21 June 2023

Civil Society Open Letter on the ongoing negotiations regarding the Regulation of Political Advertising: EU Lawmakers must uphold human rights to privacy and free expression

We, the undersigned 27 civil society organisations, are writing to voice our deep concern regarding the worrying developments related to the Regulation on the Targeting and Transparency of Political Advertising. Specifically, we urge EU co-legislators to:

- **Adopt the position of the European Parliament on Article 12 and accompanying recital 47 which aligns with and strengthens the provisions of General Data Protection Regulation (GDPR) and Digital Services Act (DSA) by also prohibiting the processing of observed or inferred personal data, in line with the European Data Protection Board Guidelines 8/2020 on the targeting of social media users.**

- **Ensure the scope of the Regulation remains narrowly focused on political advertising, i.e. excluding direct, unpaid communications between political parties or Civil Society Organisations (CSOs) on the one hand, and their members, former members and recent contacts on the other. So-called "organic" speech by political candidates, parties, CSOs, and individuals should likewise remain out of scope.**

As academic and civil society research and campaigns have made clear, targeting people with messages based on sensitive data on their tracked behaviour and perceived traits threatens privacy, free expression, and freedom from discrimination. It can also undermine the right to freely form an opinion which can have a serious negative impact on election integrity; such tactics should have no place in human rights respecting democracies. Now, however, a 'non-paper' from the European Commission Services, leaked by Contexte and Politico, indicates a strong desire among some negotiators to soften these data protection rules, **including allowing the use of especially sensitive categories of personal data such as ethnicity, religious belief or information on gender or sexual orientation in the targeting of political advertising.**

This proposal goes against what the majority of people want[1]. As underlined by the European Data Protection Supervisor[2], the use of highly sensitive categories of personal data would likely lead to data protection violations under the General Data Protection Regulation (GDPR) and undermine the EU Charter. It would also go against Article 26(3) of **the Digital Services Act - a legally**

[1] See also https://www.globalwitness.org/en/blog/do-people-really-want-personalised-ads-online/

[2] https://edps.europa.eu/data-protection/our-work/publications/opinions/edps-opinion-proposal-regulation-transparency-and_en

binding horizontal framework, which prohibits the use of sensitive categories of personal data in targeting. However, the document seems to suggest that the use of sensitive categories of personal data in political advertising should be permitted in order to enable new or less-resourced political candidates to increase their reach in a more cost-effective way than they would otherwise be able to. This argument hinges on the flawed assumption that sensitive category data is the most relevant basis for determining the most relevant audience for outreach. This proposal only reaffirms the status quo: ongoing abuse of people's privacy in order to discriminate among them on the basis of sensitive data, at least in the context of paid political communication.

The aim of the Regulation should be to prevent the continued widespread and abusive use of personal data in political advertising, not provide a validation for increased misuse of sensitive personal data in order to 'level the playing field' for actors who have not been able to do so historically. While there may be merit, in certain circumstances, for political actors and CSOs to direct their paid communications to groups of people who share demographic characteristics, that goal can largely be achieved through contextual targeting, which is permitted under the DSA[3].

Against this backdrop, we strongly urge negotiators to uphold provisions already prescribed in EU law and focus on strengthening transparency requirements and bolstering, not weakening personal data and privacy protections in political advertising.

To be comprehensive, the Regulation shall apply to amplification, targeting, publication, dissemination, or promotion of political advertising, understood as paid or sponsored content, on all electronic communications services. The aim of this Regulation is to set rules and provide transparency on all types of political advertising taking place around elections, no matter the services or platforms used.

Moreover, underpinning the analysis in the leaked non-paper is that the scope of the Regulation remains undefined, despite early efforts to reassure stakeholders that the Regulation would not infringe upon non-commercial political speech, which were warmly welcomed. Defining political speech about elections and political processes as forms of advertising sets a dangerous precedent by posing a significant risk to free expression, democratic participation and freedom of association.

The Regulation must be appropriately scoped to cover only *paid or sponsored political content* intended to influence the outcome of an electoral process, in recognition that political speech by candidates, political parties, civil society organisations (CSOs), or members of the public is entitled to the highest degree of protection under both European and international law. This includes ensuring that candidates and other political actors are able to express their political views; allowing ad hoc restriction of the dissemination of political candidates' speech would be a

[3] See **Targeted Political Ads Should Be Minimized: Policy Paper** for further elaboration

powerful tool to hand to ruling parties and officials, to wield against political opponents who challenge their power.

Any restriction on freedom of expression, under European human rights law, must be a necessary and proportionate measure to achieve a legitimate aim; while some restrictions on paid political advertising meet this standard, a broad restriction on *any* political speech, including non-commercial political speech[4], must surely fail.

It is vital that the intended purpose of this legislation remains clear and concise: **this Regulation is not a vehicle to address the spread of disinformation or disinformation campaigns coordinated outside the remit of paid/sponsored content such as spam etc**. EU lawmakers have already established a multitude of intersecting legislative and voluntary frameworks to address these issues such as the Code of Practice on Disinformation and the due diligence provisions of the DSA, most notably Articles 34, 35 and 40. Establishing an ill-defined legal framework for political advertising which places disproportionate restrictions on political expression is not only prone to abuse, but sets an international precedent for diminishing international human rights standards.

Twelve months before the EU elections, it is critical to ensure citizens trust the integrity of this democratic process. We call upon EU lawmakers to urgently change course in the negotiations on the file and to reaffirm their commitment to bring more transparency to the political advertising ecosystem as part of a series of several interlinked measures to bolster election integrity and open democratic debate. The EU must avoid putting in place legislation that unintentionally undermines the very values it was built upon.

Signed

Access Now
AlgorithmWatch
Bits of Freedom
Bulgarian Helsinki Committee (BHC)
Centre for Democracy & Technology, Europe Office
Civil Liberties Union for Europe (Liberties)
Civil Rights Defenders
Državljan D / Citizen D
Elektronisk Forpost Norge (EFN)
Epicenter.works
European Center for Not-for-Profit Law (ECNL)

[4] See European Court of Human Rights (ECtHR), Casado Coca v. Spain, Application no. 15450/89, 1994; Peta Deutschland v. Germany, Application no. 43481/09, 2012; Animal Defenders International v. The United Kingdom, Application no. 48876/08, 2013

European Digital Rights (EDRi)
European Partnership for Democracy (EPD)
European Sex workers Alliance (ESWA)
European Youth Forum (YFJ)
Helsinki Foundation for Human Rights (HFHR)
Human Rights Monitoring Institute
Human Rights Watch
Irish Council for Civil Liberties (ICCL)
Justitia
League of Human Rights (LIGA)
NOYB
Panoptykon
Privacy International
Transparency International EU
Vrijschrift.org
Wikimedia Europe