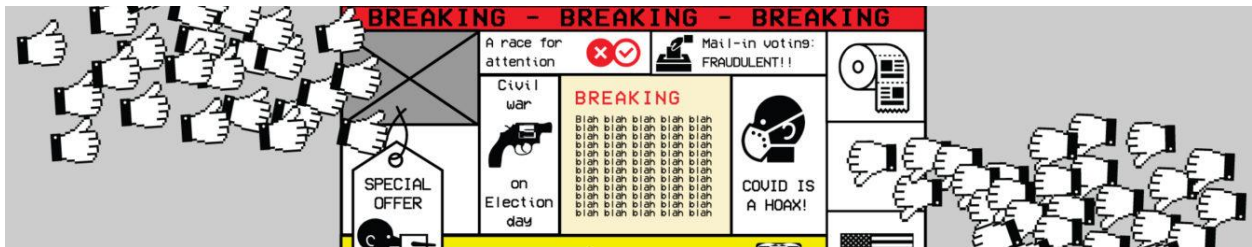


**Access Now's recommendations for trilogue negotiations of the proposed
Regulation on the transparency and targeting of political advertising
([COM\(2021\)0731](#) – C9-0433/2021 – [2021/0381\(COD\)](#))**



Introduction

The proposed Regulation on the transparency and targeting in political advertising is entering the last stage of the legislative process, the trilogue negotiations. In this process, the EU co-legislators must ensure that the proposed Regulation keeps the protection of citizens' fundamental rights and democracy at its core.

The co-legislators must uphold the highest protective standards of fundamental rights while resolving key outstanding issues in the proposed Regulations. These issues include:

1. the definition of political advertising;
2. the prohibition of inferred and observed data used in ad delivery techniques; and
3. an effective enforcement mechanism.

For each issue, we provide below detailed recommendations to the co-legislators.

Definition of political advertising (Article 2 (2))

We urge EU co-legislators to narrow the scope of definition of political advertising in Article 2 (2) to sponsored or paid political content.

The definition of political advertising proposed by both the Council of the European Union and the European Parliament covers the distribution of both paid, sponsored, and unpaid political content. The scope of the definition covers a wide range of activities that take place before political advertising is published, such as its preparation or placement. Both the European Parliament position and the general approach of the Council of the EU is so broad that it might capture the content and speech put forward online by many actors including civil society organizations (CSOs) and important societal issues essential for public discourse. This content should qualify as non-commercial political speech and not fall under the scope of the definition of political advertising.

The jurisprudence of the European Court of Human Rights (ECtHR) states that Article 10 affords a heightened level of protection to non-commercial political speech and underlines that there is little scope under Article 10 for restrictions on debates on questions of public interest.¹ If the existing definition of political advertising is not adequately narrowed to paid political content, it may weaken established boundaries between, on the one side, commercial communications that shall be regulated, and, on the other side, political speech that deserves heightened protections.

The overly broad definition of political advertising covers content that is sponsored and not sponsored but political in nature. Under this broad definition, entities producing content that is political in nature but not paid or sponsored content could fall into the scope of the obligations of data controllers listed in Article 12, even though some of these entities do not process data and/or would not be considered a controller under the GDPR. As a result, unless the definition of political ads is being narrowed, the household exemption established by Article 2 (2) (c) in the GDPR, which is applicable to people sharing content online outside of any payment or sponsorship, would be negated.

The definition of political advertising should therefore be limited to **paid and sponsored political content**. This is in line with the goal of the proposed Regulation which aims at regulating the use and deployment of political ads and related targeted techniques, but not political content shared online as a whole.

The use of personal data in targeting and ad delivery techniques (Article 12)

We strongly encourage EU co-legislators to uphold Article 12 as proposed in the position of the European Parliament, as well as accompanied Recital 47 f).

¹ 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.

The prohibition of the use of sensitive categories of personal data in targeting and ad delivery techniques in the context of political advertising is an important safeguard for the protection of personal data and the right to privacy both guaranteed under the EU Charter of fundamental rights. We therefore support the text proposed in Article 12 in the European Parliament's position. Importantly to complement this text, the newly added Recital 47 f) in the European Parliament's position calls for the prohibition of 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.

Automated ad delivery techniques process enormous amounts of data and help form predictions of what messaging is most relevant for targeted individuals. These techniques uncover and extrapolate hidden patterns in individuals' online behavior and derive personal data that individuals did not consciously or voluntarily disclose. The EDPB Guidelines rightly explain that the processing of large amounts of personal data for the purpose of targeting and ad delivery techniques puts the rights and freedoms of individuals at risk. With Article 12 and its corresponding recital, the EU co-legislators have the potential to positively reinforce people's fundamental rights and address the opacity and negative consequences of targeted political ads ahead of the 2024 elections to the European Parliament. This measure is critical to address possible interference with political messages which means that the success of the Regulation largely depends on ensuring the robustness of this prohibition.

We therefore advise against the use of language in the version of Article 12 from the current general approach of the Council which would create an exception from the prohibition of the use of sensitive categories of personal data. The proposal from Council would allow for the processing to be bypassed if an individual consent to the use of its sensitive data for ads. This proposal erodes the entire concept of the main prohibition itself and undermines a core objective of the Regulation. A practice is either banned or authorized. The exception would reaffirm existing conditions of ongoing abuse of people's sensitive data and will not remedy the existing status quo.

Effective enforcement mechanism (Article 15)

We encourage EU co-legislators to continue strengthening the role of the European Data Protection Board (EDPB) as the main oversight body for compliance with Article 12.

We welcome the test for newly proposed competencies of the EDPB proposed in the European Parliament's position in Article 15. Under this proposed measure, the EDPB may initiate its own investigations of Article 12 violations by Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs) in cases where they act as publishers of political advertising.

As the EDPB is composed of national data protection authorities, in order to enable active monitoring and the consistent application of data protection rules throughout the EU, national DPAs could delegate required responsibilities to the EDPB secretariat who would act on their behalf. Decisions of

the EDPB secretariat should be voted on by the Board by a simple majority to guarantee the effectiveness of decision making processes.

Beyond extended competencies for the EDPB, we call on EU co-legislators to strengthen coordination between all competent supervisory authorities tasked with the monitoring and enforcement of this Regulation. It is crucial to ensure the success of the proposed Regulation, especially when dealing with cross-border cases.

Conclusion

With adequate protections, clear definitions, and a robust enforcement mechanism, the proposed Regulation has the potential to adequately protect the integrity of 2024 European elections from undue influence. To achieve this goal, we urge the co-legislators to consider the above recommendations in their negotiations.

Access Now in the coalition with partner organizations, will continue to advocate for strong measures regulating political advertising that guarantees the protection of political speech and will strengthen civic space in the EU.

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