



DOT Europe position paper

Regulation on the transparency and targeting of political advertising

Introduction

DOT Europe welcomes the European Commission's (EC) Regulation on the transparency and targeting of political advertising. This proposal represents a unique opportunity to **harmonise rules** at European Union (EU) level while also covering cross-border provision of online advertisements. It has the potential to tremendously **increase legal certainty** in this field and reduce the current fragmentation across the Single Market while better allocating responsibilities and liability across the value chain.

Our members do have specific policies in place, including appropriate safeguards where necessary, to better oversee political advertising if they allow this type of content on their services. Transparency and user controls are of course at the core of such policies and we welcome the Commission's focus on those elements.

In order to benefit from the additional certainty this legislation can provide, DOT Europe believes that **further clarifications could contribute to making sure that the text is robust enough to provide the necessary guidance, flexible enough to adapt to different scenarios and technologies and future proof.**

The need for a coherent and clear EU wide framework governing political advertising

DOT Europe sees a specific Regulation on political advertising as a valuable tool. In order for this text to live up to its potential, we believe that **ensuring coherence with other pieces of legislation, together with the need for harmonised rules across the EU**, must be the top priorities of co-legislators during the upcoming discussions. Particular attention should be paid to interplay of this proposal with other pieces of legislation touching upon online advertising. It is key to avoid overlaps or conflicting rules with the GDPR as well as the relevant provisions introduced by the Digital Services Act as well as the applicable sections of the Industry's Code of Practice on Disinformation. Together these pieces should provide a coherent approach to tackle political advertising.

DOT Europe and its members have long advocated for the emergence of a strong Single Market in the EU, allowing companies to operate across borders and better comply with sector-specific rules. In the specific case of the provision of political advertising online, clear rules are needed; taking into account the strong and ever-increasing legal fragmentation across Member States.





Crucial definitions should be tightened and clarified

Clear definitions are extremely important as they will impact the entire applicability of the text and its coherence with the current legislative framework. The lack of clear definitions would have three main consequences:

- Different companies would adopt inconsistent and conflicting policies, creating confusion for advertisers and undermining transparency and access to information for citizens ;
- It will make it harder for companies to offer political advertising services, preventing the emergence of new players and the provision of such services across the EU.
- It could compromise the creation of a framework of shared responsibilities across the whole value chain, which would ultimately be detrimental to society.

DOT Europe considers that **two definitions need to be fixed in priority: political advertising and political actors.**

- Political advertising

The definition of political advertising covers a very broad swath of activities undertaken by multiple actors across the advertising ecosystem. As drafted, it introduces ambiguity and uncertainty and risks undermining the Regulation's objectives to achieve an increased meaningful transparency.

It is essential to clarify the definition in order to establish a clear and unambiguous distinction around content that qualifies as political advertising and content which does not. In the current definition, organic content could be included, meaning that, for example, protected political speech posted online by a political actor would be captured in the scope. As this is not the intention of the Regulation, a clearer line shall be drawn between organic content and paid-for content and we recommend for the Regulation to clarify that all organic content is excluded from the scope of the proposal.

While we welcome in principle the exclusion for messages 'of a purely private or a purely commercial nature' in article 2(a), clarifications would be needed to make this exclusion implementable in practice. Would, for example, a message from a political actor on their social media accounts announcing a fundraiser be considered as 'purely private', or an ad for t-shirts labelled 'Black Lives Matter' considered purely commercial? As the current definition of political advertising focuses more on the type of actor running the advertisement than on the content itself, this exclusion would place platforms in the difficult position to judge the intention of a private individual or commercial entity, leaving room for arbitrary or erroneous decisions.

Similarly it would, in certain cases, not be possible to assess whether a message is '*liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour*' as per article 2(b)¹. The most challenging part of the definition is the one referring to 'voting behaviour', as a similar message could influence an individual's voting behaviour in some cases and not in others. Such a broad provision would also potentially encompass other initiatives, such as for example a temporary change of a company's logo in specific circumstances (fight against climate change, support

¹ It is even more difficult when taking into account the language of recital 17.





for LGBTQIA+...) and could harm mobilisation or fundraising calls by NGOs. Finally, while this Regulation will be applicable across the EU, some issues can be appreciated very differently depending on the Member State².

Finally, as briefly touched upon above, we would also recommend clarifying the definition to only cover paid-for advertising. While we understand the objective of covering advertising indirectly run through an influencer or a third party for example, the inclusion of indirect financial compensation in the scope of the Regulation would be disproportionate. It would not be feasible for intermediary services to verify the information, especially since the definition of political advertising mostly relies on the type of actor paying for an advertisement rather than on the content of the advertisement itself. DOT Europe considers that the advertiser, influencer or any other third party involved should be responsible for the disclosure of such information and its accuracy since service providers cannot establish for sure whether it constitutes advertisement or not. They have no control over the third party and the nature of the content being published.

- Political actors

The definition of political actors as foreseen in the draft Regulation is also very broad and problematic, and could result in the misidentification of political actors and of corresponding political advertisements. By narrowing the definition, political advertising service providers would be able to better assess whether the ad falls in the scope of the Regulation, as long as the responsibility to provide accurate information that would be displayed to end-users is provided by advertisers and sponsors.

Among the list of 8 different points listed in the definition, two in particular could unintentionally encompass an important number of individuals or organisations: point (f) which mentions ‘*an unelected member of government at European, national, regional or local level*’ as well as point (h) which states that are considered political actors ‘*any natural or legal person representing or acting on behalf of any of the persons or organisations in points (a) to (g), promoting the political objectives of any of those.*’ The current definition could go as far as to include any civil servant or politician’s administrative assistant. This would mean that hundreds of thousands of individuals could fall under those two categories and wrongly be considered political actors. Similarly, would a private company taking the same stance as an NGO active in the context of a referendum on a societal issue be considered a political actor? It will be difficult in a number of cases for advertising services to guess which individual or organisation is indeed a political actor.

DOT Europe urges the co-legislators to provide clearer guidance by tightening these two definitions, especially as they are the foundation of this draft Regulation. **A clearer definition of political advertising would allow for more coherent company-specific policies and a better protection of civil society.** Overall, on the definitions of political advertising and political actors, the best way to solve

² An ad for a yellow vest was nothing more than an ad for a piece of road safety equipment in 2018 across the EU however, following the yellow jacket movement in France, this equipment became (and still is to some extent) a political statement.





the issues identified would be to ask the advertisers running ads that qualify as political advertising to self-declare and disclose their relationship with political parties or movements. The responsibility in relation to the accuracy of the information provided should lie with the advertiser itself, as service providers will not be able to have access to information about third parties acting on behalf of a political actor. Those measures would also allow for a better distribution of responsibilities and liability among the different stakeholders.

- Political advertising services vs. political advertising publishers

Clarifying roles and responsibilities of the different actors in the scope of the Regulation is necessary to avoid overlaps and make sure that users have access to accurate and verified information in relation to the ads they see. For this reason, DOT Europe recommends:

- Clarifying that the role of political advertising publishers is to “publish” and “disseminate” a political advertisement through a specific interface, as they are the ones presenting ads to end users.
- Clarifying that providers who allow for the purchase of political advertisements do not qualify as political advertising services, but rather as publishers. This would ensure that entities which create and purchase political ads in conjunction with political actors are the best placed to collect the necessary information that political advertising services need to later provide to political advertising publishers.

The allocation of responsibilities along the value chain needs to be streamlined

DOT Europe is a strong supporter of a better allocation of responsibilities in the online world. In this draft Regulation as in other pieces of legislation, all stakeholders should be assigned a level of responsibility that fits their role and influence in the ecosystem. This approach is the most sustainable and efficient one in the long run.

When it comes to the transparency and targeting of political advertising, responsibilities should be clearly distributed across the political advertising value chain. This is particularly important in a Regulation that aims to foster election integrity and help address disinformation online.

On the one hand, advertisers and sponsors are the best placed to accurately provide the information required as they know the context around their ads and are in the best position to assess their nature and identify which ads are ‘political’ i.e. they are best placed to identify whether their ads qualify as political advertising in the first place. Consequently, the law should unambiguously place liability on advertisers to identify whether their ads are in scope, and to provide accurate information to the platform. This can be done by asking advertisers to validate their identity with the platform and provide truthful information via obligatory self-declarations. This mechanism can ensure that the law applies in practice, allowing platforms to rely in good faith on the information and declarations provided by the advertisers and give the necessary incentive for advertisers to provide reliable information.





On the other hand, platforms shall still retain an essential role in the context of this Regulation. Even if they are not the best placed to identify in-scope ads or analysing their context, platforms are the vehicles through which transparency happens and still have to comply with numerous requirements related to transparency. While they should not have to vet the information provided by the advertisers, they can bring a strong added value by requesting from advertisers the information required in accordance with this Regulation.

DOT Europe believes that this clarification of the responsibilities of different providers along the value chain can in practice streamline the enforcement and ensure that this Regulation is efficiently applied while remaining future-proof, adaptable to technological change. By creating **a strong framework of responsibility and accountability for the different actors involved**, the Regulation will achieve its potential and bring concrete benefits to citizens.

Transparency requirements should be more flexible to better tailor to individual users and business users' interests

DOT Europe supports the Commission's approach outlined in article 7 of the draft Regulation and believes that it strikes a delicate balance between the need for accountability and the benefits advertising can bring to citizens, civil society organisations and political actors in the EU. The political nature of advertisements needs to be displayed in a clear manner, allowing users to easily recognise it and to easily access information about it. As mentioned before, in order to appropriately achieve the objective of the Regulation to provide citizens with reliable information when presented with a political advertising, it is key for this law to provide a clear delineation of obligations for platforms that provide advertising services and advertisers. This article could be improved if some targeted but still important changes were to be made.

First of all, article 7 states that the transparency notice is meant to '*enable the wider context of the political advertisement and its aims to be understood*'. Here it would be useful for platforms to have more explanations as to what elements of the transparency notice are supposed to provide the wider context. This information can be very difficult to understand for or to be known by the platform, in particular in the case of local elections for example. Here, we reiterate the need for this information to be provided by the advertisers directly. When it comes to transparency, flexibility is also essential. Given the diversity of services in the scope of this Regulation, **the legislators should make sure that the requirements on the formats to display information to the users are applicable across the ecosystem**. An efficient way to display information on one platform might not be workable on another service. Platforms are best placed to assess how to design in practice appropriate systems to inform their users in an appropriate way.

Clarifications to the concept of 'reasonable efforts' in article 7(3) are also needed. Such ambiguous language will most probably create considerable legal uncertainty which will in turn lead to litigation and increased costs.





The data storage provision of 5 years for transparency notices, outlined in article 7(5) does not seem to be proportionate. DOT Europe recommends a shortening of this provision to 1 year after the advertisement was last presented on the interface. This measure would be fully in line with article 30(1) of the DSA, fostering coherence between the two pieces of legislation.

Regarding Chapter III of the Regulation, DOT Europe considers that a balance needs to be struck between transparency requirements on the one side, and commercial interests as well as users' interests on the other. The disclosure of exact amounts spent by an advertiser on a given platform can be problematic from a commercial point of view. While transparency is paramount in the context of political advertising, publicly disclosing this information goes against the business users' legitimate commercial interests, that the platform is also supposed to protect. The public disclosure of aggregate amounts spent represents the best way to achieve both objectives.

The text should take individual's data privacy into account

The text of the Regulation could also compromise individual users' data privacy, as individual publishers of advertisement could be required to disclose personal contact details. This could seriously compromise an individual's privacy in particular if the ad was linked with a social issue (sexual or political orientation for example). Similarly, the information described in article 12(3)c³ could be very sensitive, especially if it was being made public as part of the transparency notice. DOT Europe recommends the disclosure of targeting parameters with a higher level of generality, ensuring that users' personal data is protected.

Coherence with the current data protection framework is necessary to ensure future-proofness of the text

DOT Europe already highlighted the need to make sure that this Regulation remains flexible and future-proof given how fast changing the online advertising ecosystem is. But the links between this proposal and the EU data protection framework are important as well, especially in Chapter III of the draft Regulation. We however have specific concerns with regards to the following potential inconsistencies:

- **The current text risks being interpreted as covering advertising based on interests explicitly expressed by users rather than covering the use of sensitive categories of data.** For example users may, by simply liking or following a page of a political party or a civil society organisation, see a political advertisement run by them even though they did not consent to the processing of sensitive categories of data. But data linked with a like or a page follow is not considered as a specific category of data under the GDPR, as expressing an interest in a political actor, for example, does not necessarily equate to sharing the same political beliefs. Hence, we call for greater clarity on the fact that this requirement does not seek to reinterpret the GDPR.

³ Article 12(3)c : "provide, together with the political advertisement, additional information necessary to allow the individual concerned to understand the logic involved and the main parameters of the technique used, and the use of third-party data and additional analytical techniques. This information shall comprise the elements set out in Annex II."





- The specific requirements related to targeting and amplifications outlined in the article 12 should also **remain fully aligned with the GDPR**.

The goal of this legislative text should not be to reinterpret specific provisions of the GDPR but rather to slot in as a *lex specialis*. DOT Europe calls for an enhanced consistency between this draft Regulation and GDPR, as well as clarifications on the interplay between these two pieces of legislation.

Conclusion

The online advertising ecosystem is a dynamic and fast moving environment and we have seen a lot of changes in both political advertisements and governing regulations. We are convinced that continuing discussions with stakeholders will help this Regulation to better react to changing contexts or emerging trends that might affect definitions, regulatory provisions or enforcement.

