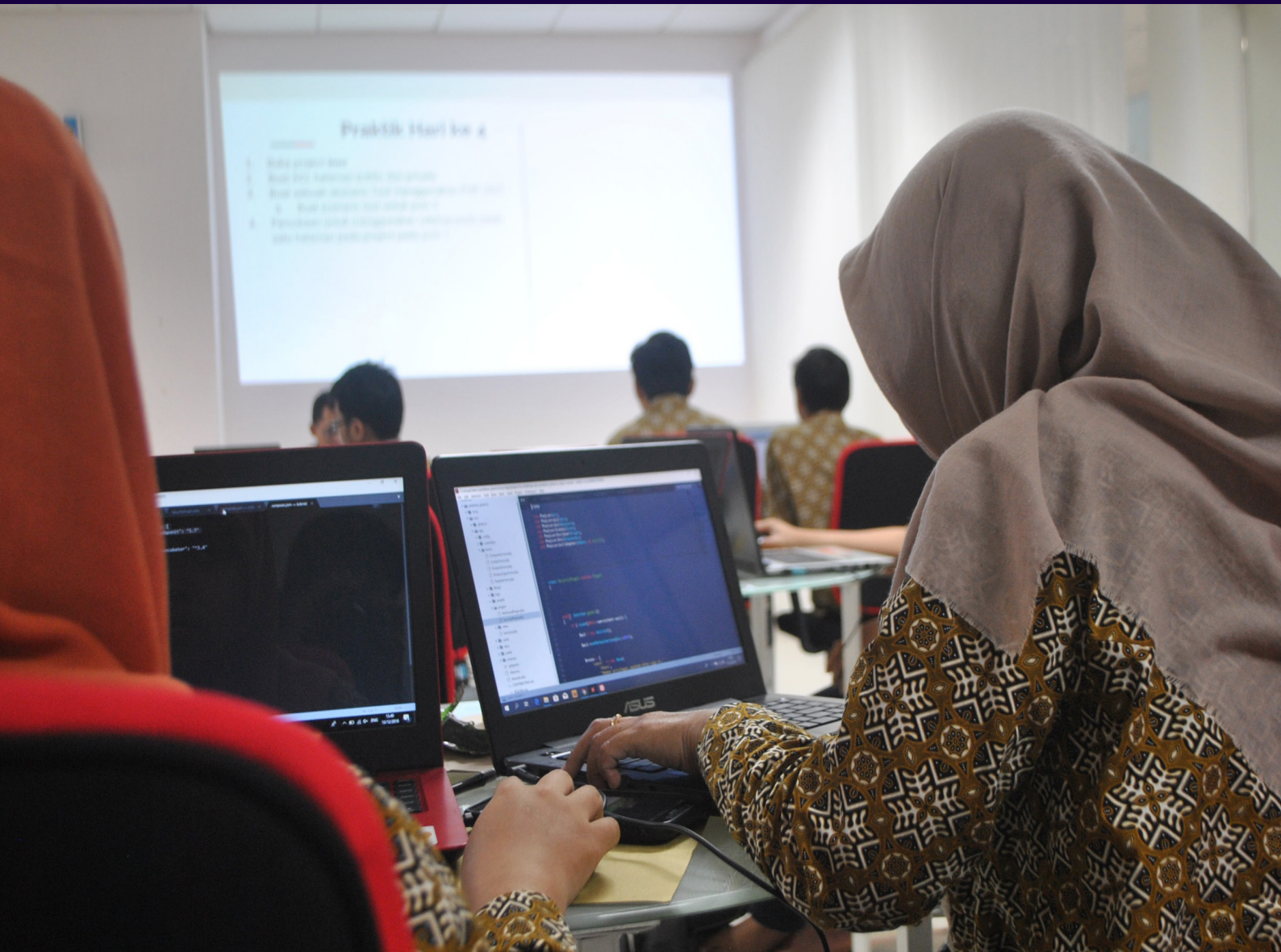


# How to implement the DSA so that the Political Advertising Regulation works in practice?

*In the absence of adequate due diligence obligations  
for VLOPs and VLOSEs, the Political Advertising Regulation  
is a mere paper tiger.*

Fernando Hortal Foronda and Evangelina Antoniou

August 2023



# Contents

Executive summary	3
1. Introduction	4
2. The status quo of political ads identification and the proposal for a Regulation by the Commission	4
2.1. The baseline of identification of political advertising before the Regulation	4
2.2. The Commission's proposal	6
3. The role of the DSA's due diligence obligations to guarantee good implementation of the TTPA	7
3.1 Risk assessment	7
3.1.1 <i>Electoral processes and civic discourse as systemic risks</i>	8
3.2 Risk mitigation	8
3.2.1 <i>Possible risk mitigation measures</i>	8
4. Conclusion	8

## Executive summary

The success of any attempt to regulate political advertising in the online domain must be underpinned by a well-designed and well-functioning system of identifying political advertisements. The [Regulation on the Targeting and Transparency of Political Advertising \(TTPA\)](#) is no exception, and **the identification regime of political ads in Articles 5 and 9 is the cornerstone of this Regulation.**

Despite the importance of ensuring that political advertisements are declared and/or identified as political ads, the TTPA sets up a system that places very few and limited obligations on online platforms and other service providers of advertising services to identify instances of political ads that have not already been declared as political by their sponsor. In other words, the TTPA places more emphasis on the role of the sponsor, who is obliged to **declare their advertisement as political**. At the same time, it minimises the role of the publisher and service providers that act as intermediaries between the platform and the publisher, who - as per the TTPA - are **not obliged to identify when an ad is political, even if, and particularly when, the ad has not been declared as political by the sponsor.**

In the absence of complementary due diligence obligations on online platforms, this is likely to make it easier for rogue and malign actors to unduly influence political processes. They would be able to circumvent the transparency obligations set out by simply not indicating that the ads they are running are political. If these political actors can anticipate, due to the lacuna in TTPA, that publishers and intermediary services will not carry out any identification checks if ads are political, then they can easily assume that by not declaring their ads as political in the first place, they will elude the requirements to disclose the resources spent on the ad, label their political ads as such, and declare their sources of personal data when in use. **This, in turn, renders the entire TTPA ineffective**, as only sponsors playing by the rules are effectively subjected to the obligations under the Regulation.

Therefore, the cornerstone of the TTPA - provided in the TTPA itself - is unsatisfactory and the bedrock that would allow for a successful implementation must be found elsewhere. In this context, the **Digital Services Act (DSA)** can play a crucial role.

The DSA establishes a series of due diligence obligations on providers of very large online platforms (**VLOPs**) and very large online search engines (**VLOSEs**), including the obligation to assess systemic risks stemming from the design or functioning of their services (**Article 34**), and to put in place reasonable, proportionate, and effective mitigation measures to those risks (**Article 35**).

Particularly, according to DSA's Article 34(1)(c), one of these systemic risks is any actual or foreseeable negative effect of services offered by VLOPs and VLOSEs **on electoral processes and civic discourse**. This also constitutes one of the TTPA's aims, namely to make electoral processes in the EU more open and fair as per the [European Commission's Explanatory Memorandum](#). Based on the DSA's provisions, **VLOPs and VLOSEs should be obliged to assess the risk of sponsors of political ads not declaring the ads they publish over VLOPs or VLOSEs as political, hence circumventing the transparency and personal data processing obligations of the DSA. Following this, they ought to put in place measures to mitigate those risks.**

# 1. Introduction

The Regulation on the Transparency and Targeting of Political Advertising (TTPA) poses a particular challenge, as it needs to specify who is responsible for assessing whether or not individual advertisements fall within the definition of political advertising, i.e. how political advertising is identified.

If the political ads' identification regime does not work adequately, the implementation and enforcement of the rules on transparency (TTPA, Chapter II) and techniques of processing personal data (TTPA, Chapter III) will barely be enforced in practice, rendering the Regulation ineffective.

TTPA does not provide a regime of identification of political advertising that can guarantee its own success. However, the DSA, (although with its own challenges regarding its uncertain adequate enforcement), has the potential to provide a regime of identification of political advertising that makes the TTPA work. The success of any attempt to regulate political advertising in the online domain must be underpinned by a well-designed and well-functioning system of identifying political advertisements. The [Regulation on the Targeting and Transparency of Political Advertising \(TTPA\)](#) is no exception, and **the identification regime of political ads in Articles 5 and 9 is the cornerstone of this Regulation.**

## 2. The status quo of political ads identification and the proposal for a Regulation by the Commission

### 2.1 The baseline of identification of political advertising before the Regulation

Currently, as part of the self-regulation initiatives and actions following the adoption of the [Code of Practice on Disinformation](#), platforms deploy specific (fully or partly automated) filters to identify whether an advertisement is political or falls within other categories of ads that are also subject to self-regulation, such as the category of “issue-based” or “social issue” ads. Subsequently, ads that are either declared by their sponsor as political or identified as political by the platform's advertisement filters are subject to certain additional restrictions, compared to purely commercial advertisements.

The weak point of the system currently in place is that the AI filters applied to advertising largely fail to adequately identify ads as political or non-political, meaning that they are more likely to get it wrong than get it right. Based on consultations carried out by EPD with organisations that run ads, this is likely to be caused by the lack of complexity of algorithms, which can easily be tricked by organisations with experience running ads or PR agencies acting on their behalf. In this sense, organisations and PR agencies running ads seek to elude the platform's filter defining an ad as political, with the aim to avoid being labelled as such. This would allow them to use a wider set of targeting techniques, which are restricted by most VLOPs. In some other cases such as in the case of Twitter, where political ads are banned, sponsors of political ads manage to publish ads that constitute political advertising as per Twitter's definition by designing them to deceive the AI filter. In turn, the filter fails to properly identify them and to apply the relevant Twitter rules.

A systematic audit of the identification of political ads was carried out [by researchers at KU Leuven and New York University](#). After auditing roughly 29.6 million ads regarded by Facebook as non-political and 4.2 million ads regarded as political, they [demonstrated](#) that **Facebook is more likely to identify false positives than true positives, while likely failing to identify undeclared political ads as political**. Even ads that were run by accounts belonging to almost any political party in Belgium were not identified as political by Facebook. The table below showcases the extent to which Facebook’s AI deployed to identify political ads fails to correctly identify them as such, delivering more false positives than true positives, and more than three times as many false negatives than true positives.

Figure 1: Le Pochat, V.; Edelson, L.; van Goethem, T.; Joosen, W.; McCoy, D. & Lauinger, T. (2022) An Audit of Facebook’s Political Ad Policy Enforcement. (Pre-publication text)

Table 1

**Table 1: Summary of (in)correctly classified ad counts, across undeclared political ads as labeled by Facebook or by us, within a 14-day observation period after an ad’s first activity.**

Detected as political by Facebook		Not detected by Facebook
<b>40,191 *</b>	<b>32,487 *</b>	<b>116,963 §</b>
False positive (subsection 5.2)	True positive (subsection 5.1)	False negative (subsection 6.3)
Not political		Actually political
<i>Precision: 0.45</i>		<i>Recall: 0.22</i>
		<i>F<sub>1</sub> score: 0.29</i>
* Across all advertisers worldwide; estimate based on 55% FP rate in U.S.		
§ Across political advertisers worldwide.		

To illustrate how glaring the errors of the platforms’ algorithms can be, note that when AlgorithmWatch ran an ad with a job offer in Poland, Facebook identified it as a political ad and suspended it on the premise that the ad’s sponsor had not flagged it as political.

There is a degree of uncertainty around how substantially (and satisfactorily) automatic filters can improve in the near future. It can [be argued](#) that through technological developments alone, redesigning and better training, the algorithms can mitigate the margin of error to such a degree that issues of automated under- or over-identification become irrelevant. Beyond the empirical evidence on the difficulties faced by algorithms to detect political advertising, others [have argued](#) convincingly that there are inherent limits to (solely) employing algorithmic systems to filter content, or implement other legal norms.

In summary, scholars have found that platforms’ margin of error, when identifying if an ad is political, is large. This margin of error can produce adverse consequences as it limits the potential of purely commercial ads – which are taken down when misidentified as political – whilst also allowing unethical political advertisers to evade scrutiny when they declare their ads as non-political.

## 2.2 The Commission's proposal

The primary procedure set up to identify instances of political advertising is established in Article 5 of the TTPA and clarified in the accompanying Recitals 34 & 37. Specifically, Article 5 formulates the obligation for sponsors to identify ads as political and subsequently, for service providers to request the information necessary to comply with the Regulation once the ad has been declared as political by the sponsor.

### *Article 5*

#### *Identification of political advertising services*

1. Providers of advertising services shall request sponsors and providers of advertising services acting on behalf of sponsors to declare whether the advertising service they request the service provider to perform constitutes a political advertising service within the meaning of Article 2(5). Sponsors and providers of advertising services acting on behalf of sponsors shall make such a declaration.
2. Providers of political advertising services shall ensure that the contractual arrangements concluded for the provision of a political advertising service specify how the relevant provisions of this Regulation are complied with.

### *Recital 34*

In view of the importance of guaranteeing in particular the effectiveness of the transparency requirements including to ease their oversight, providers of political advertising services should ensure that the relevant information they collect in the provision of their services, including the indication that an advertisement is political, is provided to the political advertising publisher which brings the political advertisement to the public. In order to support the efficient implementation of this requirement, and the timely and accurate provision of this information, providers of political advertising services should consider and support automating the transmission of information among providers of political advertising services.

### *Recital 37*

While providing for specific requirements, none of the obligations laid down in this Regulation should be understood as imposing a general monitoring obligation on intermediary service providers for political content shared by natural or legal persons, nor should they be understood as imposing a general obligation on intermediary service providers to take proactive measures in relation to illegal content or activities which those providers transmit or store.

The system devised by the Regulation in **Article 5(1)** imposes a mere obligation on **the publisher** (platforms in the case of online ads) **to ask the sponsor of the ad** (or the service provider acting on their behalf) whether the ad they seek to publish over the platform is political. Thus, the main obligation lies with **the sponsors** of the ads (or service providers acting on their behalf) **to declare the ad as political**. As a result, and as made explicit in **Article 5(2)**, providers of political advertising services must request the information necessary to comply with the obligations established in the Regulation once the ad has been declared as political by its sponsor. **Recital 34** clarifies that service providers that are intermediaries between the sponsor and the publisher must transmit the information provided by the sponsor to the publisher of the ad, so as to comply with the transparency obligations foreseen in the Regulation. **Recital 37** explains that the Regulation does not impose a general monitoring obligation on intermediary service providers nor the obligation to take proactive measures in relation to illegal content or activities which those providers transmit or store, in the same vein that Recital 28 of the DSA clarifies that the DSA does not introduce a general monitoring obligation.

The Regulation has a secondary system of identifying political ads (**Article 9**), which is based on the users of the platforms flagging the unlawfulness of a political ad to the platform, so that the platform takes action in relation to the relevant ad. However, it is unclear how effective this system will be, given that most viewers will not be familiar with the Regulation and their right to flag an undeclared political ad as unlawful, that this will likely be a time-consuming endeavour for individuals, and that it is not clear how the platform will proceed following these notices.

#### *Article 9*

##### *Indicating possibly unlawful political advertisements*

1. Where they provide political advertising services, advertising publishers shall put in place mechanisms to enable individuals to notify them, free of charge, that a particular advertisement which they have published does not comply with this Regulation.
2. Information on how to notify political advertisements as referred to in paragraph 1 shall be user friendly and easy to access, including from the transparency notice.
3. Political advertising publishers shall allow for the submission of the information referred to in paragraph 1 by electronic means. The political advertising publisher shall inform individuals of the follow up given to the notification as referred to in paragraph 1.
4. Repetitive notifications under paragraph 1 regarding the same advertisement or advertising campaign may be responded to collectively, including by reference to an announcement on *the website of the political advertising publisher concerned*.

The treatment of notices submitted by trusted flaggers with priority and without delay, as established in Article 19 of the DSA, would also apply to this Regulation in cases where the service provider is a hosting service, as defined in the DSA – i.e. for online ads. However, trusted flaggers vetted according to the procedures set in the DSA are not best suited to flag political advertisements, as they are not required to have political independence or relevant experience to identify instances of political advertising.

The approach taken in the TTPA fails to be pragmatic and to address the fact that many undeclared political ads are not identified by platforms. This occurs particularly in the cases where public scrutiny is most needed – such as when personal data is being unlawfully processed or when the amounts of money spent are not consistent with the funding of political organisations. The [finding](#) that a large number of political ads online are “false negatives”, namely that they are:

- (a) Not declared as political by the sponsor;
- (b) Not identified as political by the platform; but
- (c) Actually political

indicates that it is necessary to impose identification obligations not only upon sponsors, but also upon platforms. Only then could the Regulation possibly address with success the issues with political advertising.

### 3. The role of the DSA’s due diligence obligations to guarantee a good implementation of the TTPA

The DSA establishes a series of **due diligence obligations on providers of VLOPs and VLOSEs**, which are the main providers of political advertising services in the EU. These include the requirements to **identify a series of systemic risks** stemming from the services they provide **and to put in place measures to mitigate such risks**. It is paramount that VLOPs and VLOSEs that provide advertising services address the risks of under-identification of political advertising.

#### 3.1 Risk assessment

According to the DSA, VLOPs and VLOSEs must diligently identify, analyse, and assess any **systemic risks** in the EU stemming from the design or functioning of their service and related systems. Specifically, the DSA indicates that providers of VLOPs and VLOSEs must take into account the systems they use for selecting and presenting advertisements (**Article 34(2)(d)**). In addition, DSA’s Recital 90 states that when VLOPs and VLOSEs conduct their risk assessment and mitigation (regarding risk mitigation, see 3.2.), they should ensure that their approach is based on “*the best available information and scientific insights*”. For that purpose, and according to the same recital, it is pertinent to **involve and consult, inter alia, independent experts and civil society organisations**. Their engagement is deemed essential, as independent experts and civil society make valuable contributions with their updated insights and evidence on systemic risks and thus ensure that the risk assessment exercised by VLOPs and VLOSEs effectively adheres to “*the best available information and scientific insights*”. Ultimately, the involvement of these actors provides an excellent opportunity to incorporate fundamental rights-based solutions to these issues.



### *3.1.1 Electoral processes and civic discourse as a systemic risk*

With regard to what might constitute a systemic risk, the DSA provides that providers of VLOPs and VLOSEs must conduct risk assessments on a range of systemic risks. For example, **Article 34(1)(c)** specifies that any actual or foreseeable negative effect on electoral processes and civic discourse is considered a systemic risk. Following this provision, it is safe to conclude that the under-identification of political advertising (see the table above) can have both actual and foreseeable negative effects on electoral processes and civic discourse. Evidently, as stated in Section 2 of this paper, the main issues revolve around the under-identification of undeclared political ads and the over-identification of ads that are in fact commercial, but misidentified as political.

## **3.2 Risk mitigation**

Subsequent to the identification of systemic risks, providers of VLOPs and VLOSEs are required to **mitigate the risks** with particular consideration of the impacts of such measures on fundamental rights. **Article 35(1)(e)** specifies that platforms may adapt their advertising systems by adopting targeted measures to limit or adjust the presentation of advertisements in association with the services they provide.

### *3.2.1 Possible risk mitigation measures*

It is difficult to determine which risk mitigation measures are the most adequate to prevent undeclared political ads from not being identified as political ads by VLOPs and VLOSEs, while also protecting the exercise of fundamental rights. The cyclical nature of the risk assessments exercises should allow stakeholders to learn from previous experiences and suggest better risk mitigation measures.

However, fully or partly automated filters seem incompatible with a high level of protection of fundamental rights, including the freedom of expression. Therefore, investing in the necessary resources to ensure a human review to carry out the identification exercise - even if algorithmically assisted - seems necessary. The manner in which **algorithmic systems could assist human reviewers** as well as the number of human reviewers needed and the training they require could be best discussed in the framework of recurring risk assessment exercises.

## **4. Conclusion**

The Regulation on Political Advertising (TTPA) will only be fit for purpose through the implementation of the DSA's provisions on VLOPs and VLOSEs, mainly Article 35 on adequate risk mitigation measures. With these measures, sponsors of ads (which are presented to users on these platforms or search engines) will be prevented from not declaring their ads as political, when in fact they shall be declared as such in light of the definition given in the TTPA.

In this regard, providers of VLOPs will need to closely cooperate with regulators, civil society, and other experts. Regulators will need to ensure that providers of VLOPs assess the risk of under-identifying undeclared political ads, and civil society and experts will need to contribute to the risk assessment exercises of VLOPs and VLOSEs, to both showcase the extent to which under-identification of political advertising occurs and suggest fundamental rights-aligned solutions to this problem.



*Research for and publication of this policy brief is supported by a grant from the Open Society Initiative for Europe within the Open Society Foundations.*