

EACA Policy Brief - Transparency and Targeting in Political Advertising

I. Background and intent of legislator

The European Commission published in November 2021 a package of measures to ensure greater transparency in political advertising, particularly as political campaigning moves online. The Political advertising proposal is one of them. The proposal aims to introduce transparency obligations as well as to restrict targeting and amplification techniques in the context of political advertising.

II. What constitutes “political advertising”?

The Proposal defines in article 2(2) political advertising as: “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 to influence** the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.”

1. What are political actors?

The Proposal defines political actors in its article 2(4). These include for instance:

- (European) political parties
- political alliances
- candidates for elected offices on European, national, regional or local
- party leaderships, government members, political campaigns organisations

The definition may also include any person or organisation representing or acting on behalf of these actors.

2. How to determine if an ad is considered political?

In the Proposal, the commission decided to take a broad perspective on the scope of political ads which could result in ads which are not sponsored by political actors to be labelled as political regardless.

Additionally, it was the intention of the Commission to cover ads which are not sponsored by political actors but do cover wider subjects which deal with societal issues. This is detailed in Recital 17 which gives more specific criteria to determine whether an ad is “is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour”. It mentions that account should be taken of factors such as:

- the content of the message,
- the language used to convey the message,
- the context in which the message is conveyed,
- the objective of the message and the means by which the message is published or disseminated.

Messages on societal or controversial issues may, as the case may be, be liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.

3. Council of the EU and European Parliament stances on the definition.

As it stands for now, the definition of political advertising risks to encompass purpose-driven commercial advertising which should not be within the scope of the Regulation. EACA therefore advocated for a narrower definition back in January 2022 aiming to specifically refer to political advertising whenever there is an intention to influence an outcome of an election.

The Council of the European Union has beginning of May in a compromise text of the French presidency taken a step into this direction by (re)defining political advertising accordingly:

*(b) which is **liable and designed to influence the** outcome of an election or referendum, a legislative or regulatory process or voting behaviour.*

We are optimistic for a narrower definition along these lines to be adopted in the final text of the Regulation.

III. Transparency requirements

1. Labelling of ads

Under this regulation, advertising publishers, relying on the information shared by advertising service providers (including agencies), shall include in each advertisement a clear statement to the effect that:

- it is of a political nature,
- indicate the name of the sponsor, and
- make available information to enable the wider context of the political advertisement and its aims to be understood.

Ads will also need to be accompanied by a transparency notice which will redirect users to further information about:

- The sponsor and its contact details;
- The period during which the political ad is intended to be published and disseminated;
- Information about the amounts received during the preparation and promotion of the ad as well as the sources of the remunerations;
- Where relevant, the referendum or elections the ad is linked to;
- A link to online ad repositories.

2. Transfer of information

a) Identification of political advertising services

Providers of advertising services (e.g., platforms) and providers of advertising services acting on behalf of sponsors (e.g., agencies) shall request sponsors (e.g., clients) to declare whether the advertising service they request the service provider to perform constitutes a political advertising service.

Agencies acting on behalf of their clients are requested to make such a declaration towards the provider of advertising services.

b) Record-keeping and information transmission

Providers of political advertising services (e.g., platforms/agencies) shall retain information they collect in the provision of their services, on the following:

- The political advertisement or political advertising campaign to which the service is connected
- The specific service or services provided in connection to the political advertising;

- The amount they invoiced for the services provided, and the value of other benefits received in part or full exchange for the services provided; and
- Where applicable, the identity of the sponsor and its contact details.

IV. Limits on targeting and amplification techniques

1. Restrictions on use of targeting based on sensitive personal data

The Proposal envisages a **ban on advertising which uses “sensitive personal data” as defined by article 9 GDPR** to target individuals. Currently, the Proposal encompasses an exception stating that targeting may take place whenever an individual consents to sharing this data for the purpose of receiving targeted political advertising.

However, the Proposal was published before the Digital Services Act was finalised. Therefore, the provision is no longer in line with the DSA which does not allow exceptions to the ban on use of sensitive personal data for targeted advertising. Hence, we expect the text to be adapted on this point before its adoption.

2. Additional requirements when processing personal data

The Proposal put in place additional requirements on advertising service providers that process personal data for political advertising purposes. In addition to the requirements already enshrined in the GDPR, they must:

- Put in place an internal policy describing the use of techniques to target individuals, and retain such policy for 5 years;
- Keep record of the use of targeting, the relevant mechanisms, techniques and parameters used as well as the source of the personal data;
- Provide, together with the political ad, additional information necessary to the individual concerned to understand the logic

This information will then also be included by the publisher in the ad and/or the transparency notice which accompany it.

3. Ongoing discussions in the Council and European Parliament

At present, the LIBE committee in the European Parliament is discussing whether to include further restrictions on targeting techniques. A first draft report from the European Parliament, for instance, envisages to ban the use of “inferred data” for targeting purposes.

“Inferred data” are information collected indirectly about individuals for instance when grouping individuals according to their assumed interests or derived through their online activity, behavioural profiling, and other analysis techniques.

Therefore, we are expecting further changes and possibly new restrictions on target political advertising in the upcoming future.

