “discrimination, is at some level, inherent to profiling: the point of profiling is to treat some people differently.”⁵² There is no reason in principle why such profiling would apply only to the characteristics of age and sex.

Prohibited Conduct

62. Part V Equality Act specifically prohibits discrimination “in the arrangements A makes for deciding to whom to offer employment”. This has been interpreted broadly to cover all stages of the recruitment process,⁵³ including the manner in which the job is advertised, and instructions by employers to discriminate given to recruitment agencies or online agencies.⁵⁴ The employer’s obligations not to discriminate also apply to a person who is seeking to recruit employees, even if they are not yet an employer.⁵⁵
63. Part III Equality Act is concerned with the provision of services to the public or a section of the public. Facebook is a provider of services, and specifically so in respect of its platform for job postings and adverts. By s.29 EA 2010, a service-provider must not discriminate against a person as to the terms on which the service is provided, or by subjecting a person to any other detriment.
64. By s.31(6) EA 2010, “a reference to a person requiring a service includes a reference to a person who is seeking to obtain or use the service.” In the context of job advertisements, this potentially covers a very wide range of persons, and demographics.

⁵¹ See above, and in particular: Ali, M, Sapiezynski, P, Bogen, M, Korolova, A, Mislove, A, & Rieke, A (2019), ‘[Discrimination through optimization: How Facebook’s ad delivery can lead to skewed outcomes](#)

⁵² Tschantz, M.C. and Datta, A., 2015. Automated experiments on ad privacy settings: A tale of opacity, choice, and discrimination. Proceedings on privacy enhancing technologies, 2015(1), pp.92-112. <https://sciencido.com/article/10.1515/popets-2015-0007>

⁵³ See for example para 10.8 of the EHRC Employment Code of Practice which states that arrangements for the purposes of the Equality Act ‘are not confined to those which an employer makes in deciding who should be offered a specific job. They include arrangements for deciding who should be offered employment more generally. Arrangements include advertisements for jobs, the application process and the interview stage’.

⁵⁴ See para.16.30 EHRC Employment Code of Practice.

⁵⁵ See para.10.6 EHRC Employment Code of Practice.

65. The prohibited conduct likely to be engaged by the evidence set out at **(C)** above is likely to be categorised either as indirect or direct discrimination.

Indirect discrimination

66. In respect of the acts set out at **C(i) and/or (iii)**, these may be most likely to be categorised as indirect discrimination, which is defined by s.19 Equality Act 2010 as follows:

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

67. Insofar as both **(C)(i) and/or (iii)** demonstrate that an algorithm, or other machine-learning tool or process, has determined the decision-making, it is likely to be – and should be – viewed as a ‘provision criterion or practice’. It is, after all, a rule applied neutrally by the service provider (or employer) to all Facebook users, and specifically (would-be) job applicants. Whilst there is not yet any case law in the UK which defines an algorithm in these terms, Global Witness is advised and contends that the algorithm is and should be construed as a ‘PCP’.⁵⁶ The EHRC Code of Practice defines a ‘PCP’ widely:⁵⁷

⁵⁶ And see further, a report for the TUC: “Technology Managing People – the legal implications”, Robin Allen QC and Dee Masters, of Cloisters Chambers:

https://www.tuc.org.uk/sites/default/files/Technology_Managing_People_2021_Report_AW_0.pdf

⁵⁷ At para 5.6 [Code of Practice](#).

“The phrase ‘provision, criterion or practice’ is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include decisions to do something in the future such as a policy or criterion that has not yet been applied, as well as a ‘one-off’ or discretionary decision.”

68. As such, the PCP has put (or would put) people with the protected characteristic of sex or age (or otherwise) at a particular disadvantage when compared to people who do not share that characteristic. In the examples at **(C)(i) and/or (iii)**, Facebook users of a particular age group or sex are shown to be at a disadvantage because they either were not shown or were so much less likely to have been shown the job advertisement.
69. The pool for comparison, which must consist of the group which the algorithm affects (or would affect) either positively or negatively, is likely to be defined by those Facebook users who would be likely job applicants. The statistical domination by age or sex of particular groups shown the advert make it inherently likely that those in different age groups and/or of a different sex have been placed at a particular disadvantage by the algorithm or machine learning tool.
70. Put another way, if someone who did not share the protected characteristic would have applied for the job but was not shown the advertisement, they have been placed at a particular disadvantage.
71. It is worth adding that, pursuant to EU law, there does not need to be an identifiable victim or complainant for there to be a successful claim of direct discrimination against a company (*Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn NV* C-54/07).⁵⁸ Global Witness considers that the EHRC is able to pursue allegations of unlawful advertisements placed on or by Facebook even without having identified service users who have suffered the particular disadvantage.

⁵⁸ Although see also *Kratzer v R+V Allgemeine Versicherung AG* [2016] ICR 967, CJEU.

72. The question, then, is whether an employer or service provider (in both instances here Facebook) is able to mount a successful objective justification defence to an indirect discrimination claim. It can do this if (and see further below):

60.1 It can be shown that there is a legitimate aim;

60.2 The measure is capable of achieving that aim; and

60.3 It is proportionate to do so.⁵⁹

Direct discrimination

73. Whilst the acts at **(C)(i) and/or (iii)** appear to be ready examples of indirect discrimination, they could also be categorised as direct discrimination since the use of algorithms may also be viewed as a proxy for a protected characteristic.⁶⁰ Where the opacity of the algorithm makes it difficult to identify the criterion used by the algorithm but the effect of it is such that everyone who suffers disadvantage is found to share a particular protected characteristic (in the circumstances described in *Coll*⁶¹), the criterion deployed by the algorithm may be said to act as a proxy for the protected characteristic. In addition, it is not necessary to show, for example, that the algorithm always discriminates against those over, for example, those aged 55: it may be enough to show that it did so in this case.

74. There may also be various other proxies which relate to different protected characteristics that appear in the tailoring provisions available to recruiters.

75. Moreover, in respect of **C(ii) and potentially (i)**, it appears that the targeting of job adverts was specifically aimed at a particular group, defined by one or more protected characteristic. If Facebook had chosen (whether upon instruction or by its own choice) to show the advert only to any particular age (or sex) demographic, that amounts to an act of less favourable treatment because of age (or sex), for the purposes of a direct discrimination finding, whether as an employer or a service provide

⁵⁹ See C-17084 *Bilka-Kaufhaus GmbH v Weber von Hartz*

⁶⁰ See also Ifeoma Ajunwa, Age Discrimination by Platforms: Berkeley Journal of Employment and Labor Law, Vol 40:1 (2019). See <https://doi.org/10.15779/Z38GH9B924>

⁶¹ *R (on the application of Coll) v Secretary of State for Justice* [2017] UKSC 40; see in particular paragraphs 28-31.

76. Direct age discrimination, unlike direct sex discrimination for example, can be objectively justified (s.13(2) Equality Act 2010).

Objective justification of indirect discrimination or direct age discrimination

77. Global Witness does not know how Facebook seeks to justify any indirect discrimination, if it does so. It is possible that it would seek to rely on an aim of showing the ad to as many potential applicants as possible. It appears to Global Witness that this has been done in an inherently discriminatory way. Where an aim could be achieved through a different measure that is either not discriminatory, or less discriminatory, it will be difficult for an employer or service provider to show that it was proportionate for them to act in the way impugned.

78. Given that Facebook has committed in the United States and Canada to make all active ads for job opportunities available to everyone, including non-Facebook users (as set out above) and to “*implement a new advertising system so advertisers running US housing, employment, and credit ads will no longer be allowed to target by age, gender, or zip*”, any objective justification (particularly surrounding proportionality) appears difficult to maintain or uphold.

Reasonable steps available to Facebook as an employer, but not service provider

79. In (C)(i) above, Facebook was the employer, and it may seek to rely on a reasonable steps defence pursuant to s.109 Equality Act 2010. Global Witness submits that this is highly unlikely in circumstances where Facebook deployed its own ad creation and delivery, and in circumstances where there appear to be no policies tailored to meeting the requirements of UK equality law.

80. Such a defence would not be available, in any event, to it as a service provider for the purposes of (C)(ii) or (iii).

Instructing, causing or inducing contraventions, or aiding contraventions

81. The widespread implications of Facebook’s advertising platform are significant. If any other employer or organisation instructed Facebook to show adverts only to a particular

demographic, defined by a protected characteristic, and such adverts were published, that employer or organisation could potentially be liable for instructing, causing or inducing a contravention of the Equality Act 2010, pursuant to s.111.

82. It is also possible that Facebook induced or induces would-be recruiter/advertisers by providing options which discriminate, directly or indirectly, contrary to s.111(3) Equality Act 2010. In such circumstances, proceedings may be brought by the EHRC (s.111(5)(c)).
83. It is also likely that Facebook would be caught by the s.112 Equality Act 2010 provision on aiding contraventions if it knowingly assists an advertiser/recruiter to discriminate, directly or indirectly, in respect of the Part 3 and Part 5 provisions.
84. The consequence in some of these scenarios is that recruiting employers may find themselves in breach of the Equality Act 2010, even where they have not sought discriminatory parameters to their advert audience, because of Facebook's own delivery systems and algorithms. That is a very real concern for recruiting employers who face a significant knowledge and power deficit when compared to Facebook.
85. It is also important to underline that those would-be applicants who may be or have been discriminated against to date have very little practical capacity to bring an Equality Act claim themselves as the operation of the targeted ad creation or delivery is likely to mean that they simply do not know they have missed out on an opportunity because of or in relation to a protected characteristic. In those circumstances, Global Witness considers the EHRC is best placed to advance these concerns through its formal enforcement powers.

Data Protection Act 2018: UK GDPR

86. Global Witness instructed AWO, the data rights agency, to conduct a Data Protection Impact Assessment, attached at **Section C of the supporting bundle**. It concludes:

“... that the processing in Global Witness’ proposed use of Facebook’s suite of advertising products will result in a high-risk to the rights and freedoms of

natural persons. In particular, that processing operation may discriminate against individuals on the basis of characteristics that are protected by equalities legislation. Any such discriminatory practice would be contrary to the fairness principle in Article 5(1)(a) UK GDPR.

Global Witness have attempted to mitigate those risks, as set out in this DPIA. This includes writing to Facebook to ask for their views on the identified risks and concerns. However, as detailed further below, that risk cannot be appropriately mitigated such that Global Witness will need to consult with the Information Commissioner's Office, pursuant to Article 36 UK GDPR."

87. A complaint has been submitted by Global Witness to the ICO in those terms, and is attached.

E. CONCLUSIONS

88. Global Witness understand that the current EHRC strategic aims include working to apply equality laws in new or untested contexts, for example in relation to AI or predictive technologies. On that basis, and for the reasons set out in this submission, it contends that there is a strong case for intervention by the EHRC.

89. The facts as found and collated by Global Witness, as set out in this submission, give rise to a strong suspicion that Facebook has acted, and continues to act, in violation of the Equality Act 2010, upon which the EHRC is empowered and invited to act. The contemporaneous facts and investigation cited here are supported by the historic practices of Facebook (and indeed other digital platforms), and wider studies, including by academics and nongovernmental organisations internationally, in which discrimination has been shown to be a design feature, rather than accidental consequence, of digital advertising.

90. It is demonstrably insufficient that Facebook requires advertisers to "self-certify" that adverts placed on its platform comply with its anti-discrimination policies. Such policies as appear to be in force in respect of Facebook operations in Great Britain are inadequate and appear to be inconsequential. The evidence suggests that Facebook

through the collection and provision of data, is leading employers (and this may include itself) to target candidates, coordinating with or even aiding and abetting the employer to develop strategies as well as informing the recruiting employer about the performance associated with the advert. So, whether it is acting in its own capacity as an employer, or as a service provider by way of its business as a digital platform offering recruitment services by advertisements and job postings, Global Witness believes that Facebook is operating in violation of the Equality Act 2010, and with impunity.

91. There is clearly the potential for significant harm to the wider public as a result of Facebook's ongoing practices. This is heightened by the powerful position occupied by Facebook at a national and international level, such that it requires strategic intervention in order to ensure accountability, compliance and enforcement of anti-discrimination law, particularly in the absence of specific legislation aimed at algorithmic accountability. This has been most recently recognised, for example, by the Competition and Markets Authority who have indicated their intention to work with other regulators, such as the ICO and EHRC, towards "building consensus, both in the UK and internationally, about the tools and powers that regulators will need in order to discharge their duties effectively."⁶²

92. Global Witness are anxious about what individuals, individual organisations or employers are able to do realistically in order to ensure their own actions are not in breach of the Equality Act when placing online advertisements for jobs. There are significant obstacles both to employers and to would-be job applicants in terms of transparency, accountability and individual risk. Moreover, it is highly likely that the potential for unlawful discrimination extends to other platforms beyond Facebook.⁶³ As recognised in a recent academic study, "prior work has shown that platforms are not consistent when self-policing their algorithms for undesired societal consequences, perhaps because the platforms' business objectives are at stake."⁶⁴

⁶² <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers>

⁶³ See, for example, Venkatadri, G., and Mislove, A: On the Potential for Discrimination via Composition. In Internet Measurement Conference (IMC'20) (2020), which considers the potential for discrimination on LinkedIn's ad system.

⁶⁴ Auditing for Discrimination in Algorithms Delivering Job Ads: Basileal Imana, Aleksandra Korolova, and John Heidemann: <https://doi.org/10.1145/3442381.3450077>, 19 April 2021

93. The opacity of both the online system and algorithms deployed by Facebook present a serious challenge to the scrutiny posed by any individual litigant, or indeed any potential advertiser. Ascertaining the exact point at which discrimination occurs within the process, or within the AI tool or algorithm, is extremely difficult, not least for an individual organisation or litigant⁶⁵ against a global online platform business in a position of “*enormous power to predict and influence behaviour.*”⁶⁶
94. As both the case law in the United States and the academic studies recited in this submission show, it is not enough for an advertiser to attempt to ensure they are not discriminating. Facebook’s system itself may, and does appear to, lead to discriminatory outcomes, beyond the control of any employer seeking to recruit.
95. Facebook alone controls the advertising delivery system. It alone has knowledge of its proprietary system. Potential employers, such as Global Witness, have no control over that system yet may find themselves liable under UK equality legislation for recruitment practices that are discriminatory.
96. Moreover, whilst Facebook has attempted to address some of these systemic flaws in its operations in the US and Canada, neither employers nor would-be applicants have the benefit of any of those amendments or policies in Great Britain. In any event, it appears that those amendments only operate to address potential discrimination in the targeting of adverts applied by the advertiser. They do nothing to address the potential discrimination occasioned by Facebook’s Tools.
97. In common with others, Global Witness would welcome a decision by the EHRC to update its guidance on the application of the Equality Act 2010 to recruitment “to reflect

⁶⁵ House of Commons Science and Technology Committee’s “Algorithms in decision-making”, Fourth Report of Session 2017- 19, on 23 May 2018.
<https://publications.parliament.uk/pa/cm201719/cmsselect/cmsctech/351/351.pdf>

⁶⁶ Centre for Data Ethics and Innovation: Online Targeting: Final Report and Recommendations⁶⁶, 4 Feb 2020
<https://www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations>

issues associated with the use of algorithms, in collaboration with relevant industry and consumer bodies”.⁶⁷

98. For all of the reasons set out in this submission, Global Witness requests the EHRC to commence a formal investigation into Facebook’s advertising practices pursuant to s.20 Equality Act 2006. Unlawful discrimination should not be tolerated in the workplace and Global Witness considers that the EHRC is best placed to ensure that Facebook, and digital platforms more generally, are not permitted to evade anti-discrimination laws as a result of their sheer size and prevalence.

Schona Jolly QC

Instructed by AWO, on behalf of Global Witness

7 September 2021

Cloisters Chambers

⁶⁷ Centre for Data Ethics and Innovation: Review into bias in algorithmic decision-making, November 2020
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957259/Review_into_bias_in_algorithmic_decision-making.pdf



New campaign



1 Ad set



1 Ad



Edit



Review

New campaign

Special ad categories

You're required to declare if your ads are related to social issues, elections or politics.

[Learn more](#)

Special ad categories

You're required to declare if your ads are related to social issues, elections or politics. [Learn more](#)

No categories declared



Social issues, elections or politics



Ads about social issues (such as the economy, or civil and social rights), elections, or political figures or campaigns.

C033

Ca

New Campaign

1 Ad Set

1 Ad

[Edit](#)

[Review](#)

Campaign Name

[Create Name Template](#)

New Campaign

Special Ad Categories

You're required to declare if your ads are related to credit, employment or housing opportunities or related to social issues, elections or politics. [Learn More](#)

No categories declared

Campaign Details

[See recommendations](#)

Buying Type

C034

Search ads

Search tips

Set your location and choose an ad category to start your search.

United Kin... ▼

Ad category ▼



Choose an ad category

Select ad category



All ads



Issues, elections or politics

Report

Explore, filter and download data on ads about elections or politics. Also find the spending tracker and spending totals by advertiser and location.

[Go to Report](#)

`</>` API

Perform customised keyword searches of active and inactive ads about social issues, elections or politics.

[Go to API](#)

Search ads

Search tips

Set your location and choose an ad category

Choose an ad category

United Sta... ▼

Ad category ▼



Choose an ad category

Select ad category

-  All ads
-  Issues, elections or politics
-  Properties
-  Employment
-  Credit

Report

Explore, filter and download reports for issues, elections or politics. A report shows totals by advertiser and...

</> API

Perform customised keyword searches of active and inactive ads about social issues, elections or politics.

Go to API

JOB VACANCIES

We are looking for new people for office
job vacancies!

Send your CV & a cover letter to
jobs@officejobs.com

Ad sets

Search

Office jobs - job vacancies

2

Job vacancies

1

Job vacancies

+ Create

Audience Change

Audience changed on 20 Apr at 16:05

- Location:
 - United Kingdom
- Age:
 - 18-65+
- Gender:
 - Male
- Placements:
 - News Feed on desktop computers or News Feed on mobile devices

Activity	Activity details			Date and Time
Ad status updated	From Pending to Active			20 Apr at 18:10
Ad created	—			20 Apr at 16:05
Ad set targeting updated	Audience Change ⓘ	1 Ad set ID: 23847083316130238	Mary Sharpe	20 Apr at 16:05
Ad set optimisation goal updated	From — to Daily unique reach	1 Ad set ID: 23847083316130238	Mary Sharpe	20 Apr at 16:05
Ad set bid strategy updated	From — to Lowest cost bid strategy	1 Ad set ID: 23847083316130238	Mary Sharpe	20 Apr at 16:05
Ad set created	£25.00 Per day	1 Ad set ID: 23847083316130238	Mary Sharpe	20 Apr at 16:05

Ad sets

Search

Office jobs - job vacancies

2

Job vacancies

1

Job vacancies

+ Create

Office jobs - job vacancies > 2 > 1 Ad

Scheduled

This month: 1 Apr 2021-21 Apr 2021

All Changed by: Anyone

Activity	Activity details			Date and Time
Ad status updated	From Pending to Active			20 Apr at 18:12
Ad created	-			20 Apr at 16:06
Ad set targeting updated	Audience Change ⓘ	2 Ad set ID: 23847093922400238	Mary Sharpe	20 Apr at 16:06
Ad set optimisation goal updated	From - to Daily unique reach	2 Ad set ID: 23847093922400238	Mary Sharpe	20 Apr at 16:06
Ad set bid strategy updated	From - to Lowest cost bid strategy	2 Ad set ID: 23847093922400238	Mary Sharpe	20 Apr at 16:06
Ad set created	£25.00 Per day	2 Ad set ID: 23847093922400238	Mary Sharpe	20 Apr at 16:06

Audience Change
Audience changed on 20 Apr at 16:06

- Location:
 - United Kingdom
- Age:
 - 18-55
- Placements:
 - News Feed on desktop computers or News Feed on mobile devices