

ASSESSING THE DIGITAL POLITICAL ADS REGULATION

RED FLAG

It is fair to say that the optimism of early 21st century ‘technopolitics’ – think Barack Obama’s first Presidential victory or the promise of the Arab Spring – long ago gave way to widespread distrust and doubt around the interaction of politics and our online lives.

Recent years have seen the phenomenon of fake news lodge itself in the public consciousness, prompted by instances of online foreign interference in electoral processes, as well as the dissemination of disinformation on a range of issues.

The Cambridge Analytica scandal was one of the first instances of online interference on an apparently industrial scale and combined with the shock Brexit vote to generate huge levels of media interest. In the decade since those events, we have seen a range of similar situations emerge. For example, the 2019 European elections were marred by suggestions of Russian interference, with the European Commission finding that Russia had carried out a “widespread disinformation campaign.”¹

The EU, for its part, has made considerable progress in regulating the online environment – with the 2022 Digital Services Package likely to be viewed as keystone legislation for years to come, both in Europe and further afield. Brussels also revamped its Code of Practice on Disinformation² last year, which has proved somewhat successful despite its non-binding nature.

The EU has also committed to protecting Europe’s electoral processes through the introduction of the



European Democracy Action Plan in 2020. Due for finalisation this year, the Transparency and Targeting of Political Advertising (TTPAR) constitutes a key element of this plan. However, it is likely that the TTPAR will have far-reaching consequences for digital communication, well beyond the boundaries of what would traditionally be considered political advertising.

ONLINE EUROPE

Politics now happens online to a remarkable degree, with politicians of all stripes taking to social media in their droves. In 2010, just under 31% of MEPs had Twitter accounts.³ By 2019, this figure had risen to over 66%.⁴ No doubt the vast majority of candidates for the 2024 European elections will be campaigning online to the best of their ability.

This ability – to use digital media persuasively – is a prerequisite for a modern political campaign, and is at the heart of every political party's communications strategy.

As one indicator, the online political advertising market in Europe in 2019 was worth €100⁵ million, more than twice the total public funding made available to European political parties.⁶

ADS & ACTIVISM

In this context it makes sense that the EU is looking to refresh rules around political ads online, but the proposed TTPAR is likely to have an impact on all manner of online activities, affecting the plans of NGOs for example, who are increasingly reliant on digital channels to drive engagement.

Such tactics have already attracted the attention of policymakers and platforms to an extent. For example, during the 2019 European elections, NGOs were not granted the same exceptions to Facebook's rules on political ads as the European institutions and parties were, despite the fact that many NGOs were involved in encouraging citizen engagement in the campaign.⁷

PLATFORM POLICY

Tech companies have taken various steps to manage the proliferation of political activity on their platforms. Twitter for example banned the promotion of political content outright in 2019⁸, and TikTok recently strengthened a similar ban, also put in place in 2019, by introducing ad restrictions at an account level.⁹ Meanwhile, Meta opted to continue allowing political ads on the platform, but introduced strict transparency requirements and a ban on new ads in the days leading up to an election.¹⁰

As we can see, the definition of 'political advertising' varies considerably between platforms, with discrepancies arising between the various categories such as 'cause-based advertising.' Platforms have come under fire for allegedly irregular content moderation decisions, from banning former US President Donald Trump to ad black-outs before US elections.¹¹

While real progress has been made by platforms, there is no doubt that issues remain. In Europe, this was exemplified by Facebook's January 2022 removal of the page of Poland's nationalist opposition Confederation party.¹² The party's page had almost 700,000 followers at the time, and its removal prompted a backlash, with one of the party's leaders accusing the platform of interfering in voters' political choice in the run-up to an election. Meta, for its part, cited the spread of COVID-19 misinformation and hate speech as the reasoning behind the decision.



Image from Joel Saget/AFP/Getty Images



HIGH LEVEL HARMONY?

Indeed, the situation as it stands means that there is no harmonised regulatory framework for online political advertising across the 27 Member States. The Commission's draft TTPAR aims to address this by setting out "harmonised rules for a high level of transparency and of political advertising and related services,"¹³ which is to be welcomed. However, some elements of the proposal, as well as the amendments put forward by the European Parliament and Council, present a number of areas of concern.



TARGETING TRANSPARENCY

Gaps in existing enforcement procedures when it comes to political advertising on social media became apparent in the aftermath of the 2019 European elections, particularly with regard to suspected Russian interference, as well as discrepancies that emerged between the varying standards of protection for political ads on different platforms. This prompted the Commission to put forward its proposal to regulate political ads in November 2021.

Regulation would bring an unprecedented level of transparency to political campaigning and limit the opaque targeting techniques.

European Commission Vice President for Values and Transparency Věra Jourová

Unveiling the proposal, European Commission Vice President for Values and Transparency Věra Jourová stated that the regulation would "bring [an] unprecedented level of transparency to political campaigning and limit the opaque targeting techniques."¹⁴ The stated aims of the proposal are to combat voter manipulation, non-transparent campaigning and disinformation campaigns, particularly ahead of the 2024 European elections.

As we somewhat belatedly move to the trilogue phase of the TTPAR, concerns have been raised by some that policymakers may attempt to rush the passing of this sensitive legislation ahead of the 2024 elections. In any case, it will be crucial to fully scrutinise the amendments tabled by the European Council and Parliament in order to avoid unintended consequences.

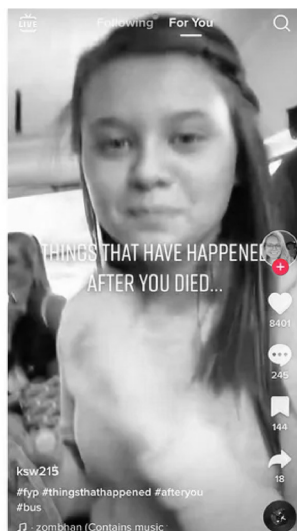
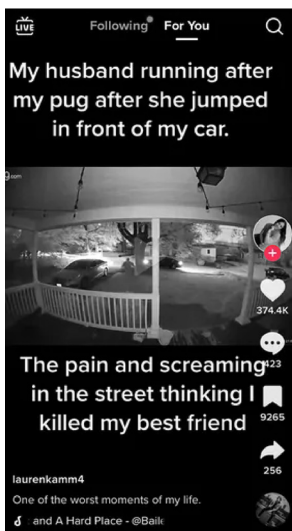
The Commission's proposal

The Commission's proposal features a number of key provisions:¹⁵

- Article 2 sets out a definition for the concept of '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.
- Article 7 establishes a range of transparency requirements for political ads, outlining the range of information that should be made available for each ad.
- Articles 9 and 10 outline the requirements for publishers of political advertising to put in place mechanisms to enable individuals to notify them of suspected infringements and set out the obligations on publishers to address requests from competent national authorities within two working days.

The Council & Parliament versions

- A range of amendments proposed by both the European Council¹⁶ and Parliament¹⁷ have added to concerns around the proposed regulation.
- Both the Council and the Parliament have suggested extending the scope of the regulation's definition of remuneration in relation to political advertising to include benefit in kind.
- The Parliament's proposed amendment to Recital 16 suggests potentially including messages originating from "any natural or legal person," "prepared, placed, promoted, published, delivered or disseminated directly or indirectly by or prepared, placed, promoted, published, delivered or disseminated by any means."
- Under Article 5, the Parliament proposes including provisions for Very Large Online Platforms in their handling of political advertising, as well as introducing factors, like language and the means by which a message is published, to determine whether or not it constitutes political advertising.
- The Parliament also proposes introducing more detailed labelling requirements for ads under Article 7, while the Council's position introduces an obligation under Article 7 for ad publishers to include a "statement to the effect that the political advertisement has been targeted or amplified," where applicable.
- Both institutions also propose introducing further obligations for publishers to address notifications and complaints received "without undue delay" or within 48 hours during election periods, under Article 9.
- The Council and Parliament also propose adding specific provisions under Article 12 that would prohibit the use of any personal data belonging to those under the voting age for targeting and amplification purposes. The Parliament also proposes that specific consent be required from users to allow for the use of personal data for political ads targeting.





Digital ads help us in getting our message across to decision-makers in Brussels and beyond. They are a very important tool in today's policy and political communication.

*Lucia Sali, Spokesperson and Head of Communications,
The European Steel Association (EUROFER)*

ASSESSING THE IMPACT

Each institution has approved its text and the regulation will now be discussed in trilogue. Differences between the texts make it difficult to fully anticipate the impact of the regulation, but some key concerns have been raised.

1. No Algorithmical Amplification

Under Article 12 of the TTPAR, the Commission proposes to regulate the ability of platforms to recommend and amplify content to users, prohibiting the use of personal data for recommendation purposes in a range of cases. The proposal argues that this will be an important intervention in the fight against disinformation, but it is clear that the ambition could have unintended consequences when it comes to the amplification of content by creators and other internet users.

Currently, online platforms make use of advanced recommendation systems to show users the kind of content that is most relevant to them. The draft regulation, as it stands, would restrict users' access to content by creators addressing political issues, even if this content has not been paid for. Users would only be able to access content looking at political issues if they expressly search for such content.

Limiting the ability of platforms to recommend content would run the risk of confining users to echo chambers, as well as essentially deplatforming content and creators by removing the main means by which they find new audiences.

Impacted tactics: The proposed regulation could impact the capacity of political content to go viral and reach a wide user base – non-paid content could also be affected, leading to a situation where users are shown random content that is not of interest to them on YouTube's homepage or TikTok's For You page, for example.

2. Limited Targeting for Political Ads

The systems in use by many of the major online platforms only allow for general targeting and recommendations, so implementing specific restrictions on the dissemination of political ads alone would be challenging. Amendment 72 as put forward by the European Parliament, for example, proposes restricting the personal data that can be used for targeting to just locations and language spoken by users. This could lead to the outright removal of content in practice.

Platforms may be left with no choice but to limit the dissemination of a wide range of content, extending far beyond what would be traditionally considered political ads, in an effort to ensure compliance with the regulation. Creators' content which contains any references to politics would likely be impacted, as would public affairs digital activations and many of the digital campaigns undertaken by NGOs.

Many minority groups and NGOs rely on targeted advertising to ensure their messages reach their intended audiences, and do so by relying on limited funds. Under Article 2 of the Commission proposal, the placement of any content "which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour" is considered political advertising. This broad definition paves the way for a whole host of digital campaigns and content to be subject to precautionary removal.

Impacted tactics: Impacted tactics could include minority groups and issue-lead vote mobilisation, NGO educational campaigns in sensitive areas and the digital campaigning by charitable organisations.

3. Brands Challenged on ESG Communications

The line between brand marketing and social cause activism is increasingly blurred and the proposed regulation has the potential to impact a wide range of companies and organisations, even beyond those traditionally engaged in digital campaigning.

During the 2019 European elections for example, Lufthansa encouraged Europeans to get out and vote by branding one of its aircraft with 'SayYestoEurope' livery in the month ahead of the election.¹⁸ Ahead of Ireland's vote on marriage equality in 2015, over 300 businesses took part in the Business for Yes Equality campaign, which saw large and small businesses placing ads in local newspapers and elsewhere calling for a yes vote in the referendum.¹⁹

Engagement on a wide variety of topical issues could be construed as political under the regulation, given the fact that the Parliament has proposed including messages originating "from any natural or legal person" in Recital 16. This could pave the way for the inclusion of many common marketing approaches, affecting the ability of businesses to speak out on a variety of topics.

Impacted tactics: Brands' political engagement could be affected, particularly their advocacy around diversity and inclusion policies or targeted recruitment initiatives. Brands' ability to engage with political actors on topics like the climate crisis could also be impacted.



Winning campaigns make new connections between people and politicians, and in this day and age that inevitably means activating and amplifying voices online. Sensible rules on targeting and amplification are welcome, but as always with digital policies, we need to ensure that what we agree now is flexible and future-proof.

Shane Fitzgerald, Head of Campaigns, Red Flag

4. User-Generated Content in Question

One of the most significant unintended consequences of the current proposals could be the deplatforming of user-generated content, given the fact that many content creators make use of social media to express their views on current political topics. For example, in the two weeks prior to the 2019 European elections, the European Parliament commissioned a significant social media campaign, aimed at encouraging younger voters to make their voices heard. This was done through both an Instagram influencer campaign and a YouTube advertising campaign.²⁰

Likewise, an important element of political campaigning in many jurisdictions is the use of testimonials and input from the electorate. Under Article 2 of the Commission's draft regulation, content by all users related to political issues could be affected, extending beyond what might be considered a political ad in the strictest sense. This could even extend to the deplatforming of content generated in third countries, further restricting Europeans' access to information.

Put simply, the proposal's broad definition of political advertising could lead to the silencing of civic discourse in crucial electoral and campaigning periods. Content generated by influencers and testimonials from voters and other stakeholders can play a decisive role in voters' decision-making ahead of elections, and users' access to such content should be safeguarded. If no money has been paid for the placement, targeting or sponsorship of content, it seems sensible that, in order to protect freedom of speech, content is not restricted.

A reference to remuneration should be included in the regulation's definition of political advertising under Article 2, in line with the DSA's definition of 'advertisement,' which stipulates that there be "remuneration specifically for promoting" the information contained in the ad.²¹

Impacted tactics: Content creators' testimonials on their own channels could be restricted, as could educational videos, investigative journalism pieces, and amplification of policy-related posts on message boards.

5. No Solutions for 2024 European Elections Campaign?

Even if the proposed regulation was to be agreed and implemented in its current form, it is difficult to see how all necessary systems could be put in place to ensure effective implementation ahead of the 2024 European elections. The regulation only touches upon pan-European campaigning and isn't designed to address the calls for a 'political ads single market' – in fact, the only reference made to a pan-European political ads market is in the Parliament's proposed Amendment 6, which refers to restrictions already in place regarding "cross-border and pan-European political campaigns."

Platforms would likely be granted a high degree of autonomy to decide what content requires moderation under the regulation, which could lead to decisions being taken arbitrarily and hastily. The Commission's draft sets out tight deadlines for platforms to address notifications they receive regarding potential infringements, and the period running up to elections is given special status in the draft regulation.

A less prescriptive approach to timelines for addressing notices received, given the required liaison with both complainants and advertisers, would make sense, and indeed the DSA provides a valuable example in this regard.²²

Impacted tactics: Without clarity and established systems in place ahead of the elections, it is possible that political ads blackouts might happen in the run-up to elections as platforms take varying approaches in an effort to meet obligations. Cross-border ads and ads targeting Brussels from national capitals could also be affected by the proposal, and its failure to address calls for a pan-European political ads market would mean that national campaign managers would still be needed for European elections.



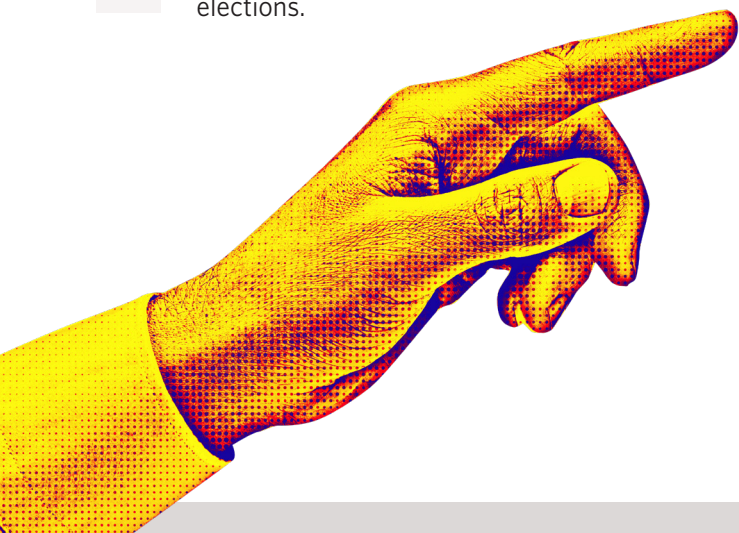
SUMMARY

Regulation of the political digital communication sphere is undoubtedly needed and the Commission's commitment to this is to be commended. The intention to create a clear standard for political campaigns across the Member States is particularly notable and could help with the EU's goals of communicating the European project clearly to citizens across the continent.

Indeed, the EU has already taken a number of significant steps to combat the dissemination of disinformation and fake news on major platforms. Last year's update to the Code of Practice on Disinformation represented a considerable advancement in this regard, and many large platforms have demonstrated their commitment to adhere to the Code's guidelines through their recently-submitted progress reports.²³ Implementation of the Code of Practice goes hand in hand with platforms' efforts to ramp up content moderation ahead of the full implementation of the DSA – another significant milestone in the EU's efforts to make the online space safer.

At the same time, the TTPAR was presented as quite a niche act and there was relatively little interest in the legislative process (only 10 consultation entries for example).²⁴ Yet in its current shape, extending far beyond the scope of existing self-regulation schemes, it could have a broad impact on multiple industries, civic activism and the general architecture of social communication online.

As crucial channels of democratic input into European policymaking, it is now up to the Council and Parliament to actively educate and seek fresh input from potentially impacted stakeholders, to ensure that this regulation, which could affect European politics and our public sphere so deeply, is fit for purpose.



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