



Centre for Democracy & Technology Europe

Response to the European Commission Draft Regulation on the transparency and targeting of political advertising

On 25 November 2021, the European Commission unveiled its [draft proposal for a EU Regulation on the transparency and targeting of political advertising](#), as part of the [European Democracy Action Plan](#). CDT Europe welcomes the commitment of the European Commission in attempting to create a more transparent political advertising environment. In the era of behaviourally targeted advertising as the norm, prior efforts to manage the negative impacts of online advertising, particularly in the political context, have proven insufficient; therefore this draft regulation is a marked step in the right direction.

Given the unique European context, in which the largest trans-national democratic election in the world occurs every five-years, it is appropriate for the European Institutions to take steps to ensure that contemporary issues with online political advertising don't continue to be detrimental to the credibility of European democracy. Within this brief, CDT Europe analyses the proposal, noting the strengths of the draft regulation whilst outlining where the proposal falls shy of establishing a concrete framework that can effectively address the many challenges it aims to address.

Meaningful & Effective Transparency Measures

At the core of the proposal is a welcome set of increased transparency obligations. The current state of affairs within the online political advertising ecosystem is that of opaqueness; therefore, it will be useful to ensure that users have visibility on political advertising content through transparency notices and relevant financial sourcing information. More transparency could also help ensure that the enforcement of national electoral laws during an election period is more effective. By adopting transparency as the central approach to the proposal, the European Commission has provided scope for users to freely access relevant information, so as to facilitate a better understanding of the content they are engaging with.

Where the proposal falls short however, is around how effective these proposed obligations will actually be in tackling some of the foundational aspects of the online advertising ecosystem that prove problematic for democratic participation. Our analysis of the proposal raises significant questions: will users be able to meaningfully understand the transparency notices? Will notices related to the amplification techniques be as effective as notices on political content and financial sponsors? And will transparency notices alone facilitate increased user control over the criteria and values that inform what these systems display to them?

This question of meaningful transparency also extends to the obligations for the sharing of data, for the purposes of analysis, with researchers, civil society organisations and electoral observers. It will be essential for these provisions to align with the proposed Article 31 of the Digital Services Act; moreover, it will be vital for transparency notices to be comparable across platforms to facilitate researchers' ability to aggregate subsets of information for studying particular issues. At the moment, it remains unclear as to whether this will be achievable practically, and whether this level of transparency will be maintained in a privacy respecting manner.



Significantly increased transparency is an important aspect in reshaping the online political advertising space, but the draft regulation fails to outline transparency obligations that are appropriate to the individual mechanisms it addresses. It is not clear if the transparency obligations will allow users to distinguish between the targeting of an advertisement and the algorithmic amplification of some user generated content, which may include paid amplification. The draft regulation also does not clearly outline how it will address comprehensive, coordinated political advertising campaigns, which are especially relevant when it comes to tackling disinformation. The European Union must therefore reflect on whether this proposal will truly redefine the political advertising environment for the better, or simply create a myriad of transparency requirements that fail to meaningfully protect election integrity online.

Definitions & Scope: Providing Clarity to Ensure a Healthy Civic Space

During the consultative process for this draft regulation, civil society recommended that the Commission avoid creating definitions that would strictly categorise ads as either “political” or “non-political”, and CDT is pleased to see that, [in some respects, these recommendations were taken on board](#). Rather, the Commission has focused on specific activities performed by defined political actors. By focusing primarily on all potential actors involved in political advertising, the proposal presents a whole-of-value-chain approach which is important when considering the complexity of the ecosystems and the challenges the proposal is aiming to address.

However, aspects of the definitions presented raise concerns on how broadly they could be applied and the regulation’s potential impact on civic space. The Commission has been more extensive in defining a ‘political actor’, as including *any person representing or acting on behalf of any of the persons or organisations promoting the political objectives through ‘political advertising’*. The latter term, in turn, is defined as a message *“liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour”*. Taken together, these definitions present a two-fold conundrum.

The first aspect raises concerns about which entities might be subject to these obligations, due to the broad scope of the definitions. Such a definition will subsequently have an impact on civil society, which increasingly uses online advertising for campaigning and public mobilisation and to advocate on specific issues that are high on the political agenda during election periods. In a context in which individual advocates or civil society organisations may end up liable for content related to advocacy priorities, irrespective of whether this content is aligned with the priorities of a political actor as defined by the proposal, it will likely result in a chilling of these entities’ speech. The lack of clarity within the definition causes real concern that these provisions will hinder civic space in Europe, precisely at the time when it needs bolstering.

On the other hand, even though the proposal establishes that it is the responsibility of the ad creator to identify the content as a political advertisement, online platforms may still err on the side of caution in deciding what content to classify as “political”, which may lead to overbroad categorisations of subjects being linked to political campaigns or election period content. In



practice, this would likely lead to the use of automated systems, based on lists of ‘political topics’ determined by online platforms, to assess if an advertisement is political. Therefore, as the proposal makes its way through to the European Parliament and European Council, it’s imperative that the definitions outlined in the proposal are narrowed even further and are much more explicit on which entities are included within the scope, that the activities included in the proposal are clearly based on remunerated actions, and that the obligations do not impinge on the online civic space.

A Step Further: Addressing Targeting & Amplification

A key aspect the proposal aims to address is the issues surrounding the processing of personal data in targeting and amplification mechanisms. Most notably, the Commission has taken the step to prohibit the use or processing of personal data based on protected, sensitive characteristics. This aims to reinforce the existing GDPR requirements, by ensuring processing of such personal data is prohibited within the context of political advertising, which if applied effectively, would address some of the enforcement and implementation challenges seen with GDPR.

However, this prohibition is immediately followed in the proposal by exemptions to this obligation based on explicit consent or processing carried out in the course of legitimate activities, which are both once again in line with GDPR and other relevant Directives. The question therefore is, what is the added value of this proposal if it does not go beyond existing data protection regulations in the EU? In his opinion on the proposal, the European Data Protection Supervisor rightly [recommended](#) for the further clarification on how the proposal complements and is without prejudice to the application of the GDPR and EUDPR. CDT Europe very much supports this conclusion; with the array of challenges concerning online political advertising, forthcoming legislation should build upon, not duplicate existing mechanisms.

These exemptions also fail to concretely tackle the issue of microtargeting. Since the Facebook–Cambridge Analytica data breach occurred in 2018, there has been increased awareness of the challenges that microtargeting poses for our democracies. Historically marginalised communities have particularly been targeted by this technique, which utilised personal and demographic data to run targeted campaigns providing false election information or to dissuade these groups to exercise their right to vote. The fact remains that voters are not fully aware of how certain inferred data about them is being used for these purposes, even in spite of existing limitations under GDPR, therefore calling into question the effectiveness of the explicit consent exemption as proposed.

CDT Europe recommends therefore that as the proposal proceeds through to institutional amendments, a priority must be placed on closing the gap these exemptions would create in terms of effective implementation of the ban on the use of sensitive data and to providing much more clarity on the obligations related to the use of personal data within these mechanisms. Concretely, in line with numerous civil society organisations and the European Data Protection Supervisor, we recommend a phasing out of targeted advertising based on pervasive tracking and prohibition of microtargeting in the context of political advertising.



Harmonisation of Enforcement Mechanisms

Within the draft regulation, the European Commission foresees the enforcement regime as complementary to and building upon both the GDPR and the Digital Services Act. CDT Europe very much welcomes this approach, given how evident the link between these existing and upcoming legislative proposals is; this is clearly in line with the approach referenced in the explanatory referendum. Even here however, the proposal lacks some clarity, as it refrains from outlining the specific competent authorities responsible for the varying elements of enforcement, which are split between various entities for different parts of the regulation. In addition, there is a need to more concretely outline how uniform implementation will be established across Member States, as the feasibility of this proposal rests upon effective cross-border implementation.

Therefore it is clear that enforcement of this proposal goes hand-in-hand with a much stronger enforcement of GDPR, a long-standing call from civil society, as well as the outcomes of the negotiations of the Digital Services Act, which are far from clear at this stage. A holistic approach is therefore required; further development of this proposal must be brought into the ongoing discussions on reinforcing the enforcement mechanisms of GDPR and in consideration of the implementation of the DSA. It would be a missed opportunity for the EU to not truly harmonise these definitive legislations from the outset, so as to avoid legislative complications at a later stage.

Conclusion

The current status quo of the online political advertising environment is one of obscurity and the bypassing of existing accountability mechanisms by bad actors to exacerbate polarisation and undermine information reliability. The European Union has the opportunity now to correct course and CDT Europe would urge EU institutions to recognise that the continued dominance of surveillance-based advertising simply does not support transparent, thriving democracies. As the proposal works its way through the ordinary legislative process, it is vital that the EU, in close coordination with experts and civil society, address the issues raised in this brief. To truly ensure users have rights and can make informed decisions related to voting and benefit from effective transparency within the political landscape, EU institutions must be more ambitious and take definitive steps to strengthen, clarify and robustly enforce this and other relevant legislative frameworks.