

The necessity and legal basis for an EU regulation on online political advertising



The unregulated use of online political advertising poses challenges and risks that require public intervention. Here, we outline what the main problems with online political advertising are and **why the EU is best set and legally capable** of offering a satisfactory response through a Regulation.

Why should we regulate online political ads?

The emergence of online advertising has transformed political campaigning and caused new problems that require policy responses: such as a lack of transparency, a regulatory vacuum, and the abuse of personal data. These reinforce each other, and can be easily exploited by political actors.

1) The **use of data to target audiences** poses various challenges. First, the processing of data, often collected with flawed consent by users, is a threat to [the right to privacy and protection of personal data](#).

Second, personal data can be used to **target small, homogeneous audiences**. This makes debunking misleading messages and disinformation more difficult, as content can be fed to concrete audiences, and fosters political and affective **polarisation** and **filter bubbles**. Furthermore, opaque targeting poses threats to the right to information of those citizens [not targeted by ads](#). Microtargeting can also be used to **demobilise voters strategically**, as political actors can easily [target those less motivated to vote](#) among the likely voters of their political opponents with ads aimed at reducing their trust in the democratic system – while hiding that they are the sponsors of those ads. Beyond targeting, [platforms' optimization algorithms](#) only exacerbate this problem.

2) **There are neither sufficient transparency obligations at the national level nor adequate oversight by national**

authorities. This has, for instance, led online [political advertising to happen year-round](#) and made it **easier for dark and big money to capture politics and policy, in violation of electoral rules** in most [European Member States](#). Anyone can purchase political ads that campaign on behalf of or against certain political parties while evading any public scrutiny. Moreover, political parties' own spending online remains largely opaque. Unlike ads in newspapers, only a fraction of the population can see political ads due to targeting, thereby inhibiting public scrutiny. Platforms are not only failing to be transparent about political advertisement to public authorities, but also to the public over ad libraries, leaving watchdogs such as [CSOs and journalists](#) **incapable of holding political actors and economic operators accountable**.

3) Furthermore, EU citizens struggle **to identify whether the political content they see online are ads or organic content** (i.e., a piece of news or content shared by a friend). [37% of EU citizens](#) recall not being able to identify if a piece of online content they saw was a political ad or not. This figure suggests that a larger percentage of EU citizens have been misled to identify political ads as organic content. Member States **authorities have struggled to implement regulation on political advertising**, even when the regulation was updated to specifically address online advertising. In most cases, insufficient cooperation by large platforms like Google and Facebook and other Member States, as well as [uncoordinated enforcement and monitoring](#), are seen as key causes for the lack of success of EU Member States in implementing electoral legislation in the online sphere.

Moreover, the fragmentation of the Single Market is now a certain risk, as Member States either have passed or are considering to introduce divergent regulation that will pose unavoidable obstacles to the cross-border provision of online political advertising services, including recent regulation in

[Czechia](#), [France](#), [Germany](#) and [Ireland](#) among others. This is particularly relevant in view of European Parliament elections, but also for the voting of mobile EU citizens in their national elections and for service providers that operate on a cross border basis.

What about non-legislative measures?

The European Union has in the last four years implemented two non-legislative interventions to address these problems. First, the Commission issued a [Recommendation](#) to national authorities and political parties on how to enhance transparency of online campaigning. Whereas no evaluation of the implementation of the recommendations has been made public, there is **no discernible evidence that these recommendations have been implemented systematically**.

Second, the [Code of Practice against Disinformation](#) was introduced – a voluntary self-regulatory commitment by major platforms including transparency of political advertising. Despite marginally improving the monitoring and oversight of political advertising in the EU and providing useful insight into online political advertising for policy-makers, the **Code was only partially implemented by platforms, failing to solve many of the problems regarding political advertising**.

Is there legal basis for an EU Regulation?

First, it must be noted that the EU already regulates the collection and processing of personal data in the [General Data Protection Regulation](#) (GDPR) and will imminently regulate online advertising through the [Digital Services Act](#) (DSA). The Regulation merely introduces *additional* restrictions to the collection and processing of data in political advertising and *additional* transparency requirements for political advertising to those foreseen in the GDPR and DSA respectively. In other words, online political advertising is already regulated by the EU, as general rules on data collection, data processing and online advertising apply to online political advertising.

Second, for the EU to legitimately regulate online political advertising, it must be proven that such legislation is in compliance with the principles of **a) conferral, b) subsidiarity, and c) proportionality**.

a) [Article 114 TFEU](#) confers on the Union the competence to harmonise regulations to establish and guarantee the functioning of the Single Market when at least one of two specific circumstances established in [settled case-law](#) apply, namely that: (i) differences between national [regulations directly obstruct](#) the [functioning](#) of the internal market, or (ii) regulation is needed to [prevent](#) the [emergence](#) of [future obstacles](#) to [trade](#) as a result of divergences in national laws. The Commission [provides abundant evidence](#) that **each sufficient condition is met**, showcasing that **national regulations vary in scope, content and effect**, define political advertising differently, set different transparency standards across the Single Market and sometimes even ban the provision of online advertising services.

Chapter III of the Regulation (targeting and amplification) has [Article 16\(2\) TFEU](#) (the right to protection of personal data) as its legal basis. There is widespread consensus on its adequacy as legal basis for Chapter III.

b) The Regulation follows the [principle of subsidiarity](#), as many Member States [have tried and failed](#) to establish and enforce high levels of transparency of political advertising on large online platforms, mostly due to the extraterritorial nature of the main publishers of political ads online, but also due to the cross-border nature of online advertising itself. Guaranteeing electoral integrity online cannot be achieved by Member States alone and requires EU action. **Member States are able to oversee offline political advertisement**, which is provided by national economic operators, **but lack the legal means and policy tools to successfully monitor online advertising**.

c) Last, the [principle of proportionality](#) is followed as **other forms of EU action** (such as the soft-law interventions discussed above) **have proven insufficient** to attain the objectives of the Treaties – in this case, establishing and guaranteeing the functioning of the Single Market and protecting personal data – alongside the political objective of ensuring transparency. The Regulation does not cover content such as common rules on the financing of political parties out of proportionality considerations.

In other words, the Regulation of online political advertising at the EU level is needed and has a sound and solid legal basis.