

# NEWS MEDIA EUROPE

## News Media Europe position on the European Commission Proposal for a Regulation of the European Parliament and of the Council on transparency and targeting of political advertising

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Political advertising plays a uniquely important role in democratic processes which, in light of emerging challenges related to the rule of law and disinformation, requires attention. The proposal is particularly relevant to the media sector, in particular news publishers who disseminate political advertisements both during and outside of electoral cycles.

In this context, news media and advertisers hold a special responsibility towards their audiences, such as readers and subscribers, and the wider public interest, in line with the broader ethical and editorial responsibilities that come with conducting responsible advertising.

Yet, regulating political advertisement must also come with the recognition that a proportionate balance must be struck between the rights and obligations of the various actors involved in the advertising value chain, and that political advertising also plays a legitimate role in the revenue models of European media which must be preserved.

Specifically, the proposal should not lead to an over-regulation of free and independent media that already duly observe consumer and advertising laws and self-regulatory codes of conduct. Nor should the proposal place an excessive burden on an already fragile advertising business model of news media or threaten the integrity of editorial content.

News media organisations are already subject to strict national electoral laws that regulate political advertising. This includes rules on when political advertisements may be published and various disclosure requirements. In this respect news publications are already substantially regulated compared to online platforms when it comes to political advertising.

The proposal of the European Commission follows commendable objectives but must recognise the above concerns and reconcile them in a way that preserves the integrity of editorial content and the ability of media to conduct legitimate advertising business.

### **Definition of political advertising**

The proposal is grounded in a broad definition of “political advertising” in Article 2 (2) that includes issue-based advertising that is liable to influence the outcome of an election or referendum, legislative or regulatory process or voting behaviour.

It follows that certain forms of commercial advertising may fall in the scope of the proposal since such advertising can also be issue-based. For example, a commercial entity may decide to support an advertising campaign related to race or gender equality.

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In our view, this approach does not lend sufficient clarity to determine what advertising falls in the scope of the proposal and thus creates excessive legal uncertainty that is likely to harm both the ability of news media to continue financing editorial content and that of regulators to consistently enforce the proposed rules.

This issue is compounded by a lack of clarity as to what constitutes in Article 2 advertising that is of a “purely private or a purely commercial nature”. It is therefore important the two definitions are given further consideration and attention, both in in the relevant Article 2 and Recitals 15 and 16.

We also do not believe issue-based advertising should necessarily be identified as political advertising depending on whether it is liable to influence political outcomes as it is more relevant to distinguish intent in this context.

Another issue of concern is that the proposed definition in Article 2 (2) even seems to extend beyond what would normally be considered as advertising as it refers to a very broad concept of “message” which could capture content produced under editorial responsibility in the scope of the Regulation rather than advertisements delivered against remuneration. This is clearly not intended, as is clear from Recitals 3, 14, 19 and 29.

We therefore recommend amending Article 2 and the accompanying Recitals 15, 16, 17 and 19 accordingly with the recognition that there is a serious need to clarify that the editorial content of (printed and online) media does not constitute political advertising:

Article 2

[...]

2. ‘political advertising’ means, the preparation, placement, promotion, publication or dissemination, by any means, of a message, **unless it constitutes editorial content under the editorial responsibility of a media service provider or it is of a purely private or purely commercial nature:**

(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~~ **intends** to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.

[...]

For coherence, Recitals 15, 16 and 17 should be amended accordingly:

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(15) There is no existing definition of political advertising or political advertisement at Union level. A common definition is needed to establish the scope of application of the harmonised transparency obligations and rules on targeting and amplification. This definition should cover the many forms that political advertising can take and any means and mode of publication or dissemination within the Union, regardless of whether the source is located within the Union or in a third country. **This definition should not cover messages of private or commercial nature including cases where a commercial stakeholder expresses support to a political topic for branding purposes e.g. education, waste reduction, climate-change, nature and wildlife protection, race and gender equality etc.**

(16) The definition of political advertising should include advertising published or disseminated directly or indirectly by or published or disseminated directly or indirectly for or on behalf of a political actor. Since advertisements by, for or on behalf of a political actor cannot be detached from their activity in their role as political actor, they can be presumed to ~~be liable intend~~ to influence the political debate, ~~except for messages of purely private or purely commercial nature.~~

**(16a NEW) The definition of political advertising should not include editorial content published or disseminated directly by traditional media such as newspapers (online or in print), television and radio, and also increasingly via their online platforms, websites, mobile applications, computer games and other digital interfaces when such editorial content is under the editorial responsibility of a media service provider.**

(17) The publication or dissemination by other actors of a message that is **liable intended** to influence the outcome of an election or referendum, legislative or regulatory process or voting behaviour should also constitute political advertising. In order to determine whether the publication or dissemination of a message is **liable intended** to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour, account should be taken of all relevant 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.~~

[...]

(19) Political views **and messages covering news and current affairs** expressed in the programmes of audiovisual linear broadcasts or published in printed **and online** media without direct payment or equivalent remuneration should not be covered by this Regulation.

It is therefore important to consider how political advertising can be differentiated from commercial issued-based advertising. One solution is to focus on the identity of advertisers, relevant actors and funding with links to the said campaign.

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While in this regard we identify a risk that the proposal will unnecessarily capture certain forms of advertisement, we also consider the risk that it will fail to capture other forms of political advertisements that should indeed be regulated.

In particular, there are legitimate concerns that in certain Member States certain political entities directly own, operate and determine editorial choices in newspapers and news sites, resulting in a situation where political advertising in the form of political leaflets mimic the appearance of legitimate and independent newspapers and news sites.

We remain concerned that such entities would not be required to comply with the rules of the Regulation. This concern further highlights the importance of the role of ownership structures to determine what constitutes political advertising in practice. This should inform the definitions used in the proposal. In this regard, the introduction of an ultimate beneficial owner mechanism or test should be considered to determine whether the rules should apply.

To be clear, this concern does not relate to the political affinities of certain independent news media that ensue from conscious and independent editorial choices and when these newspapers are committed to national editorial self-regulation, but cases where there is no operational or editorial independence from political entities. The political affinities of news publishers must be approached with nuance since many receive funding from political bodies but also remain editorially independent.

All in all, the proposed Regulation should not become an incentive for political parties to shift their advertising budgets towards producing their own non-regulated organic content as this would undermine its very purpose.

## **Transparency requirements for political advertisements**

In order to ensure good standards of transparency in political advertising the proposal introduces a general obligation for publishers of political advertisement to clearly identify and label such advertisement under Article 7.

This obligation entails a duty for advertisers to communicate key information to publishers of political advertisements, such as news media publishers, so that they may in turn fully meet their transparency obligations towards citizens exposed to such advertisements.

This includes information about the identity of advertisers and contact details, the period of ad publication, the value of the political advertising services, and indication of the election or referendum to which an ad is linked, and information about how data is used to serve ads. This information must be made available notably through a transparency notice (which for printed media should be regarded as easily retrievable by way of an internet link) and labelling system.

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Publishers of political advertisements must in turn make “reasonable efforts” under Article 7 (3) to ensure that the information communicated to them is complete before making advertisements available. The application of those rules should be subject to codes of conducts, not least for SMEs, in the Member States.

It is in our view insufficiently clear what could constitute “reasonable efforts” as there is a risk that leaving such an important concept open to interpretation by public authorities could lead to over-enforcement or even abusive enforcement to undermine media independence.

In this context, it is necessary to stress that such rules could have the unintended consequence of facilitating Strategic Lawsuits Against Public Participation (SLAPPs) in certain jurisdictions with insufficient safeguards. It is therefore critical to consider alternative ways of implementing the transparency requirements.

We therefore recommend that a clearer, more prescriptive approach is incorporated in the proposal to ensure that news media have clear and proportionate steps they can take to ensure that they do not become liable for the compliance failures of other actors in the value chain.

One solution could be for advertisers to provide a proof of audit demonstrating compliance with the requirements laid down in the Regulation under Article 6 (3). This way, news media and other publishers of political advertisements could verify with certainty the information communicated to them.

At any rate there is a need to strike a delicate better balance of rights and obligations between the various actors involved in the advertising value chain that recognises the different responsibilities that should come with the different roles played by actors in the advertising value chain. We therefore recommend amending Articles 6 and 7 and Recital 40 accordingly:

Article 6

[...]

3. Providers of political advertising services shall ensure that the information referred to in paragraph 1 is communicated to the political advertising publisher which will disseminate the political advertisement, **together with a verifiable proof of audit upon request**, to enable political advertising publishers to comply with their obligations under this Regulation. That information shall be transmitted, in a timely and accurate manner in accordance with best practice and industry standards, by means of a standardised automated process where technically possible.

[...]

Article 7

[...]

3. 'Political advertising publishers shall ~~make reasonable efforts to~~ ensure that the information referred to in paragraph 1 and 2 is complete **by requesting a verified proof of audit from sponsors and providers of advertising services acting on behalf of sponsors**, and where they find this is not the case, they shall not make available the political advertisement.

[...]

Recital 40

The information to be included in the transparency notice should be provided in the advertisement itself or be easily retrievable on the basis of an indication provided in the advertisement. **For printed publications, this could for example be achieved by means of providing a link to a website, where the transparency notice can be accessed.** The requirement that the information about the transparency notice is to be inter alia clearly visible should entail that it features prominently in or with the advertisement.

[...]

## Record-keeping and transmission of information

In order to ensure high standards of transparency in political advertising the proposal introduces a general obligation under Article 6 for publishers of political advertisements to maintain comprehensive records of political advertisements made available.

Such records must store information on the transparency requirements of the political advertisements and must be made available to competent authorities and interested entities such as vetted researchers, civil society, political actors, electoral observers and journalists upon request and without costs.

When making such information available to competent authorities under Article 10, we believe that granting access to the entirety of the records should constitute a transmission of information that meets the requirements for completeness, accuracy and trustworthiness laid out in the Regulation.

When making such information available to other interested entities under Article 11, it is essential that requests for access to information may be rejected where they are unfounded, repetitive and excessive or lead to a proportionate fee. Unfortunately, the proposal under Art. 11 (6) only foresees the possibility for proportionate fees where the requests are found to be "repetitive and their processing involves significant costs".

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Moreover, it should be clarified in the proposal that the role of publishers of political advertisements is not to conduct the research on behalf of interest entities, or even in their stead, by sorting and providing curated results from relevant records.

On the contrary, it is essential that such research is carried out independently and it is therefore best if the role of publishers of political advertisements such as news media publishers remains confined to providing a neutral access to an online database or records. We therefore recommend amending Article 11 accordingly:

## Article 11

1. Providers of political advertising services shall take the appropriate measures to transmit the information referred to in Article 6 to interested entities upon request and without costs, **for example by granting access to a database.**

Where the provider of political advertising services is a political advertising publisher, it shall also take the appropriate measures to ~~transmit~~ **make available** the information referred to in Article 7 to interested entities upon request and without costs.

[...]

## Reporting obligations in annual financial statements

The proposed Regulation provides for advertising publishers to observe a periodic reporting obligation in their annual financial statements regarding political advertising services under Article 8.

We believe this obligation is excessively far-reaching and redundant considering all other disclosure obligations in Articles 5-7, and the possibility for competent authorities and other interested entities to request access to information under Articles 10 and 11.

The relevant information can therefore also be obtained without inclusion in the annual financial statements, so the requirement from Article 8, which imposes an unnecessary administrative burden, should be removed.

## Targeting and amplification of political advertising

The misuse of personal data to influence elections creates important risks for the integrity of democratic processes, both through manipulation techniques and disinformation campaigns. Unfortunately, there are many recent examples to that effect involving large online platforms.

To address this, the proposal would require under Article 12 that the targeting of online political ads be accompanied by a transparent explanation of profiling techniques used, in line with the existing requirements of the GDPR. Specifically, this would include the making

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available of a description of targeting techniques used, keeping records of those techniques and relevant parameters, and providing users with information so that they may understand the targeting logic and the role of third parties.

In addition, it is foreseen that there should be a general prohibition against the use of sensitive personal data (eg. ethnicity, sexual orientation or religious beliefs) unless users have provided their explicit consent, in line with the existing requirements of the GDPR.

National data protection authorities would also participate in the enforcement of those aspects of the proposal which are relevant to their existing mandates.

Overall, it is our understanding that the proposal does not introduce obligations that are not already found in the GDPR. We view this positively as we do not believe that the proposal is an appropriate instrument to introduce new rules regarding the protection of personal data and privacy, which should be exclusively regulated under the GDPR and ePrivacy frameworks for the purpose of legal certainty.

At the same time, it also becomes important to consider why there may be a perceived need to include such measures in this proposal, if at all, and whether their scope is appropriate. It is clear that there are substantiated and underlying concerns that the above data protection and privacy requirements are currently not being met by online platforms, in particular very large ones.

Several high-profile national elections that took place in recent years in Europe and beyond demonstrate this. The ongoing and consequential failures in the enforcement of the GDPR give rise to legitimate concerns about whether replicating existing GDPR requirements in the proposed instrument will at any rate lead to better enforcement. In our view, the proposed measures are unlikely to affect these shortcomings.

The Commission should clarify whether the proposed Regulation is intended to introduce any new requirements that do not already exist regarding the processing of personal in the GDPR and ePrivacy frameworks, and to substantiate new measures on the basis of a comprehensive impact assessment justifying the burden that would result on small and medium-sized news publishers in particular.

In that sense, we share the reservations expressed by the European Commission Regulatory Scrutiny Board in its opinion of October 2021 on the draft impact assessment and its call to ensure that the proposal should include stronger “mitigation measures for SMEs”, not only with respect to measures related to the targeting and amplification of political advertising but also to record-keeping and transmission of such information and reporting obligations in annual financial statements.