Feedback to the European Commission's proposal for a regulation on the transparency and targeting of political advertising

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For questions and comments, please contact the author Dr. Julian Jaursch at jjaursch@stiftung-nv.de. This feedback draws on SNV's previous work on online political advertising and on defining political advertising. It includes input from colleagues from SNV as well as other think tank and civil society representatives. We thank the European Commission for the opportunity to provide feedback to the draft and look forward to engaging further with the Commission as well as the European Parliament and other interested stakeholders.

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Summary of key points

The Commission's legislative proposal contains many important and timely innovations in ensuring political advertising transparency. This, in turn, can contribute to fair and pluralistic political debates and elections in the EU. To further bolster this effort, European lawmakers could and should considerably improve some of the key proposals.

The main strengths of the proposals that should be maintained are:

- The draft takes the view that political advertising is not limited to just electoral periods. It covers many different political advertisers as well as issue ads, thus placing a wide range of political advertising within the scope of the rules. This is also accomplished by including both online and offline ads in the rules. Taken together, this broad view is the right approach and should be maintained in the upcoming negotiations.
- The draft is structured into articles containing a set of transparency rules and principles, and two annexes with specific pieces of information that should be provided to regulators and other external observers. These annexes can be changed faster and more easily than a law. This flexibility is desirable and should be kept because it would ideally allow for a more dynamic review and update of the transparency requirements.

The key improvements that should be implemented are:

- The definition would benefit from clarifications and examples. Especially because of the wide range of different advertisers and advertisements covered, it is imperative to delineate the at times overlapping definitions better.
- For political advertising, the use of highly sensitive personal data (as defined in EU data protection law) and inferred data should be banned without exceptions. The Commission acknowledges the risk of discrimination stemming from the segmentation of the electorate and the delivery of narrowly tailored political ads, but precisely because this is the case, it is not suitable to rely on consent rules.
- The law should provide a framework for determining what good and bad design practices regarding ad disclosures and notice mechanisms are. This could be done in an additional annex. Particularly if the consent option is kept, a ban on deceptive design practices should be considered.
- Regulators and researchers should be able to request data access to all data points mentioned in the draft, not just a selected few.
- The Commission should mandate a cross-platform, real-time political ad repository. This would help citizens and specifically those researching political advertising to understand online ad campaigns better than the combination of suggested rules for single-platform database from the Digital Services Act and this draft.
- Enforcement mechanisms should be streamlined by giving EU-level oversight agencies more powers and/or establishing clearer cooperation guidelines for national authorities.

1. Keeping the flexibility built into the draft

The overall approach of the draft is consistent with the Commission's stated goals: It focuses narrowly, yet precisely, on transparency, it covers both online and offline political advertising and it proposes EU-wide rules considering that the online ad market is a cross-border market. These basic tenets of the draft should be kept. Furthermore, it is a good idea to create a set of principles in the articles (and recitals) but leave the detailed transparency prescriptions to the annexes. Since these annexes can be changed with delegated acts, it should be expected that a fast, dynamic updating process of these transparency lists is possible. This is desirable in light of the online (political) ads market, which can change quite frequently (for example, new services emerge, targeting techniques develop or evolve, user behaviors or device preferences change, all of which can necessitate adaptations to what information is most useful to create transparency). Lawmakers should continue this approach of having strong, fixed rules coupled with easy-to-review lists of transparency requirements.

The draft makes references to important other EU legislative acts touching upon advertising, namely the existing General Data Protection Regulation (GDPR) and the proposed Digital Services Act (DSA). This is useful, as the GDPR, the DSA and this draft will overlap in certain areas. It could be clearer where these laws intersect and this overlap is dealt with. Whereas this draft makes a reference to the DSA, the DSA does not make a reference to the political advertising transparency draft, even though the DSA might include specific rules for online advertising as well.

More importantly on the overlap with the DSA, the political ads transparency draft could be more ambitious in going further than the DSA. The Commission should use the political ads transparency draft to introduce an even higher level of protection for citizens. The targeting "ban" has big loopholes (see 3. for improvements) and the additional transparency requirements proposed in the draft are but an extension of what is in the DSA (see 4. for improvements).

2. Clarifying the definition

The draft definition is promising in the following ways that should be promoted in future negotiations:

- It focuses on political messages that are directly or indirectly paid for, thus sensibly excluding private statements in support of political candidates or causes.
- Political advertising happens at all times, not only during electoral periods. Therefore, it is good that the definition is not limited to cover only elections. Additional rules for elections, as mentioned in the definition, can be helpful.
- Defining "political" content/issues can be tricky. Therefore, it is useful that the definition starts from an actor-based perspective instead.
- Paid political communication emanates from various actors and covers a large range of topics. Therefore, it is good to have a second part of the definition so that it covers both actors *and* issues.

With these promising points in mind, the definitions in Article 2 could be clearer and easier to distinguish. The draft's scope can be read to cover the entire breadth of the political advertising "value chain", which is generally a good approach, but requires clear delineations of various actors and trying to avoid blurring the line between them. For instance, does "political ads publisher" cover news websites or platforms such as Google and Instagram or the combination of Google and a website placing an ad? Or all of the above? The wide range of entities potentially covered here should be acknowledged and, if possible, categories could be combined. Another example for this is: In what cases does a "political actor" differ from a "sponsor"? It would also be helpful if the definitions were clarified and explained. Examples for the categories, maybe in the recitals, might help shed more light on what lawmakers had in mind specifically. At the same time, such lists of examples should not be taken to be the exclusive scope of advertising covered in the legislation.

Regarding issue ads, it will be crucial in the future to specify more clearly how the corresponding definition in Art. 2, 2(b) is to be interpreted. The current language of a message that "is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour" is broad.[1] This, again, is welcome but should not lead to either policymakers, regulators or even advertising platforms to try to define certain "political" issues that are to be scrutinized more closely.[2] This approach would be too rigid and give too much power to those determining what is deemed "political". It has so far not worked in practice.[3] At least in a recital, it should be made clear that the regulation does not intend for any actor to determine a set list of supposedly political issues.

Especially in the online sphere, when people see a political ad, it is often the result of an advertiser choosing a target audience and corporate algorithms displaying the ad to certain segments of this/any population. The Commission seems to want to cover these two "techniques" when addressing "targeting" and "amplification", respectively. The fact that machine-learning systems might be used in ad delivery should be more clearly acknowledged in the "amplification" definition (Art. 2, 8). For example, "including by automated means" could be added at the end. In a similar vein, it should be clarified that "amplification" does not only mean "increasing" the reach, as the article states. Ad delivery algorithms can be used for a variety of purposes such as reaching a lot of people but also getting people to do certain things (for instance, clicking on something, signing up for something) or reaching a small but specific group of people. It is not clear that this is

[1] It also does not seem fitting to use the term "liable", which has the connotation of legal liability.
[2] Cf. European Partnership for Democracy, "Reaction to Online Political Ads Regulation Proposal," *European Partnership for Democracy*, November 25, 2021, 2, https://epd.eu/wp-content/uploads/2021/11/epd-reaction-to-the-commission-proposal-on-political-advertising_25_11_2021.pdf.
[3] The example in Canada shows this, see Muriel Draaisma, "Elections Canada 'wrong' to Say Climate Change Ads Could Be Partisan, Expert Says," *CBC News*, August 20, 2019, https://www.cbc.ca/news/canada/toronto/diane-saxe-elections-canada-warning-climate-change-advertising-partisan-activity-1.5253116; IAB Canada, "IAB Canada Launches 'Issues Tracker' Ahead of Federal Election to Help Members Comply with New Rules," *IAB Canada*, September 5, 2019, https://iabcanada.com/iab-canada-launches-issues-tracker-ahead-of-federal-election-to-help-members-comply-with-new-rules/.

covered well in the draft definition. The proposed transparency requirements for "amplification" need to be amended accordingly (see 4.).

Another caveat with defining political advertising is not specific to the draft but nonetheless should be taken note of as it might require clarification in the future. The distinction between ads and "a purely private or a purely commercial" (Art. 2, 2(a)) message can be hard in practice. Especially the latter point– distinguishing between political and commercial messages – can be tricky, for example, if companies promote products or services within a context that relates to ongoing debates in society. One hypothetical question could be: Is a paid corporate message that their product helps achieve EU climate goals political? It might be reasonable to introduce exemptions, such as the one for "purely commercial" messages, but future negotiations should ensure that any exemptions remain narrow and are clearly spelled out, so that they do not develop into a loophole for advertisers to evade scrutiny.

Lastly, judging from similar debates at the national level, it should also be expected that governments and political foundations raise objections to the definitions' scope. European lawmakers should be prepared to clarify whether and how these entities are covered. For instance, German media regulation attempts carve-outs for (governmental) public service announcements. On other transparency regulations regarding lobbying, political foundations have claimed exemptions. For this draft, generally speaking, transparency requirements should continue to apply to all paid political communication. Any potential exemptions should be limited in scope and clearly defined.

3. Implementing an actual ban on the use of highly sensitive data

In Art. 12, 1, the draft indicates that highly sensitive personal data, as laid down in the GDPR (Art. 9, 1)), should not be used for targeting and amplifying political advertising. This is a desirable stance to deal with the risks emanating from behavioral targeting online.[4] The key risk of online ad targeting and algorithmic ad delivery is discrimination. While in a way, every ad is discriminatory (some people see it, others do not), with algorithmic ad delivery, the scale and opacity of this discrimination is increased greatly.[5] Ultimately, profiling people based on sensitive data and their online behavior and then delivering messages to very homogeneous groups can distort political debates. Tackling this risk via targeting restrictions is therefore a sensible policy option. However, if the Commission truly wants to address these risks, the targeting prohibition needs to be an actual

[4] In addition, it is line with people's opinions on what data should be used for paid political messaging, according to survey such as Anastasia Kozyreva et al., "Artificial Intelligence in Online Environments: Representative Survey of Public Attitudes in Germany" (Berlin: Max Planck Institute for Human Development, 2020), https://pure.mpg.de/rest/items/item_3188061_4/component/file_3195148/content; Global Witness, "Do People Really Want Personalised Ads Online?," *Global Witness*, April 15, 2021, https://www.globalwitness.org/en/blog/do-people-really-want-personalised-ads-online/.

[5] For a summary and sources on the risks of behavioral targeting, see Julian Jaursch, "Rules for Fair Digital Campaigning: What Risks Are Associated with Online Political Advertising and What Reforms Are Necessary in Germany" (Berlin: Stiftung Neue Verantwortung, June 8, 2020), 19–24, https://www.stiftung-nv.de/sites/default/files/rules_for_fair_digital_campaigning.pdf.

prohibition. In the draft, it is heavily undermined by the exemption in Art. 12, 2, which allows targeting if citizens consent to this data use.[6]

The general idea of the consent exemption – to enhance user autonomy by allowing people to choose whether their sensitive data can be used or not – is laudable. In practice, it has not typically worked. Consent frameworks tend to favor incumbent corporations and do not truly provide users with choices: Bigger companies can afford to make their businesses compliant with laws such as the GDPR and the future political ads legislation more easily than smaller ones. More crucially, network and lock-in effects often make it impractical for users to deny consent. Corporate design decisions to trick users into providing consent are a substantial risk that is not addressed well enough in the draft (see 4. for improvements). Lastly, it is questionable overall whether individuals should bear responsibility for the effects of "targeting and amplification techniques", which the Commission obviously views as dangerous enough to address in a specific article.

If the Commission deems targeting techniques to be a risk for individuals and society and is in favor of banning it, Art. 12, 2 should be scrapped. Otherwise, the ban is not a ban, but a hurdle to the use of personal data. Large companies benefitting from network and lock-in effects will have it much easier to clear this hurdle than smaller ones. Entrenching such effects seems to go against the intention of the Commission in this draft as well as the draft DSA and the draft Digital Markets Act.

Furthermore, the Commission should implement a ban on using inferred data for political advertising. Advertisers, advertising services and advertising platforms – using personal behavioral data collected from citizens – might assume certain traits, interests and behaviors, often without people's knowledge. This data can be used for the "amplification" techniques mentioned in Art. 2, 8. For example, machine-learning ad delivery algorithms might display ads based on a profile inferred from a high number of individual behavioral data points such as people's likes, shares and clicks. Addressing this practice with just transparency measures – as the draft proposes – is inadequate[7], as citizens would likely have to put more effort into understanding the process than companies would have in collecting ever more data on them. The Commission correctly sees a risk in political content being "amplified" without users' knowledge or consent. However, the transparency requirements in the draft might likely fall short of alleviating this situation, so a ban on inferred data should be implemented.

4. Enhancing transparency and design requirements

One strength of the Commission draft is that it addresses various aspects of ad transparency: Ad-hoc real-time transparency for individual ads (Art. 7) is paired with mandatory permanent record-keeping for all ads and data access (Art. 6 and 11), which in

[6] Cf. European Data Protection Supervisor, "EDPS Opinion on the Proposal for Regulation on the Transparency and Targeting of Political Advertising" (Brussels: European Data Protection Supervisor, January 20, 2022), https://edps.europa.eu/system/files/2022-01/edps_opinion_political_ads_en.pdf.
[7] Cf. European Partnership for Democracy, "Reaction to Online Political Ads Regulation Proposal," 4.

turn is coupled with additional transparency rules for targeting (Art. 12). In addition, the DSA will likely include ad repositories, which the political advertising transparency draft references as another means to create transparency. This strength of focusing on individual ads, specific advertising techniques and data access should be maintained and expanded upon in the final law. It is especially welcome that Art. 11 includes a wide range of actors that can potentially request information on political advertising for research purposes. Furthermore, the idea to move some of the transparency requirements into annexes that can be changed with delegated acts is useful (see also 1.).

The transparency requirements in the draft can and should be made even stronger by introducing the following changes:

- Art. 11 requires political advertising services to provide data on ad campaigns (from Art. 6) and – only under certain circumstances – on the in-ad disclosures (from Art. 7) to interested entities. This is useful and welcome but, if applicable, should be expanded to cover information on targeting (from Art. 12). This would allow regulators and researchers a much better picture to analyze ads and ad campaigns.
- The draft references advertising platforms' "ad repositories", where people are supposed to find all political advertising. The DSA might make such repositories mandatory. The political ads transparency draft does not improve upon or add to the DSA on this in a meaningful way. It should strengthen and expand the DSA rules by introducing a mandatory, cross-platform, real-time ad archive for political ads. Whereas the DSA will likely only include rules for individual platforms' ad databases, the Commission has the opportunity to push for a joint industry standard for political advertising transparency in ad repositories. This would allow citizens a better overview and researchers easier access to data, which would tie in with draft rules in Art. 6, 7, 11 and 12. It should be a real-time, comprehensive political ads repository containing all the information required in the draft articles and annexes of this legislation.
- The political ads transparency draft should enable a wide range of academic, civil society and journalist researchers to apply for data access and not solely rely on a reference to the DSA's data access provision, in case the latter turns out to be weak. Art. 11 should therefore continue to enumerate clearly and in detail the broad range of researchers who can request data. Furthermore, it should be contemplated to also allow civil society researchers and journalists from outside the EU (not just inside the EU) to apply for data access. To broaden the scope of potential researchers, this would be an important opening. Lastly, it would be a stark improvement if the draft differentiated between various transparency needs. As researchers have pointed out, the information citizens need to understand political ads is not the same as the information and data scientists need.[8] For instance, more detailed mandates on data formats and access for researchers would be helpful. A differentiation would acknowledge that

[8] Max van Drunen et al., "Transparency and (No) More in the Political Advertising Regulation," *Internet Policy Review*, January 25, 2022, https://policyreview.info/articles/news/transparency-and-no-more-political-advertising-regulation/1616.

transparency is useful if it considers trade-offs, different target groups and different types of transparency.[9]

- It is promising that the draft requires transparency information to be easily accessible and "user-friendly" (Art. 7, 4; Art. 9, 4 (sic!); Art. 12, 6) and that it makes explicit references to EU accessibility requirements, at least in a recital (40). Such hints at the important issue of the design of both advertising and transparency notices could be stronger.[10] It does not seem fitting to prescribe by law certain design practices for ad disclosure labels, for instance, as such requirements would vary depending on the platforms and devices, among other things. However, an annex with best design practices and potentially even prohibited deceptive design practices would enhance the rather vague language on "user-friendly" transparency information. A ban on deceptive design practices ("dark patterns"[11]) for some consent matters was discussed within the DSA process and this could be extended to what lawmakers expect of ad disclosures. Such an annex would be especially pertinent if the consent exemption in Art. 12, 2 is maintained. It should be developed in close cooperation with external stakeholders from a variety of fields including user experience/user interface designers, psychologists, sociologists and platform users. This way, the legislation could become a more innovative approach in discussing and developing a guiding framework for design practices regarding advertising.
- If digital platforms and others ("controllers") use "targeting and amplification techniques" (Art. 12, 3), they need to have a corresponding internal policy in place. They need to provide users with this policy (Art. 12, 4). This can be helpful but should be further improved by requiring controllers to report on the implementation of their targeting policies. This would allow oversight agencies and the public to see if/how advertising platforms actually enforce their own rules. This requirement could be tied into the potential DSA mandate for risk assessments for platforms. It should also take note of the differentiated or layered approach to transparency mentioned above, distinguishing between policies useful for regular users and for researchers and regulators.
- Annex 1 could include additional transparency data: If applicable, the disclosure of registration with national regulators could be included. Moreover, instead of relying on aggregated spending amounts, exact amounts could be required (or, at least, prescribe acceptable ranges, so that advertisers or advertising services do not have a loophole of claiming spending for a campaign is between a wide range such as 100 and 100,000 euros).
- As mentioned in 3., transparency requirements (alone) will likely not be able to address the risks with ad delivery algorithms that use personal data (potentially including especially sensitive and inferred data) to display ads. Therefore, a true

[9] Katharine Dommett, "Regulating Digital Campaigning: The Need for Precision in Calls for Transparency," *Policy & Internet*, February 12, 2020, https://doi.org/10.1002/poi3.234.
[10] Cf. Drunen et al., "Transparency and (No) More in the Political Advertising Regulation."
[11] "Dark patterns" should be not be used in EU legislation/communication, as it is an outdated term, cf. M. J. Kelly, "What Are Deceptive Design Patterns and How Can You Spot Them?," *The Mozilla Blog*, May 5, 2021, https://blog.mozilla.org/en/internet-culture/mozilla-explains/deceptive-design-patterns/.

ban on the use of highly sensitive and inferred data without exceptions should be part of the draft.

5. Streamlining enforcement

Under the draft, enforcing the political advertising transparency rules would be left to multiple national regulatory agencies. Data protection authorities would be in the lead on issues regarding targeting, while the data access and transparency requirements would be left to those national agencies that member states determine to be "Digital Services Coordinator" (DSC) within the DSA. While it is justified and welcome to leave targeting and profiling issues with data protection authorities (especially since the draft explicitly references the GDPR), this division of labor still might hinder strong enforcement, which is why the introduction of a coordination mechanism (Art. 15) is envisioned.

The suggested coordination mechanism needs to be considerably improved. In this draft, member states are asked to cooperate and coordinate efforts at the EU level. "Contact points" are to "meet periodically". These requirements in Art. 15 need to be strengthened by introducing clear timelines, formats of exchange and the option to develop joint processes or adopt joint procedures against potential infringements. Furthermore, it is imperative that the legislation requires member states to equip their national oversight bodies with adequate resources and enhance their expertise on political advertising issues. This is mentioned in the DSA proposal for the DSCs but should be reiterated in this draft. The GDPR shows clearly that poorly resourced and understaffed agencies hurt (national) enforcement, despite the agencies' extensive expertise.

More fundamentally, EU lawmakers should consider whether the proposed division of labor is useful in the first place. This is not merely a fault in this draft but rather speaks to weaknesses in the DSA texts: It is questionable whether the enforcement structure delineated in the Commission's original DSA draft is suitable overall. The DSA draft asks member states to determine DSCs, establishes an advisory DSC board and leaves some enforcement powers to the Commission. In an intricate, rather lengthy process of back-and-forth between the national and EU levels, the DSA is supposed to be enforced. This system does not seem appropriate to ensure consistent, swift and strong enforcement, neither of the DSA[12] nor of political ads transparency legislation.

While the Commission's draft on political advertising transparency, of course, cannot change the DSA, it is worth to consider why there is not a more streamlined European enforcement mechanism envisioned in this draft. The Commission justifies its engagement on political advertising with the single market, which also applies to advertising, and – correctly and necessarily – tries to sidestep issues related to ads that are in the remit of member states (like those concerning media regulation and national electoral law). If the Commission were to follow through with this, a stronger role for the

[12] Julian Jaursch, "The DSA Draft: Ambitious Rules, Weak Enforcement Mechanisms" (Berlin: Stiftung Neue Verantwortung, May 25, 2021), https://www.stiftung-nv.de/sites/default/files/snv_dsa_oversight.pdf.

European Data Protection Supervisor or a separate EU-level entity could have been suggested. Whereas electoral law and media regulation remain member state competencies, the proposed transparency and data access rules could be handled at the European level. Since these issues concern mostly online advertising and very large online platforms, over the long term, EU lawmakers should consider a specialized, independent, well-resourced EU online platform agency responsible for enforcing the DSA and the relevant parts of the political advertising transparency legislation.[13]

[13] Jaursch.