

POLICY POSITION ON A REGULATION ON POLITICAL ADVERTISING

Background

The digital arena has become the primary mode of political communication – a dynamic and fast-moving environment that presents both opportunities and challenges. Political advertising is an important component of democratic elections, helping politicians to engage with potential voters. However, there are significant digital threats to democracy and to human rights.

Furthermore, the rapid rise of online political campaigning has made most political financing regulations obsolete, putting transparency and accountability at risk. Digital advertising obscures who pay for ads, how much funding is involved and who is the ultimate beneficiary. It also blurs the level playing field that guarantees fair elections as regulators struggle to enforce spending limits and prevent illegal sources of funding. This is fast becoming an existential weakness for democracies in the Union as they wrestle with the digital realities of unaccountable funding of elections.

Recognising this, the European Commission proposed a [new regulation on the Transparency and Targeting of political advertising](#). The resulting proposal seeks to address the lack of core transparency tenets such as traceability of the funding of ads, ultimate sponsors, and beneficiaries as well as aggregated data to help concerned parties, including national regulators, to enforce campaign finance and electoral laws.

Process

TI EU is advocating the highest standards of transparency in political advertising services sold across the single market. TI EU will pay particular attention to disclosure obligations on sources funding, identity of sponsors and open access to the resulting databases for the specific purpose of enforcing campaign finance rules and prevent undue influence from illegal actors. Regarding the use of amplification techniques, the TI movement has adopted a common position to limit targeting to the use of geographic location data. All other processing of personal data should be proscribed during electoral / referendum when such processing has not proscribed by national laws. Finally, particular attention must be paid to the comprehensive EU-wide definition of political advertising which will apply both online and offline. The objective here being to close potential loopholes and ensure a minimum standard of electoral integrity among EU Member States to facilitate compliance and enforcement.

The legislative proposal is currently under review by designated committees in the European Parliament and working groups in the European Council. The vote in lead Committee is tentatively slated for the 7th of September 2022. The Commission proposal is strong on all our advocacy objectives. However, certain transparency provisions can be strengthened, and the use of targeting and amplification should be much more limited than what is currently envisioned.

Legal basis

The proposal considers the different activities related to political advertising as a service activity under article 114 of the TFEU. The objective is to harmonise the provision of political advertising services and address differences between Member States which may obstruct fundamental freedoms across the single market. Furthermore, the proposal considers the need to ensure transparency as a legitimate public goal, in line with article 2 of the TEU. This allows the EU to adopt specific disclosure rules to “support an open and fair political debate and free and fair elections or referendums and to combat disinformation and unlawful interference including from abroad”. TI EU agrees with the legal basis proposed.

The European Commission proposal

The proposal aims to establish a single regulatory framework for the political advertising services. The core objective is to harmonise rules for the provision of such services across the single market by specifically addressing two specific sources of fragmentation:

1. National definitions of political advertising
2. Transparency obligations related to the provision of political advertising services.

On the first, the proposal introduces a common EU-wide definition of what constitutes political advertising while stipulating on the second, the transparency requirements that should be released to the public for each political ad. Very large online platforms are mandated to publish the transparency notices in dedicated ads repositories, as foreseen in the Digital Services Act. The draft proposal also establishes mechanisms for reporting unlawful advertising as well as the transmission of information to competent authorities and interested parties such as researchers, CSO's, political actors and electoral observers.

On the second, the proposal to establish specific requirements related to the use of targeting and amplification techniques. In a nutshell, the use of special category data as defined by GDPR (race or ethnic origin, sexual orientation, political opinions, religious or philosophical beliefs, biometric & health, sex's life or orientation) is prohibited. The exemptions are foreseen either in case of explicit consent or in case of a legitimate activity carried by non-profit organisation. The use of any other type of data is authorised, provided it abides by GDPR, and individual concerned are pro-actively informed about the parameters used.

Finally, the proposal established minimum standards of sanctioning for non-compliance. Infringements related to transparency obligations refer to administrative fines set out in national jurisdictions while infringement of data protection obligations refer to the GDPR sanctioning regime.

Positive aspects of the proposal

While certain provisions need to be strengthened, the proposal provides a notable improvement to the overall regulatory regime governing political advertising services:

- It introduces **a single harmonised EU-wide definition** that facilitates enforcement both for online and offline advertising services.
- The proposal **covers the entire value-chain**: the advertiser, the advertising service, the publisher, the sponsor on whose behalf the ad was placed as well as the entity ultimately controlling the sponsor where applicable.
- Distinct transparency provisions related to the funding of political ads, including **aggregated amounts spent** or received for the placement of the ad as well as **their sources**. This aspect is crucial for enforcing national campaign finance rules, particularly the statutory spending ceiling to guarantee a level playing field between political actors.
- Tied to the provisions, rules for **the clear indication when ads are run during elections or referendums**, during which there are heightened risks of fraud, corruption, and other forms of undue influence.
- Mechanisms for the **mandatory provision of information** to the public, via online repositories for Very Large Online Platforms (VLOPs) or other means to competent authorities, researchers, NGO's and electoral observers are foreseen.
- A general obligation **to inform the public about the targeting and amplification techniques** as well as the **main parameters** used.

Areas of improvement

Certain provisions need to be strengthened to ensure that Regulation facilitates the fight against fraud, corruption, and undue influence. There also numerous areas that would require clarification both on a legal and operational basis. In line with standards and best practices, TI EU recommends the following areas of improvement:

- The **definition** of political ads (art 2.b) **should be clarified**, specifically the provision pertaining to regulatory or legislative processes or voting behaviour. TI EU recommends a broad scope definition of regulatory or legislative processes to be introduced in order to prevent differing interpretations in national jurisdictions.
- Misidentification of online political ads is a clear concern raised by researchers and competent authorities. To enhance the proposal's ability to enforce electoral integrity, **VLOP's must be obliged to conduct periodic peer-reviewed reporting on ad labelling** and set-up processes that effectively remedy mislabelling. (art. 5).
- Limit the scope of the proposal to **enumerated ads only** as to facilitate identification.
- **During** elections and where-ever applicable, **transparency notices should include the exact political party** to which the sponsor or entity ultimately controlling the sponsor belongs to.
- Sources of **funding should be clearly identifiable** by both the public and enforcement agencies. Transparency notices should disclose where applicable the identity of the natural or legal person in case of a single source or link to external repository, report, or any type of document in case of multiple sources that identifies all sources used for the placement of the ad (art 7).
- **Introduce a single European Repository of Political ads (new article)** to be used by publishers that do not qualify as VLOP's. This provision ensures that the proposal remains platform agnostic and closes a loophole where a publisher with a large market share in one Member State would not be subject to the same transparency obligations as those foreseen for VLOP's.
- **During elections or referendum**, advertising publishers **must report amounts**, or the value of benefits received in part or in full exchange **services in a real-time manner**. Investigation for non-compliance with campaign finance legislation often occurs ex post facto, when its already too late to prevent unfair competition in the electoral cycle (art. 7).
- **Processing** of personal data and the use of targeting and amplification techniques should be severely curtailed. To ensure a level playing field and protect citizens, TI EU recommends limiting processing to "provided" data ie: basic information provided voluntarily by the user upon registration. The processing of any additional data that is inferred from the basic provided information should be forbidden (art. 12).
- **The** exemption for allowing the processing for special categories of data (ie: sensitive data) **based on consent should be removed (art. 12)**. The use of sensitive data can severely fragment audience preventing accountability of political messaging online.
- Introduce a clause any limitations of the ability of lawful political to conduct political advertising activities should be in line with the rule of law, particularly to avoid the persecution of political opposition. lawful political actors

Raphael Kergueno

Policy Officer – EU integrity
Transparency International EU
Rue du Commerce 31, 1000 Bruxelles
M. +32 (0) 487 19 54 38
W. <http://www.transparency.eu>
EU transparency register: 501222919-71