

Bolstering Online Political Advertising Policy in Europe

A democracy and open government perspective

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As advertising in newspapers, TV, billboards, and radio moved online, the digital domain has become the centre of campaigning across Europe, with large online platforms such as Meta, Google, and Snapchat dominating the market. Online advertising techniques have evolved to include the use of personal data in the targeting and delivery of ads, the hiring of influencers, and the fragmentation and tailoring of specific audiences for campaigns.

Why regulate online political ads?

As online advertising became more prominent, scandals such as that of Cambridge Analytica in 2018 and several cases of [election interference](#) and [incitement of violence](#) around the world laid bare the problems of political advertising online. In such a fraught online ecosystem, fundamental rights to expression, privacy, and participation are at risk and fair electoral competition is at stake.

First, digital campaigns are not restricted to political candidates but can be placed and paid for by anyone, including domestic and foreign interest groups. Advertisers can place countless ads per day, flooding users' feeds and search results with political ads, distorting political debates. As opposed to the well-regulated mass campaign environment offline, online advertising can be targeted and, as a result, only seen by individuals within certain groups. Without public scrutiny, unrestricted content of ads and money fueling them creates an unlevel political playing field with loopholes for big money interference which can be abused by malign and foreign actors. Further, personal data can be misused for hyper-targeted political advertising. Such targeting eclipses information on political options to citizens online and, without safeguards, can be – and has been – abused to feed on people's fears and incite hatred.

What policies are in place or on the way?

In November 2021, the European Commission issued a [proposal for a regulation](#) on the transparency and targeting of online political advertising, which introduces a set of transparency obligations for all ads in Europe and sets conditions for the use of personal data in advertising. The regulation was set out in the [European Democracy Action Plan](#), is being developed to complement the proposed [Digital Services Act](#), and is expected to enter into force in April 2023.

Meanwhile, EU member states have taken several steps at the national level. The Netherlands adopted a [law on political party financing](#) and a voluntary [code of conduct for transparency of online political ads](#) (including through its 2020 OGP action plan). Ireland passed [electoral reforms](#) with specific measures on online ads. The Czech Republic adopted [rules for political campaigning and an electoral commission](#) with provisions for online advertising. Romania passed a [law limiting political campaign spending online](#). France published [a guide on digital campaigning](#), developed [a tool](#) to detect illegal political advertising on Facebook and, ahead of its 2022 presidential election, created [an agency](#) to combat expected manipulation of online information.

As most European national election laws regulate offline but not online political campaigning environments, and online platforms operate across borders mostly disregarding differences in national legislation, the EU's proposed regulation has an important legislative vacuum to fill.

While the EU's proposed regulation is needed, it must put human rights and democratic values front and centre.

Ideas for policy action — at EU and national levels

With the EU's proposed regulation on the table, and a myriad of policy and political initiatives in place across EU member states, this brief lays out the key issues to address for regulating online political advertising and proposes ideas for how to address them through policy action grounded by open government, fundamental rights, and democratic values, as follows:

Setting definitions and scope: Definitions of online political ads and actors in the value chain are the basis of a solid regulation on online political advertising. Yet many concerns have been raised about definitions leaving too much room for interpretation and arbitrary operationalisation by platforms, and about the lack of clarity on the applicability to all or only paid-for political content. This vagueness could cement the status quo of online platforms automatically taking down ads with certain keywords (like 'democracy').

- ✓ **Clarity on the definition of political ads:** the EU can still clarify its definition of political advertising to ensure that the operationalisation of the definition will follow clear, actionable guidelines and that the scope only covers sponsored political content and not all political content. Definitional guidelines should prevent the use of bulk lists of political topics as filters, as well as the automated take-down of ads that mention certain keywords.
- ✓ **Mandate self-identification of political advertisers:** to maximise transparency in political discourse and tighten guidelines for implementation, the EU can clarify in the legislative proposal how online platforms and other publishers of online political advertising should

identify political advertisers, setting the rules for proactive self-identification complemented with oversight measures for automated flagging or human review of political content. Such detail should take away the potential for arbitrary interpretation and at will implementation of political ad definitions of political advertising.

- ✓ **Ensure proportionality in the scope of the definition and regulation:** Ensure the regulatory proposal is proportionate to the actual occurrence of online political advertising and disinformation ads. Although the data isn't widely available, disinformation ads appear to make up only a small fraction of the online ad market and, even in the days ahead of an election, political ads online only make up a small share, too. While the regulatory proposal only implicitly includes civil society organisations and public interest actors in the definition of political advertisers, opinions diverge on the extent to which civil society should be subjected to the proposed rules. All this calls for proportionality in the definition setting.

Ensuring transparency: Transparency is at the heart of the EU's proposed regulation and should be the basis of all member state policy action. While much of Europe's offline campaigning is regulated to enable public scrutiny, the same is not in place - and is much needed - for the online campaign ecosystem.

- ✓ **Mandate political ad repositories:** To enable all stakeholders to monitor, verify, and act on sponsored political content online, the EU can create and run a comprehensive, interoperable, and accessible ad repository for all online political ads that are published on platforms not categorised as very large online platforms (VLOPs). This would complement the obligation already foreseen in the EU's proposal for VLOPs to use ad repositories, imposing the same level of transparency on all political ads, regardless of the type of platform they are published on.
- ✓ **Provide transparency on spending and sources:** For empowering watchdog organisations and citizens to hold political parties to account, publishers of online political ads need to display at individual level and aggregate level (ad repositories) political actors' spending, targeting criteria, and data source (if applicable), and the sponsor's identity on each advertising campaign. Such transparency needs to occur in real time.

Closing critical gaps: Current online political advertising techniques allow sponsors to fragment and select audiences based on personal data. While these targeting techniques make online ads tailored to specific audiences, they also pose multiple risks for privacy, manipulation of the public, and the integrity of electoral processes. The Cambridge Analytica scandal is a clear case of such techniques resulting in mass violation of rights. Moreover, concerns have been voiced on the adequacy of the EU's existing General Data Protection Regulation (GDPR) to protect personal data in the context of political advertising.

- ✓ **Address the faults of the consent model for the processing of data for political ads:** The EU's proposed requirement of consent for the processing of data has prompted many to question whether consent should be the preferred model for curbing abuse around political advertising. In practical terms, the mechanism of consent is in question due to the systematic use of dark

patterns to obtain flawed consent and there are inherent challenges to the regime of informed consent for the processing of special category data that is revealed, observed data or inferred. In addition, some argue that the use of certain data - particularly special category data - in political advertising is illegitimate, as it is a driver of atomisation and polarisation of public debate and can be used to exploit the vulnerabilities of the public. Instead, or to safeguard the consent model, the EU could impose a regular democracy impact assessment of this mechanism that takes into account collective harms.

- ✓ **Restrict targeting:** Beyond special category data, other data can also be used to exploit individuals' vulnerabilities. Consequently, stakeholders propose either restricting the categories and granularity of data that can be used for targeting purposes (ie microtargeting) or banning the processing of data for the purpose of political advertising.
- ✓ **Regulate the use of algorithmic amplification:** The EU can distinguish between targeting and algorithmic amplification techniques, and consider regulating or banning the use of algorithmic amplification in the context of sponsored political content. Algorithmic amplification techniques are inherently opaque in design and function, rely on machine-learning algorithms, and can have harmful effects on political discourse due to their discrimination of the price of content. Many stakeholders have asked for a ban on the use of the technique as well as the use of inferred data for the same purpose.

Implementation and enforcement: The problems associated with online political advertising will only be tackled successfully if the rules on transparency and data use are effectively enforced and if sanctions are in place to deter bad practices.

- ✓ **Harmonise sanctions:** Differences among sanctions imposed by member states for violations of electoral campaigning rules vary substantially, from very light fines to imprisonment. Considering that the country of origin principle applies online, it is important to ensure that all member states levy sanctions and fines for regulatory violations that would have negative impacts on political and electoral processes – not just in their member state, but also in others. This is particularly important for member states where big tech companies are established (including Ireland and Luxembourg). In addition, regulatory authorities will likely need to be empowered with a variety of other legal remedies such as injunctive relief (e.g. “stop processing orders”), civil remedies, investigatory and referral powers (to other legislative or prosecutorial bodies), and other powers such as mandated restoration for harms.
- ✓ **Ensure coordinated enforcement:** Many observers have flagged that insufficient coordination among member state authorities is one of the main drivers of poor monitoring and oversight of rules on online advertising, especially considering the variety of national laws already in place around freedom of expression online. For the EU's regulation on online political advertising to be successful, member states must ensure that adequate mechanisms are in place to guarantee both smooth coordination among different organisations at the national level and among Data Protection Authorities and Digital Services Coordinators.
- ✓ **Guarantee public access to justice:** As both the proposed regulation on online political advertising and the complementary Digital Services Act would rely extensively on existing

frameworks for enforcement under the GDPR, the European Commission and member states must ensure that Chapter 8 of the GDPR is effectuated. Specifically, Article 79 would give the public injunctive powers, but has been, thus far, underutilised, and Article 80 would give the public the right to counsel and open standing. Both avenues would make for a more accessible, effective pathway to public accountability.

Additional steps to safeguard democracy: Safeguarding democracy in the context of sponsored political ads requires action to protect the political sphere and electoral processes - especially online. This includes keeping elections free and fair, preserving open democratic debate, and updating digital safeguards.

- ✓ **Impose guidelines for political party and campaign financing and spending online:** Many EU member states have [laws in place](#) to govern political party and campaign financing, but these laws don't adequately map to the online advertising environment. As France, Romania, Netherlands, and the Czech Republic are doing through new laws or non-legislative actions such as the Dutch Code of Conduct, EU member states can recalibrate existing laws or put new provisions in place to ensure that political financing and spending guidelines serve to safeguard the online advertising environment as well as that which flourishes offline.
- ✓ **Write or reform lobbying and regulatory openness legislation:** A number of countries and institutions are moving to make participation in policy-making more transparent. Current leaders include Ireland, which has used its OGP action plan, and the European Commission. This has two benefits: first, it is an important step to equalise access to decision making. Second, especially when combined with other data, such as online advertising and political finance data, it allows the public and watchdog organisations to understand who is influencing campaigns and how that may shape final policies.
- ✓ **Establish or update national electoral commission:** As the Czech Republic has done recently and as Ireland has [committed to do](#) in the framework of the Summit for Democracy, EU member states can ensure that the body enacting national electoral laws and political financing and spending provisions has the mandate and capacity to govern the online political sphere.
- ✓ **Develop national and transnational capacity for monitoring and acting on online political influences:** EU member states can develop such capacity in collaboration with civil society and in close cooperation with EU institutions and other member states, to protect elections and political discourse online against influence operations and cyber attacks.

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