

POLICY BRIEF: REGULATING POLITICAL ADS IN THE EU

Civil Liberties Union for Europe

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I. Introduction

1. The Civil Liberties Union for Europe (Liberties) welcomes the European Commission's proposal for a Regulation on the transparency and targeting of political advertising¹ (proposed Regulation). Transparency in political advertising is vital for the healthy functioning of the European Union (EU) and for democracy in the Member States, including **free and fair elections, access to a plurality of views, participation in democratic debate, and decreasing the risk of manipulation.**

2. Political ads have a significant impact on the freedom and fairness of elections, freedom of expression, access to information, the formation of opinions, making political decisions, and the rule of law. These fundamental principles are expressed in Article 2 TEU and lie at the heart of any democracy.²

II. Position of the law in the legal environment

3. The proposed Regulation builds upon the horizontal approach of the draft Digital Services Act³ (DSA) and the General Data Protection Regulation⁴ (GDPR), which aims to create a safer digital space where people's fundamental rights are protected from the toxic data harvesting at the core of the business models of Big Tech companies. The **proposed Regulation as 'lex specialis' can further strengthen the fundamental rights of EU citizens** by ensuring their right to access information, to express their views, and to make informed decisions when casting their votes, while protecting their personal data at the same time.

III. Scope of the proposed Regulation

4. Liberties welcomes the initiative of a common definition for political advertising. However, the scope of the proposed Regulation is overly broad, covering civil society organizations (CSOs) that work on legislative or regulatory processes important to their causes.

1 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0731>

2 Galaski, J. Simon, E. [Solutions for Regulating Targeted Political Advertising on Online Platforms](#), November 02, 2021

3 [Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services \(Digital Services Act\) and amending Directive 2000/31/EC](#), December 15, 2020.

4 [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\)](#), April 27, 2016.

We strongly disagree with this approach, which treats CSOs as political parties or movements that aspire to take political power. CSOs play an important role in democracy by facilitating the participation of the public in decision-making and promoting non-partisan, legally recognised legitimate public interests, such as fundamental rights. **They are fundamentally different from political actors, as they do not aspire to political office.** By treating them equally to political parties the EU would give populist authoritarian leaders a legal tool to arbitrarily restrict their work, which is usually a strategy to stifle public participation in democracy and silence voices that promote Article 2 values. The proposed Regulation should exclude **CSOs that aim to influence legislative or regulatory processes, so they are free to educate and mobilize the public to demand respect for their rights, and so they are free to carry out fundraising activities without undue restrictions.**

5. We believe that the proposed Regulation should **apply to political actors in a broad sense**, covering parties, governments, elected and non-elected officials, and party foundations or those which *aim* to influence the outcome of an election or referendum. However, other activities that involve public discourse about legislative or regulatory processes should

not fall under the scope of the proposed Regulation. To achieve this goal, three amendments are needed to Article 2 (see our text version in the footnote⁵).

5.1 Article 2 (2) b) “legislative or regulatory process” should be deleted.

5.2 Article 2 (4) e) and f) should cover, besides elected officials, also the institutions themselves.

5.3 In order to clarify Article 2 (2) b), we suggest modifying the verb and **changing ‘liable’ to ‘aim’.**

6. Recital (19) explicitly excludes programs of audiovisual linear broadcasts or published print media from the scope of the proposed Regulation in case they publish political views. Therefore, we suggest adding **non-linear media services and websites** to the list.⁶

IV. Transparency

7. Liberties welcomes the extensive transparency requirements for political advertising services and political advertising publishers in Articles 6 and 7, which go further than

5 Political advertising means the preparation, placement, promotion, publication or dissemination, by any means, of a message:

- (a) by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature, or
- (b) which is liable aims to influence the outcome of an election or referendum, or voting behavior.

6 Rec (19) Political views expressed in the programmes of audiovisual linear and **non-linear** broadcasts or published in printed or **online** media without direct payment or equivalent remuneration should not be covered by this Regulation.

those set out in the DSA. However, the Regulation can go further to ensure meaningful transparency.

8. **The proposed Regulation should require *real-time*⁷ transparency** on behalf of sponsors and providers of advertising services.

9. Mandatory ad archive APIs, as set out in the DSA, is an important step, but the proposed Regulation should contain enhanced disclosure requirements for online and offline political ads. To facilitate public scrutiny, political campaigns that contain multiple ads across different platforms should be easier to identify. Liberties believes that **creating authorities responsible for enforcement should set up “cross-platform ad databases”⁸ that contain detailed information on spending, publishing, targeting and delivery criteria of all political ads.** Competent authorities could provide these cross-platform ad databases.

10. Article 5 of the proposed Regulation stipulates a self-identification of political advertising services. The oversight of self-identification should involve trusted flaggers, CSOs, electoral bodies, and authorities, which will complement Article 9 (1), enabling individuals to flag unlawful political advertisements.

11. We strongly urge the institutions not to make platforms liable for identifying political advertisements unless they have actual knowledge of them. This will avoid incentivising platforms to apply unreliable filtering techniques that stifle legitimate public debate protected by freedom of expression and information. Studies show that algorithms wrongly identify non-political ads⁹ as political (false positives); therefore, **human review is crucial.**

V. Amplification and targeting techniques

12. Recital (47) of the proposed Regulation paints a clear picture of the detrimental effects of targeting techniques on citizens’ fundamental rights and freedoms. However, the proposed Regulation does not then draw the proper conclusion, which is to ban those techniques.

13. **Targeted online political advertising, in particular opaque targeting and amplification techniques, can have harmful effects on democracies.** Targeting techniques make it easy to identify very narrow segments of the population and can be used to mislead, manipulate, or demobilize voters, creating ideological echo chambers for them. Moreover, it

7 See for example the European Partnership for Democracy “[EPD reaction to the Commission proposal for a Regulation on the transparency and targeting of political advertising](#)” March 2021

8 Jaurisch J. “[Responses to the European Commission’s public consultation on a proposal for an initiative on greater transparency in sponsored political content, and other supporting measures](#)”, Stiftung neue Verantwortung, 31 March 2021

9 https://www.usenix.org/system/files/sec22summer_lepochat.pdf

is easy to flood these echo chambers with tailored disinformation or extremist content that can polarize people.¹⁰

14. Liberties welcomes the fact that Article 12 (1) prohibits targeting and amplification techniques that rely on sensitive data. However, in terms of political advertisements, the legislator should go further to protect people from tailored messages, capturing them in communication silos. The GDPR and the DSA require online platforms to prevent or minimize biases that lead to discrimination against vulnerable groups. The horizontal requirements should be further elaborated in the proposed Regulation.

15. Article 24 (1) (b) of the DSA requires online platforms not to present advertising based on profiling using sensitive data based on Article 9 (1) of the GDPR. Related to political advertisements, it is important to go beyond the requirement in the DSA and ban non-justifiable targeting entirely. **Following this logic, the only targeting that is justified is language in multilingual areas of Europe and constituencies.**

16. The same conclusion can be drawn from the perspective of **mitigating the risk of disinformation**. Targeting and amplification techniques are the bedrock of spreading online disinformation. Political actors also have the right to exercise freedom of expression. However, the right to freedom of expression cannot be taken to include the right for political parties

to target people and amplify their voices over others. Therefore, it is of utmost importance to eliminate the possibility of targeting people based on personal data other than that which is derived from the logic of the electorate system: language and location in a broad sense.

17. Article 12 (1) of the proposed Regulation bans the use of sensitive data as listed in Article 9(1) of the GDPR. However, lifting the prohibition when data subjects consent (GDPR 9 (2) (a)) completely undermines the ban. **Consent is rarely freely given, specific, and informed** (Article 4 (11) GDPR). Rather, it is well documented that platforms and websites use dark patterns to trick data subjects into sharing their personal data. Including this exemption would thus render the prohibition simply symbolic.

18. The proposed Regulation Annex II c) requires information about the source of the personal data referred to in point (a), including, where applicable, information that the personal data was *derived, inferred*, or obtained from a third party and its identity as well as a link to the data protection notice of that third party for the processing at stake. **The possibility of using derived or inferred data should be banned.**

10 Access Now, Civil Liberties Union for Europe, European Digital Rights Organization, [Informing the Disinfo Debate: A Policy Guide to Protect Human Rights](#), 2021.

VI. Access to data

19. The Regulation should impose a duty on **both authorities and political actors to respond to CSOs, journalists, and vetted researchers' questions, similarly to freedom of information requests.**

20. Access to data by CSOs, journalists, vetted researchers, and electoral observers is crucial. These independent stakeholders can provide expertise in analyzing and understanding the data provided by political advertising services and political actors. They can also support the enforcement of the Regulation. Therefore, we suggest that the Regulation ensure that citizens scrutinize the activities of the whole spectrum of political advertisers through the reports of independent auditors and vetted researchers.

21. Article 11 (2) requires accreditation of journalists to access information. However, in many Member States, no such accreditation exists to avoid licensing or permits. Therefore, **'accreditation' should be removed from the text.**

VII. Supervision and enforcement

22. The proposed Regulation's horizontal approach requires the cooperation of different authorities at the Member State level. We suggest nominating a lead authority that helps to provide meaningful enforcement in the case of shared competencies.

23. We agree with strong oversight, with the possibility of sanctioning those responsible for infringement (Article 15) **and recommend that the Regulation include minimum harmonized sanctions.**

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting and protecting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of national civil liberties NGOs from across the EU. Unless otherwise indicated, the opinions expressed by Liberties do not necessarily constitute the views of our member organisations.

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