

# ERGA Position Paper on the Regulation on the transparency and targeting of political advertising

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## ERGA Position Paper on the Regulation on the transparency and targeting of political advertising

Political advertising is not a service like others because it allows political parties, candidates and their supporters to directly convey their message to voters and to shape the political debate. This can potentially influence public opinion, and possibly alter the functioning of democracy.

Recognizing the changes in the media landscape and, in particular, in the market for political advertising (see Annex 3, pages 16-17), **ERGA shares the EU Commission's goal of ensuring fair and transparent campaigns, both online and offline, as well as a more harmonized approach in the implementation of EU democratic values and fundamental rights, as a milestone for the audiovisual sector.**

While the overall assessment of the proposal is very positive, ERGA would like to highlight some areas for further improvement, to ensure a greater impact in terms of electoral integrity and protection of fundamental rights. The recommendations are grouped into the following areas.

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### *Scope of the Regulation and level of harmonization*

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Being aware that the national legislations governing political advertising in the EU are often extremely stringent as to broadcaster conduct but do not apply an equal level of accountability to the online platforms (see Annex 1, pages 11-13), **ERGA welcomes the legislative proposal of the European Commission, and its goal to move towards a more even playing field that applies to traditional media, video sharing platforms and social networks while recognising their difference in editorial control and business models.**

ERGA acknowledges that the combined reading of Article 2, Paragraph 2, Recital 1 and 2 of the proposed Regulation leads to the conclusion that the new rules are designed to apply both to traditional/offline media and to services available online (for example, online media and digital platforms). Nevertheless, since the circulation of political ads and issue-based ads online could have, in certain cases, a negative impact on democratic processes, ERGA recommends that Article 1 and the corresponding Recitals further clarify this aspect.

As regards the **level of harmonization of the proposed Regulation** (see Annex 4, section 4.1, pages 18-19), ERGA highlights that the European Member States do not have a common or harmonised approach towards the proposed Regulation of political advertising. In some European countries, the provision of political advertising services is a relatively unrestricted form of political communication, while, in many others, it is either allowed only during the pre-election period or it is completely prohibited. ERGA understands that the Member States which already apply a ban on political ads are allowed to maintain such ban. However, in order to have more clarity, **ERGA recommends that Article 3 and the corresponding Recitals of the proposed Regulation clarify this aspect by stipulating that this Regulation does not interfere with the existing national rules.**

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## Definitions

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Moving to the **assessment on the definitions** of the proposed Regulation (see Annex 4, section 4.2, pages 20-27), ERGA:

- appreciates that the definition of Article 2, Paragraph 2 letter a) is vast enough to include not only the political actors but also those who act “for or on behalf” of them. This means that the “interest groups” supporting a political actor will also be subject to this Regulation;
- asks for further clarification regarding the concepts of “purely commercial nature” and “purely private nature” mentioned in Article 2, Paragraph 2 letter a) and Recital 16;
- acknowledges that the combined reading of Article 1, Article 2, Paragraph 1, and Recitals 3, 29 and 14 of the proposed Regulation leads to the conclusion that **political advertising consist of services that are “normally” provided against remuneration and that, consequently, the proposed Regulation also applies to situations where a political advertising service is provided without a remuneration in return;**
- **suggests a narrower definition for the** messages indicated in Article 2, Paragraph 2 letter b (the so called “**issue-based ads**”), **that takes into account the purpose of the message:** “*a message which is liable and designed to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour*”;
- recommends that the Regulation could contain a provision that gives the possibility (not the obligation) to the competent authority of each Member State to draft and **update a list of issues of political relevance** valid at the national level before each election;
- with regards to the notion of targeting and amplification techniques, Article 2, Paragraph 8, ERGA highlights that **targeting and amplification techniques** are two completely different activities and have two different purposes and recommends having **two different definitions**.

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## *The political advertising value chain and the obligations foreseen in the proposed Regulation*

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As regards the **obligations for the service providers** (see Annex 4, section 4.3, pages 27-33), recognizing that nowadays the political advertising market is characterised by heterogeneity of players and activities, by a variety of formats that advertising content can take<sup>1</sup> and by the

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<sup>1</sup> For example, paid content (including so called issue-based ads), promotion in rankings, sponsored search results, paid targeted content, promotion of political views within commercial advertisements or through endorsers and influencers, organic advertising.

significant use of technology, especially online<sup>2</sup>, **ERGA welcomes the broad approach adopted by the Commission, imposing obligations on the whole value chain of political advertising** (that is, on all the “political advertising service providers”) **and not only on online platforms, appreciating the forward looking and technologically neutral features of this approach.**

ERGA also **welcomes the identification of asymmetric transparency obligations for the various individuals of the value chain of political advertising services:** the publisher, in fact, represents the interface with the end user, and its role has greater relevance for the effectiveness of the Regulation.

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### *The repositories*

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ERGA notices that, although the repositories have been expressly mentioned in Article 7 and in Recital 42 of the proposed Regulation, with specific reference to the advertising repositories that the Very Large Online Platforms and Search Engines (VLOPSEs) should keep according to Article 30 of Digital Services Act, the proposed Regulation does not expressly impose on all the publishers’ specific obligations regarding the keeping of **political advertising repositories**. Now, based on its specific experience gathered when monitoring the platforms’ compliance to the provisions of the Code of Practice on disinformation precisely with reference to the transparency of political ads, **ERGA believes that the lack of a precise provision on repositories seriously reduces the effectiveness of the Regulation and risks jeopardizing the efficiency of any compliance monitoring activity** (see Annex 4, section 4.4, pages 34-39).

Having real time access to the platforms’ data is extremely difficult, and the platforms allow it with extreme caution. Because of that, the obligation to keep repositories is of paramount importance for the monitoring of compliance to the Regulation provisions. Therefore ERGA recommends that:

- the proposed Regulation should dedicate a **specific article** to the ad repositories and **recommends that each publisher of political ads (irrespective of its size) should be obliged to keep its own political ad repository**, which must be accessible **in real time** and **designed in accordance with precise standards** identified by ERGA or by the EU Commission in a set of guidelines. Through such repositories, public authorities and citizens should be able to link the ads they see to the political actor on whose behalf the ad is published and its political and sponsored nature, see how much has been spent on the ads or on the campaign, see why they are targeted with an ad and what data source was used for this targeting;

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<sup>2</sup> At every stage of the value chain, political advertising is very often assisted by different technological resources, such as software for content creation, web analytics, artificial intelligence systems, technological platforms to manage advertising transactions, and algorithms which incentivise the process of spreading online contents, rank the various content showed in search results and personalise the content received. These technologies are useful for targeting audience, designing content, buying and selling advertising spaces, optimizing political campaigns.

- all the **publishers should provide APIs** (always designed according to guidelines drafted by ERGA or by the EU Commission) **that allow competent authorities, as well as researchers and other relevant stakeholders, to access the political ads repositories in real time** and carry out an in-depth analysis of the data, to understand the reach of the advertisements and at the same time to be able to compare the results of the analysis carried out among various repositories.

Naturally, **the obligations regarding political advertising repositories and related APIs should be calibrated on the size of the publishers and might contain some exemptions** (for example, a temporary exemption lasting one or two years) **or a lighter approach for SMEs and start-ups.**

In addition, although the scope of this Opinion does not cover the provisions of the DSA, it does not seem wrong to mention that, in order to allow effective monitoring of the provisions of this Regulation, **ERGA believes that all the online platforms, not only the VLOPSEs mentioned in Article 30 of Digital Services Act, should be obliged to keep a general ad repository** in addition to the repository of political ads. It might be useful to stress that keeping the ad repository is not a particularly burdensome obligation for the platforms since the sale of advertising slots and spaces is the main source of income for all the online platforms. It seems obvious, therefore, that each and every online platform (and not only the VLOPSEs) keep its own general ad repository, because such a repository is essential for their business model. Of course, also in this case, exemptions (for example, a temporary exemption lasting one or two years) or a lighter approach could be adopted for SMEs and start-ups.

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### *Targeting and amplification techniques*

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**ERGA believes that both targeting and amplification techniques should be strictly regulated and limited** (see Annex 4, section 4.5, pages 39-44). In particular:

- ERGA recommends that the Regulation explicitly mentions that all the obligations of the GDPR also apply to targeting and amplification activities for political ads and that further restrictions are introduced as regards the categories of data that may be processed for the purposes of political advertising;
- Recital 47 of the proposed Regulation explains that inferred data *“is increasingly used to target political messages”* and that *“this negatively impacts the democratic process”*. Therefore ERGA recommends **limiting the targeting and amplification activities only to the data for which the user has provided his explicit consent** (i.e. gender, age, location, and other identity data that are provided by the users to the platform) **and prohibiting targeting on the basis of data inferred by the platform (and not provided by the user), at least as regards the inferred data that allows companies to show the political preferences of the user;**
- the proposed Regulation should take into account the new provisions of the DSA, in particular Article 24, Paragraph 3;

- considers amplification techniques in the case of political advertising as high-risk artificial intelligence systems, as defined within the proposed Artificial Intelligence Act (AI Act) and recommends to designate them as such.

In any case, **the competent authorities, including audiovisual media services regulators, should be given the task of adopting specific guidelines, in addition to those mentioned in Article 12, Paragraph 3, aimed at further limiting the use of targeting or amplification techniques.** Besides, as regards the identification of competent authorities for this specific sector, ERGA recommends that also media oversight bodies must be equipped with data access, regulatory and enforcement powers in this area in order to be able to assess phenomena like illegal targeting and illegal amplification techniques.

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### *Enforcement, remedies and sanctions*

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As regards the enforcement and sanctioning regime, ERGA understands that the proposed Regulation does not intend to interfere with other nationally regulated aspects and does not want to deprive the Member States from their freedom to choose what sanctions may be suitable and adequate for the breaches to the Regulation's provisions. For this reason, Article 16 states that *"in relation to Articles 5 to 11, 13 and 14 Member States shall lay down rules on sanctions including administrative fines and financial penalties applicable to providers of political advertising services under their jurisdiction for infringements of the present Regulation"*, and leaves to the privacy regulators the task to impose administrative fines for the violation of Article 12.

However, ERGA highlights that online advertising services are very often provided on a cross-border basis; experience gained in adjacent sectors (e.g. the audiovisual sector) shows that in such a situation, it would only take a single Member State not to adopt adequate sanctions to jeopardize the success of the whole Regulation. For this reason, **ERGA recommends that Article 16 should introduce a more coordinated and consistent sanctioning regime and an additional framework for proportionate, dissuasive, and effective sanctions in all Member States** (see Annex 4, section 4.6, pages 44-47).

ERGA recognizes that the main aim of this draft Regulation is to foster transparency of political ads and to encourage and facilitate compliance. In ERGA's view, therefore, the initial reaction to a breach of the Regulation's provisions should be aimed at restoring the transparency by promptly correcting the errors and repairing the damage done. Only in case the publisher does not correct the mistake and repair the damage (or in case it is too late to do so) a financial penalty should be applied. Following this approach, **ERGA recommends the adoption of a two-tier sanctioning system initially imposing the publisher to remedy the damage done by the violation of the rules:**

1. the Regulation should give the competent authorities the corrective powers, once the infringement has been spotted, not only to issue a warning against a non-compliant

provider but also to issue an adequately reasoned order to any actor of the value chain to promptly correct the errors and repair the damage done<sup>3</sup>;

2. a financial penalty should be issued at a later stage, only if the order has not been complied with in the specified timeline. The financial penalty should be addressed to the actor responsible for the offence, which is not necessarily the publisher.

This two-tier system would solve the problem of restoring the damage done by the violation because it would impose on the publisher the obligation to correct the ad to ensure adequate transparency, also (if possible) by sending a message to all the users who have already seen the ad.

In case there is the need to issue a financial penalty, to ensure that the Member States have sufficient autonomy, **ERGA recommends the identification of minimum and maximum penalty ranges**. Both ranges are needed: the minimum range, in particular, is highly needed because some Member States might decide not to sanction the breaches to the proposed Regulation - or to apply pecuniary fines that are irrelevant in order to induce the publishers to establish their headquarters in the territory. These ranges may be expressed as fixed amounts of money or in percentages, and the percentages may refer to the turnover of the company or to the value of the political ad campaign. The most common solution is to refer the percentage to the turnover of the company. In Annex 4, section 4.6 to this opinion, ERGA proposes two options for identifying the minimum and the maximum percentages:

1. the fine could be calculated in percentage of the turnover, in line with the provisions of the Digital Service Act;
2. the fine could be a mix of fixed amounts and percentage in order to give the Member States greater flexibility (see examples in Annex 4, section 4.6).

Special exemptions or reductions of the penalties may be introduced for micro- and small enterprises in order not to undermine the good functioning of the market and the emergence of new players and start-ups.

Finally, in case the actor within the value chain which failed to comply with the obligations of the Regulation is located outside the EU or in case it is impossible for the competent authority to identify it, as a last resort, ERGA suggests that the sanction may be imposed on different actors of the value chain. The internal contractual relation among the subjects who are part of that value chain will then allow the actor that was sanctioned to be reimbursed by the other actor who actually breached the law. This approach, which imposes one single sanction to only one of the subjects of the value chain, is already adopted in some Member States for other types of violations (e.g., gambling and betting). Naturally, in accordance with the principle of “*ne bis in idem*”, the same sanction cannot be issued more than once for the same breach.

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<sup>3</sup> The order might as well be accompanied by a moderate financial penalty: without a financial penalty, in fact, the publishers might be less stimulated to check the correctness of the transparency note, knowing that the competent authority’s initial reaction would be only a letter asking to correct the ad.



**ERGA appreciates the consistency of the proposed Regulation with the DSA** (see Annex 4, section 4.7, pages 47-50) as regards the treatment of the providers that are not based in the EU (Article 14), the way the transparency notices should be made visible and user-friendly (Article 7); the identification of competent authorities and the requested independence features and specific powers such as:

- a) requesting to access data, documents or any necessary information from providers,
- b) issuing warnings to the providers for the non-compliance with the Regulation;
- c) publishing a statement which identifies the legal and natural person(s) responsible for the infringement and the nature of that infringement;
- d) imposing sanctions, including administrative fines and financial penalties.

ERGA also appreciates the explicit reference to the national regulatory authorities or bodies under Article 30 of the AVMS Directive (Recital 58), as well as to ERGA itself, as a suitable body to ensure cooperation among authorities competent for the oversight of the Regulation (Recital 60), together with the European Cooperation Network on Elections. However, **since both the European Cooperation Network on Elections and ERGA are mentioned by Recital 60 as “existing structures” that should be used to facilitate cooperation among competent authorities, it would be consistent that either none of the two is mentioned in Article 15, Paragraph 9, or that they are both mentioned.**

Besides, as regards the identification of the single point of contact at the EU level (Article 15, Paragraph 7), ERGA raises some concerns:

- in one of its clauses, Recital 62 stipulates that *“the contact point should, if possible, be a member of the European Cooperation Network on Elections”*. ERGA highlights that not many national regulatory authorities under Article 30 of the AVMS Directive are also part of the European Cooperation Network on Elections. Consequently, if Recital 62 was applied, the audiovisual regulators would have fewer chances to be appointed “contact point”. But the logic of this clause is difficult to understand: if the main goal of the contact points is to ensure proper coordination among the Member States and between the Member States and the Commission, ERGA firmly acknowledges the importance of cooperation, and it has proved in many occasions to be able to foster synergies between the Commission and its NRAs, who (on the other hand) have enough competences and experience to be tasked with the responsibility to monitor the implementation of this Regulation. There is no reason, therefore, to limit the chances of the audio-visual regulators to be appointed “contact points” only because they are not part of the European Cooperation Network on Elections. For this reason, **ERGA recommends that the mentioned clause in Recital 62 is deleted;**
- as regards the coordination needed to solve cross border cases and the role of the digital service coordinators and the reference (made by Article 15, Paragraph 2, of the proposed Regulation) to Article 45 and 46 of the DSA, **ERGA confirms the substantial concerns expressed with reference to the DSC in its position paper related to the DSA published in June 2021:**

- when dealing with cross-sectoral issues in which different fields of expertise are involved, different institutions have to be heard and a working coordination has to be ensured. ERGA agrees that it is helpful to establish mechanisms to ensure consistent application of the DSA rules throughout the different regulatory sectors involved and, moreover, to allow Member States to appoint a particular independent authority as a focal point for inter-sectoral cross-border enforcement issues. However, ERGA clarifies that its remit should be focused on a set of transversal, essentially administrative, coordination functions and that, in any case, the DSC/contact point should have no hierarchical/supervision role towards other NRAs involved in the operational enforcement of the Regulation;
- if the cross-border case only concerns NRAs from the same regulatory field, ERGA is convinced that there is no need for the involvement of the DSC/contact points. Such sector-specific cross-border enforcement mechanisms between only the sectoral authorities of the countries involved, are more effective to solve the issues at stake. Therefore, ERGA proposes that these cases should be dealt with only between sector-specific NRAs directly involved in the (sector-specific) matter. If mediation becomes necessary on cases concerning only systemic online content Regulation, they should be handled within ERGA (the corresponding sector-specific network), which is already equipped with a mediation function.

## Annex 1 - Background

Political advertising is not a service like others because it allows political parties, candidates and their supporters to directly convey their message to voters<sup>4</sup> and to shape the political debate. This can potentially influence public opinion, and possibly alter the functioning of democracy.

The vast majority of jurisdictions have rules setting precise standards during the political campaigns and addressing political actors, with regard to issues of fairness and impartiality of information, concerning the equitable allocation of free airtime or the possibility to purchase airtime in an equal and non-discriminatory manner, as well as with regard to the treatment of opinion polls and the value of having a day of reflection (or silence) in the day preceding the election.

In 1999, the Committee of Ministers of the Council of Europe issued a recommendation on measures concerning media coverage of election campaigns<sup>5</sup>, aimed at ensuring that the Member States established frameworks for media coverage of elections that would support the principles of fairness, balance and impartiality, and contribute to free and democratic elections. The recommendation stated that where paid political advertising is permitted, Member States should ensure that all political candidates and parties “are treated in an equal and non-discriminatory manner”. For example, in the Member States where political parties and candidates are permitted to buy advertising space for electoral purposes, regulatory frameworks should ensure that “the possibility of buying advertising space should be available to all contending parties, and on equal conditions and rates of payment”. Also significant is the fact that “the public should be made aware that the message is a paid political advertisement”. Thus, the recommendation stresses the importance of clear identification of political advertising. The Committee also recommended that “Member States may consider introducing a provision in their regulatory frameworks to limit the amount of political advertising space which a given party or candidate can purchase.”

The updated version of the recommendation on measures concerning media coverage of election campaigns was published in 2007<sup>6</sup>; it reiterated the standards from the 1999 recommendation but added that “Member States should apply the principles concerning the broadcast media and rules on “fairness, balance and impartiality” to “non-linear audiovisual

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<sup>4</sup> By running ads on various types of media, candidates can reach audiences that otherwise may not have been paying attention to the election and build name recognition, highlight important issues, and call attention to the shortcomings of their opponents.

<sup>5</sup> Recommendation No. R (99) 15 of the Committee of Ministers to member States on measures concerning media coverage of election campaigns, 9 September 1999, available at [https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset\\_publisher/aDXmrol0vvsU/content/recommendation-no-r-99-15-of-the-committee-of-ministers-to-member-states-on-measures-concerning-media-coverage-of-election-campaigns?inheritRedirect=false](https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-no-r-99-15-of-the-committee-of-ministers-to-member-states-on-measures-concerning-media-coverage-of-election-campaigns?inheritRedirect=false)

<sup>6</sup> Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, available at [https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset\\_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2007-15-of-the-committee-of-ministers-to-member-states-on-measures-concerning-media-coverage-of-election-campaigns?inheritRedirect=false](https://www.coe.int/en/web/freedom-expression/committee-of-ministers-adopted-texts/-/asset_publisher/aDXmrol0vvsU/content/recommendation-cm-rec-2007-15-of-the-committee-of-ministers-to-member-states-on-measures-concerning-media-coverage-of-election-campaigns?inheritRedirect=false)

media services of public service media”. The targets of both recommendations, in any case, were broadcast media.

Online political advertising has been facing increasing scrutiny since 2017 when the Parliamentary Assembly of the Council of Europe voted a resolution on the challenges and accountability of online media<sup>7</sup> and the Council of Europe published an extensive report on information disorder.<sup>8</sup> The Cambridge Analytica scandal in 2018 and the most recent elections in the US contributed to igniting the debate.<sup>9</sup>

Acknowledging the changes in the media landscape, on 25 November 2021, the European Commission published a proposal to regulate political advertising, introducing transparency obligations for marketers and strict limits to the use of sensitive personal information. The aim of the proposal is twofold: the first objective is to contribute to the proper functioning of the internal market for political advertising and related services; the second one is to protect natural persons with regard to the processing of personal data.

As recalled in the Explanatory Memorandum, the Regulation is proposed as a complementary and coordinated tool with other provisions: the 2018 electoral package; the Regulation on the protection of personal data; the EU Code of Practice on disinformation; the Digital Services Act; as well as the Regulation relating to the statute and financing of European political parties and European political foundations.

The ERGA Report on “Notion of disinformation” published in 2020<sup>10</sup> shows that the European Member States do not have a common or harmonised approach towards the Regulation of political advertising. In some European countries, political advertising is a relatively unrestricted form of political communication, while, in many others, political advertising is either allowed only during the pre-election period (for example Germany) or it is completely prohibited (for example, in Ireland, France, Italy, Portugal, Switzerland, and the UK). For a more detailed analysis of the legislation in the various EU countries, see chapter 3.1.

National legislations focus on traditional broadcasters (both public and private/commercial), recognizing that they have always played a major role in informing the public, offering diverse opinions and content. As such, they are subject to heavy regulatory requirements when it comes to political advertising and must comply with rules governing what they may broadcast and in what manner they may broadcast it in order to meet various requirements enacted under relevant laws that aim to ensure the proper functioning of democracy. Such rules cover political content and are often extremely stringent as to broadcaster conduct, but do not apply

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<sup>7</sup> Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability, 25 January 2017.

<sup>8</sup> Council of Europe DGI (2017): Information Disorder: Toward an interdisciplinary framework for research and policy making.

<sup>9</sup> According to the website “The Newyorker” (<https://www.newyorker.com/tech/annals-of-technology/the-problem-of-political-advertising-on-social-media>) in the course of the 2016 Presidential election, Donald Trump and Hillary Clinton spent eighty-one million dollars on Facebook ads. In the following election, candidates spent more than sixty-three million dollars marketing themselves on Facebook and Google. Trump’s campaign, in particular, spent more than anyone else’s, with a total of twenty-four million dollars in digital-ad buys.

<sup>10</sup> <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>

to online platforms, which enjoy a considerable degree of freedom in deciding how to sell slots and spaces to political ads providers: both in the Member States that ban political advertising and in the Member States that have rules in place related to political advertising and ensure that broadcasters have editorial responsibility for the content they cater to viewers, online platforms are not subject to an equal level of accountability in their decision to distribute political advertising.

Political parties in certain countries have made commitments with regards to political advertising online (for example, in 2021 the Dutch political parties and global online platforms signed the first national Code of Conduct on online political advertising in the European Union<sup>11</sup>), but the issue is much broader: political advertising online is often not done directly by political parties or candidates, but rather by interest groups, and is not declared at all.

Besides, several researchers and experts<sup>12</sup> have highlighted the importance of the so-called “issue-based ads”, which often contribute more to the outcome of elections than actual political advertising placed by political parties or candidates: since they are often not regulated<sup>13</sup> and more difficult to detect, issue-based ads can be even more harmful than political ads, negatively impacting democratic processes. As such, they have a comparable or larger impact on the democratic discourse and should therefore be treated in the same way as traditional political advertising.

**ERGA welcomes the legislative proposal of the European Commission and its goal to move towards a more even playing field that applies at the same time to traditional media, video sharing platforms and social networks while recognising their difference in editorial control and business models.**

**ERGA shares the EU Commission’s goal of ensuring fair and transparent campaigns, both online and offline, as well as a more harmonized approach in the implementation of EU democratic values and fundamental rights, as a milestone for the audiovisual sector.**

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<sup>11</sup> <https://www.idea.int/news-media/news/first-national-code-conduct-online-political-advertising-european-union-signed-dutch>

<sup>12</sup> See for instance the Report published by EDMO at this webpage: <https://edmo.eu/wp-content/uploads/2021/12/Issue-Based-Advertising-Report.pdf>. And also, Vera Sosnovik and Oana Goga. 2021. Understanding the Complexity of Detecting Political Ads. In Proceedings of the Web Conference 2021 (WWW '21), April 19–23, 2021, Ljubljana, Slovenia. ACM, New York, NY, USA, 12 pages. <https://doi.org/10.1145/3442381.3450049>

<sup>13</sup> The aforementioned ERGA report on “Notion of disinformation”, explains that “EU Member State legislation does not include definitions of issue-based advertising. As mentioned above, the Member States that treat political advertising in the broad sense of applying to matters of public interest, capture issue-based advertising, as does the European Court of Human Rights.”

## Annex 2 – Why is ERGA looking into this Regulation

ERGA has ever since its inception been driven by a desire to provide a platform for the exchange of best practices with the goal to safeguard freedom of expression, freedom of reception and accessibility of audiovisual media services across Member States to safeguard media pluralism and to promote citizens' right to information. Safeguarding these freedoms is even more important in the context of elections.

That is also why in 2018, ERGA focused on the issue of internal media plurality as of the least harmonized area and prepared an overview of relevant regulations across the Member States, highlighting the need for more intense cooperation among regulators as well as with other relevant stakeholders, including researchers, in this area.<sup>14</sup> The conclusions of the report also led to more intense work of ERGA members on disinformation in the following years.

ERGA monitored the implementation of the Code of Practice on disinformation and provided recommendations to ensure that the Code becomes a more effective tool. Protection of the integrity of elections has been one of the key elements of the Code, and ERGA has published its recommendations in this area in several reports and positions focusing on harmonization of definitions, better access to data and for co-regulatory mechanism to strengthen the monitoring framework.<sup>15</sup>

As ERGA outlined in its position on European Democracy Action Plan (EDAP) in 2020 *“in conjunction with the Audiovisual Media Services Directive, the Action Plan, together with the Digital Services Act, are the two major initiatives of the European Commission that have the potential to overhaul the current regulatory framework for audiovisual media services and video-sharing platform services in Europe, and thus provide the relevant regulatory authorities with tools to protect and promote core European values, such as freedom of expression and freedom to make informed decisions in national or European elections<sup>16</sup>.”* Drawing also from its work in the area of studying a phenomenon of disinformation, ERGA has consistently advocated for transparency in the activities of digital platforms and especially in the context of elections. Furthermore, ERGA members have, throughout published reports and positions, consistently called for platforms' to provide necessary data for research and supported efforts to harmonize definitions of key concepts, such as disinformation and political advertising.

In order to provide a framework for seamless cooperation between NRAs, ERGA has established a Memorandum of Understanding to address the issue of cross-border cases. Therefore ERGA appreciates the explicit reference to the national regulatory authorities or bodies under Article 30 of the AVMS Directive (Recital 58), as well as to ERGA, as a suitable body to ensure cooperation among authorities competent for the oversight of the Regulation (Recital 60).

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<sup>14</sup> Report on internal plurality, [http://documents.rvr.sk/\\_file\\_system/ERGA-2018-07\\_-\\_SG1\\_-\\_Report\\_on\\_internal\\_plurality.pdf](http://documents.rvr.sk/_file_system/ERGA-2018-07_-_SG1_-_Report_on_internal_plurality.pdf)

<sup>15</sup> ERGA Report on disinformation: Assessment of the implementation of the Code of Practice, <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>; ERGA Recommendations for the new Code of Practice on Disinformation, [https://erga-online.eu/wp-content/uploads/2021/11/ERGA-RECOMMENDATIONS-2021\\_11.pdf](https://erga-online.eu/wp-content/uploads/2021/11/ERGA-RECOMMENDATIONS-2021_11.pdf)

<sup>16</sup> ERGA Position Paper on the European Democracy Action Plan, [https://erga-online.eu/wp-content/uploads/2020/10/ERGA\\_Position\\_EDAP-Consultation\\_Summary.pdf](https://erga-online.eu/wp-content/uploads/2020/10/ERGA_Position_EDAP-Consultation_Summary.pdf)

As outlined here, ERGA and its members have a long track record of providing their respective national and EU-wide expertise in the form of recommendations to the European Commission and to all relevant stakeholders in the area of transparency and targeting of political advertising. The following chapters will recall these recommendations and address them in more detail as they relate to the proposed Regulation.

## Annex 3 – The market for political advertising: main features and trends

As the impact assessment accompanying the proposal of Regulation underlines, the European market for political advertising (specifically online) has steadily grown in recent years in terms of economic size, even if it remains relatively small when compared with the market in the US or Canada. It has also increasingly become a cross-border market, where flows of money move between the Member States, and has shifted progressively away from the traditional media into the online environment, because of the relatively low cost of advertising online and the possibility to easily reach large audiences while optimizing the advertisements' effectiveness.<sup>17</sup>

In this respect, the evolution of the political advertising market largely reflects the changes affecting the advertising market in general. Estimates by *E-marketer* state that the worldwide ad spending during 2021 has increased by 19.9% and that most of that additional new money comes from digital, which has risen by 29.1% in the same year. Moreover, forecasts for 2022 show that worldwide digital ad spending will reach \$491.70 billion this year and zoom past half a trillion next year.<sup>18</sup>

A similar trend can be appreciated in the political advertising market, where the online distribution channel has become more and more relevant over the last years. For example, data from the Google Transparency Report show that the online political advertising spending on Google in Europe has reached the amount of about €27 million starting from March 2019, with more than 200.000 ads published on Google, YouTube and partners properties.<sup>19</sup> Data relating to the campaign for the European Parliament elections in 2019 are also significant: online political advertising carried out by the European Parliament reached 292 million views between February and May 2019, for a total expenditure of almost €1.5 million in the same period.<sup>20</sup>

The rising relevance of the online environment has stimulated innovation in political advertising services, also expanding the number of actors and bringing out new resources and tools. Essentially, in traditional political advertising, there is a direct relationship among three main players: the political actor (supported by his funders), an intermediary (consultant or advertising agent) and the publisher (print or broadcast media, radio or tv). In the new (online) market, those relationships become more complex and do not require any contact between the publisher and the sponsor or the political actor because they involve new players and activities: new forms of funding, like crowdfunding and micro-funding; new intermediaries such as data analysis firms that use data on voters and audience to enhance the effectiveness of political messages; advertising intermediaries operating in the online programmatic advertising trading system (demand side and sell side platforms, ad server, ad exchanges, ad networks, data management platforms, ad verification). Finally, many different publishers can

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<sup>17</sup> See Impact Assessment Report accompanying the proposal of Regulation, Annex 5. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021SC0355&from=EN>

<sup>18</sup> E-marketer, *Worldwide Digital Ad Spending Year-End Update*, Nov. 2021.

<sup>19</sup> Google Transparency Report. <https://transparencyreport.google.com/>.

<sup>20</sup> Statista, Online political advertising in Europe. <https://www.statista.com/topics/5455/online-political-advertising-in-europe/#dossierKeyfigures>



distribute political advertisements: not only media outlets (traditional and online), but also news websites and other online platforms with different business models and services (e.g., news aggregators, search engines, social media, etc.).

Today, the market for political advertising services is a complex and fast evolving environment, where many different market players operate, such as political and marketing consultancies, advertising and campaign organisations, data brokerage and data analysis firms, media outlets and online platforms. They offer a wide range of diversified services corresponding to different activities along the value chain (Fig. 1). End-users of this type of services are typically political actors (political parties, candidates, officials) that plan and finance political advertisements and campaigns directly or through political party foundations, lobby organisations and other supporters.

**Fig. 1 – Political advertising value chain scheme as from the proposal of Regulation**



In addition to the heterogeneity of players and activities, the political advertising market is also characterised by a variety of formats that advertising content can take and by the significant use of technology, especially online. Indeed, like commercial advertising, political advertising may consist of paid content (including so called issue-based ads), promotion in rankings, sponsored search results, paid targeted content, promotion of political views within commercial advertisements or through endorsers and influencers, organic advertising.

Furthermore, at every stage of the value chain, political advertising is very often assisted by different technological resources, such as software for content creation, web analytics, artificial intelligence systems, technological platforms to manage advertising transactions. These technologies are useful for targeting audience, designing content, buying and selling advertising spaces, optimizing political campaigns. They also impact indirectly, to the extent that they create a favourable context to spread political messages. Online platforms’ algorithms are a key element in incentivising the process of spreading online content. This is particularly true for search algorithms, which rank the various content shown in search results, and for the algorithms used by social networks, which automatically personalise the content received, enabling users to act and react in multiple ways and so contributing to the dissemination of the advertisement.

## Annex 4 – Analysis of the provisions of the proposed Regulation and recommendations

### 4.1 – Scope of the Regulation and level of harmonization

The ERGA Report on “Notion of disinformation” published in 2020<sup>21</sup> shows that the EU Member States do not have a common or harmonised approach towards the regulation of political advertising. In some European countries the provision of political advertising services is a relatively unrestricted form of political communication, while, in many others, it is either allowed only during the pre-election period (for example Germany) or is completely prohibited (for example, in Ireland, France, Italy, Portugal, Switzerland, and the UK).

As stated in chapter 2.2 of the mentioned ERGA Report, “it is important to reiterate that the many EU Member States prohibit various forms of political advertising in audiovisual media, and the legislation applicable to political advertising is usually in relation to its prohibition”. For instance, in Italy – where political advertising is banned from national TV - the time allocated to each political party on television is closely monitored, broadcasters face high compliance costs to provide equal treatment to all political parties and may be sanctioned by the Italian NRA if the timeslots are not balanced.

Second, some countries prohibit political advertising in a broad sense (i.e., **purpose or objective dimension**), such as Norway, which prohibits advertisements to “promote belief systems or political messages”, and Ireland, which prohibits advertisements directed towards a “political end”. Similarly, in Denmark, the term “political” is used in a wider sense than “party political,” and includes campaigning for the purposes of influencing legislation or executive action by local or national (including foreign) governments. In Germany, political, ideological, and religious advertisements are prohibited under the Interstate Media Treaty (MStV), which entered into force on 7th November 2020. The prohibition only applies to broadcasting, on-demand media services, and audio services and does not apply to social media as such. This type of broad approach aligns with the European Court’s approach of treating political advertising in a very broad sense i.e. concerning matters of public interest, and not merely election-related advertisements.

Third, there are those Member States that define political advertising in a narrow sense related to elections and candidates (i.e., **actor dimension**), such as Romania, which prohibits “political advertising, whether positive or negative, in connection to political parties, politicians, political messages” (except during elections). Similarly, in Croatia, advertising of political parties, coalitions, and independent members of representative bodies is prohibited (except during elections).”

Now, the mentioned ERGA Report on “Notion of disinformation” clarifies that both in the Member States that ban political advertising and in the Member States that have rules in place related to political advertising and ensure that broadcasters have editorial responsibility for the content they cater to viewers, the rules and limitations do not apply to online platforms.

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<sup>21</sup> <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>

These actors enjoy a considerable degree of freedom in deciding how to sell slots and spaces to political ads providers and are not subject to an equal level of accountability.

ERGA acknowledges that the combined reading of Article 2, Paragraph 2, Recital 1 and 2 of the proposed Regulation leads to the conclusion that the new rules is designed to apply both to offline and online media and services. Nevertheless, since the circulation of political ads and issue-based ads online could have, in certain cases, a negative impact on democratic processes, **ERGA recommends that Article 1 and the corresponding Recitals further clarify that the proposed Regulation applies both to the traditional/offline media and also to the services available online (for example online media and digital platforms).** This statement would confirm the scope of the proposed Regulation and foster the adoption of a level playing field applicable at the same time to traditional media, video/content sharing platforms and social networks.

Furthermore, with regard to the Member States which already apply a ban on political ads, it would be beneficial to further clarify the following aspect.

Article 3 of the proposed Regulation (“Level of harmonization”) states that *“Member States shall not maintain or introduce, on grounds related to transparency, provisions or measures diverging from those laid down in this Regulation. The provisions of political advertising services shall not be prohibited nor restricted on grounds related to transparency when the requirements of this Regulation are complied with.”*

To clarify the concept, Recital 11 explains that *“Member States should not maintain or introduce, in their national laws, provisions diverging from those laid down in this Regulation, in particular more or less stringent provisions to ensure a different level of transparency in political advertising. Full harmonisation of the transparency requirements linked to political advertisement increases legal certainty and reduces the fragmentation of the obligations that service providers meet in the context of political advertising”*. At the same time, Recital 13 of the Regulation stipulates that *“This Regulation should not affect the substantive content of political advertising nor rules regulating the display of political advertising including the so-called silence periods preceding the elections”*. Also, the explanatory memorandum attached to the proposed Regulation states that the Regulation *“does not go beyond what is necessary and in particular does not address other issues related to political advertising beyond transparency and the use of targeting techniques. It does not interfere with other aspects regulated at national level like the legality of the content of political advertisement and the periods during which advertisements are permitted, or the nature of participants in the democratic process.”*<sup>22</sup>

The aforementioned statements show that the objective of the proposed Regulation is quite specific and focuses essentially on the transparency of the political advertisements and campaigns for users. Indeed, the content of political advertisements remains regulated on the basis of relevant national and EU law, which means that, beyond the transparency obligations, the initiative does not interfere with the substantive content of political messages.

Therefore ERGA understands that the Member States, which already apply a ban on political ads are allowed to maintain such ban. However, in order to have more clarity, **ERGA recommends that Article 3 and the corresponding Recitals of the proposed Regulation clarify**

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<sup>22</sup> Explanatory memorandum to the proposed regulation on political ads, page 7, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0731>.

**this aspect, by stipulating that this Regulation does not interfere with the existing national rules.**

## 4.2 – Definitions

In its premises, the proposed Regulation on the "transparency and targeting of political advertising" stresses that *"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."*

In its report *"Notions of disinformation and related concepts"*<sup>23</sup>, published in 2021, ERGA already emphasised that the *"EU Member States adopt different definitions of political advertising"*<sup>24</sup>, *"do not specifically define issue-based advertising"* and that *"many EU Member States prohibit various forms of political advertising in audiovisual media, and the legislation applicable to political advertising is usually in relation to its prohibition"*. That report highlights that some scholars have already examined the approaches to political and issue-based advertising in Europe and tried to come up with meaningful definitions.<sup>25</sup>

In the 2018 EU Code of Practice on disinformation<sup>26</sup>, political advertising is defined as *"advertisements advocating for or against the election of a candidate or passage of referenda in national and European elections,"* while issue-based advertising is not defined. In the revised and strengthened Code of Practice on Disinformation, published on 16 June 2022 (the

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<sup>23</sup> <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>

<sup>24</sup> For example, Lithuania adopts the following definition: "Political advertising means information disseminated by a state politician, political party, its member, a political campaign participant, on behalf and/or in the interest thereof, in any form and through any means, for payment or without charge, during a political campaign period or between political campaigns, where such information is aimed at influencing voters' motivation when voting at an election or a referendum, or where it is disseminated with the purpose of campaigning for a state politician, political party, its member or a political campaign participant as well as their ideas, objectives or programme Part 8 of Article 2 of the Law on Funding of Political Campaigns and Control of Funding Thereof of the Republic of Lithuania ". And Hungary adopts the following definition: "Political advertisement' shall mean any program published, the purpose of which is to enhance or advocate support for a political party or political movement, or the government, or which promotes the name, objectives, activities, slogan, or emblem of such entities, which is displayed and/or published in a manner similar to that of an advertisement point 55 of Article 203 of the Media Act.

<sup>25</sup> For example, Van Hoboken explains that the approach of the European Court of Human Rights takes a "broad view" of what constitutes political advertising, which includes not only paid advertisements concerning political parties and candidates during elections but also so-called issue-based ads, such as paid advertisements on "matters of broader public interest" from campaign groups and NGOs. "A number of EU Member States", the ERGA report says, "adopt an approach to political advertising which aligns with the European Court of Human Rights' approach".

<sup>26</sup> <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>

“2022 Code of Practice<sup>27</sup>”), the Code’s Signatories have committed to define “political and issue advertising” in line with the definition of “political advertising” set out in the proposed Regulation, and to review this situation within the first year of the 2022 Code’s operation.<sup>28</sup>

As some EU Member States do not have specific legislation on political ads, or have different definitions of political advertising, and most of them do not define issue-based advertising, a common, clear and detailed definition seems necessary.

To solve this problem, the proposed Regulation defines “political advertising” at Article 2, Paragraph 2: *“political advertising means the preparation, placement, promotion, publication or dissemination, by any means, of a message:*

- a) by, for or on behalf of a political actor<sup>29</sup>, unless it is of a purely private or a purely commercial nature; or*
- b) which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour”.*

In its Statement published in March<sup>30</sup>, ERGA welcomed *“the idea to provide a common definition of political advertising which will empower national electoral bodies to engage with platforms much more effectively, while still providing room for adaptation by national electoral laws”*. But while the actor-based definition of the proposed Regulation (that is, letter “a” of Article 2, Paragraph 2) was *“greatly welcomed, as it covers both political parties and those paid by political parties<sup>31</sup> to campaign”*, ERGA underlined that, with regard to letter b of Article 2, Paragraph 2, *“the proposed definition is very wide and risks to encompass cases that are not strictly and directly related to “political advertising”*. For this reason, the ERGA

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<sup>27</sup> <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>

<sup>28</sup> Specifically, the 2022 Code of Practice provides that “[s]hould there be no political agreement on the definition of ‘political advertising’ in the context of the negotiations on the European Commission’s proposal for a Regulation on the transparency and targeting of political advertising within the first year of the Code’s operation or should this Regulation not include a definition of ‘political advertising’ which adequately covers ‘issue advertising’ ... the Signatories will come together with the Task-force to establish working definitions of political advertising and issue advertising that can serve as baseline for this chapter.” 2022 Code of Practice, Measure 4.2, at p.10.

<sup>29</sup> ‘political actor’ means any of the following:

- a) a political party within the meaning of Article 2(1) Regulation (EU, Euratom) No 1141/2014 or an entity directly or indirectly related to the sphere of activity of such a political party;
- b) a political alliance within the meaning of Article 2(2) of Regulation (EU, Euratom) No 1141/2014;
- c) a European political party within the meaning of Article 2(3) Regulation (EU, Euratom) No 1141/2014;
- d) a candidate for any elected office at European, national, regional and local level, or for one of the leadership positions within a political party;
- e) an elected official within a public institution at European, national, regional or local level;
- f) an unelected member of government at European, national, regional or local level;
- g) a political campaign organisation with or without legal personality, established to achieve a specific outcome in an election or referendum;
- h) 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.

<sup>30</sup> <https://erga-online.eu/wp-content/uploads/2022/03/2022-03-ERGA-Statement-on-political-advertising-final-adopted.pdf>

<sup>31</sup> For instance influencers.

Statement concluded, *“Further clarifications of the definitions would be appropriate in order to avoid any potential risk of undermining fundamental rights, such as, freedom of speech”*. The opinions of the Statement are therefore reiterated in this Report. In particular, ERGA:

- with regards to art 2, Paragraph 2 letter a):

- appreciates that letter a) defines the notion of political ads following the “actor-based definition” that is adopted by several Member States (see section 4.1);<sup>32</sup>
- **appreciates that the definition of Article 2, Paragraph 2 letter a) is vast enough to include not only the political actors, but also those who act “for or on behalf” of them. This means that the “interest groups<sup>33</sup>” supporting a political actor will also be subject to this Regulation;**
- requires clarifications on the extent to which the exemption of “purely commercial nature” and “purely private nature” may apply to the messages defined by Art. 2, Paragraph 2, letter a) of the proposed Regulation. Recital 16 seems to hint that the “purely private nature” of the message refers to the substance/content of the message rather than the method of transmission, but this is just an interpretation. Instead, understanding the meaning of “purely private nature” is a very important issue and it deserves to be clarified. In fact, it is worthwhile highlighting that posting messages in private groups (accessible only with the approval of one or more users) can become important channels for disseminating content, which can reach many people and play a significant role in the dissemination of ideas/ content with a potential to influence the outcome of elections or referenda. For example, the Telegram groups/channels are often used to reach hundreds of users at the same time<sup>34</sup> and hundreds of thousands of users in few seconds thanks to the use of amplification techniques and of automated re-circulation software. ERGA would like to avoid that Art. 2, Paragraph 2, letter a) may be interpreted in a way that excludes the practice of posting messages in private groups from the application of the proposed Regulation. Therefore ERGA **asks for further clarification regarding the concepts of “purely commercial nature” and “purely private nature” mentioned in Article 2, Paragraph 2 letter a) and Recital 16**. Besides, also the exemption for “purely commercial” messages is difficult to interpret.<sup>35</sup> a Recital could better explain this exemption by giving **examples of situations that would fall under its scope;**

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<sup>32</sup> <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>

<sup>33</sup> For example trade unions, lobby associations, NGOs.

<sup>34</sup> For example, in 2020 AGCOM, the Italian NRA began a proceeding for infringement of copyright on the Telegram platform after the complaint of the Italian Publishers Association (AIE), which led to the block of 26 channels on which literary works were illegally disseminated. These channels provided more than that 350 thousand users a very big catalogue of digital editions of literary works, regularly usable in download mode.

<sup>35</sup> EGTA, the European Group of Television Advertising, suggests amending the political advertising definition in Article 2 to exclude commercial communications and limit the scope of the proposal.

- the definition of “political advertising” does not mention the **issue of “remuneration”** of the ad. In other words, it does not explain whether a political message that is not paid for may be considered political advertising or not. On this matter, the opinions are very different: the ERGA Report on “Notion of disinformation” explains that *“political advertising applies in a broad sense to paid advertising on matters of broad public interest and is not limited to election-related ads”*. Van Hoboken, mentioned in the same report, also shows that *“the paid-for element of political advertising is crucial, as its inclusion in the definition of political advertising can prevent political advertising rules from being potentially misused and applied to journalistic commentary during election period”*. In fact, the Report explains that *“the European Court of Human Rights found a violation of Article 10 of European Convention of Human Rights (ECHR), where political advertising rules are used to restrict political expression where there is no paid-for element. This occurred in a 2017 judgment involving the fining of a Russian newspaper, where the Russian government argued that a partisan newspaper article during an election was in effect a political advertisement, and subject to campaigning rules. The European Court of Human Rights emphasised the lack of a “paid-for” element as crucial when it wholly rejected that the article was a political advertisement, and instead classified the article as “ordinary journalistic work” during an election. Thus, focusing on the paid-for element of political advertising can also protect the media and other actors against the overzealous application of political advertising rules to political expression and journalistic commentary under Article 10 ECHR”*. On the same line, Recital 19 of the proposed Regulation<sup>36</sup> seems to imply that political views expressed in AV programmes or printed media without direct payment or equivalent remuneration should not be considered as political ads. However, ERGA highlights that there are some Member States whose legislation considers political ads also the ads that are free of charge (for example Hungary and, to a certain extent, Italy, whose legislation allows political messages -not political ads- as long as they are free of charge). Besides, including the criterion of remuneration into the definition of political ads could be a problem if the publisher refuses to be paid or in case the publisher itself (e.g., the online platform) prepares and distributes the ads in its platform to support a specific political party and/or candidate. The solution to this dilemma might be found in the combination of Article 1, Article 2, Paragraph 1, Recital 3, Recital 14 and Recital 29:. In particular:
  - Article 2, Paragraph 1, defines a “service” as a “self-employed activity, normally provided for remuneration, as referred in Article 57 TFEU”;
  - Recital 3 explains that “advertising, including political advertising”, constitutes a service under Article 57 of the TFEU”;

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<sup>36</sup> Recital 19: “Political views expressed in the programmes of audiovisual linear broadcasts or published in printed media without direct payment or equivalent remuneration should not be covered by this Regulation”.



- Recital 29<sup>37</sup> states that *“The rules on transparency laid down in this Regulation should only apply to political advertising services, i.e. political advertising that is normally provided against remuneration, which may include a benefit in kind.”*

**ERGA acknowledges that reading these three combined provisions leads to the conclusion that political advertising consists of services that are “normally” provided against remuneration and that, consequently, the proposed Regulation also applies to situations where a political advertising service is provided without remuneration in return.**

It is also worthwhile highlighting that Recital 29 extend the concept of “remuneration” also to the “benefit in kind”. To clarify what “benefit in kind” means, it is useful to recall Recital 16 of the Electronic Communication Code<sup>38</sup>, which specifies that: *“[...] the concept of remuneration should [...] also encompass situations in which the end-user is exposed to advertisements as a condition for gaining access to the service, or situations in which the service provider monetises personal data it has collected in accordance with Regulation (EU) 2016/679.”*

- with regards to Article 2, Paragraph 2 letter b):

- Although the proposed Regulation does not expressly mention this, it is ERGA understanding that letter b) encompasses the **so-called issue-based ads**; therefore, for the sake of simplicity, when referring to the definition of letter b) of Article 2, Paragraph 2, this Report will refer to “issue-based ads”.

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<sup>37</sup> Recital 29: “The rules on transparency laid down in this Regulation should only apply to political advertising services, i.e., **political advertising that is normally provided against remuneration**, which may include a benefit in kind. The transparency requirements should not apply to content uploaded by a user of an online intermediary service, such as an online platform, and disseminated by the online intermediary service without consideration for the placement, publication or dissemination for the specific message, unless the user has been remunerated by a third party for the political advertisement”.

<sup>38</sup> Recital 16 of the Electronic Communications Code: “16. In order to fall within the scope of the definition of electronic communications service, a service needs to be provided normally in exchange for remuneration. In the digital economy, market participants increasingly consider information about users as having a monetary value. Electronic communications services are often supplied to the concept of remuneration should therefore encompass situations where the provider of a service requests and the end-user knowingly provides personal data within the meaning of Regulation (EU) 2016/679 or other data directly or indirectly to the provider. It should also encompass situations where the end-user allows access to information without actively supplying it, such as personal data, including the IP address, or other automatically generated information, such as information collected and transmitted by a cookie. In line with the case-law of the Court of Justice of the European Union (Court of Justice) on Article 57 TFEU (1), remuneration also exists within the meaning of the TFEU if the service provider is paid by a third party and not by the service recipient. The concept of remuneration should therefore also encompass situations in which the end-user is exposed to advertisements as a condition for gaining access to the service, or situations in which the service provider monetises personal data it has collected in accordance with Regulation (EU) 2016/679.”



- as suggested by several experts<sup>39</sup>, the definition of “issue-based ad” included in the proposed Regulation is too wide and could have a chilling effect on freedom of expression, because of unclear and undetailed description of the message. The definition potentially risks capturing issues that are not strictly and directly related to “political advertising”; with a large interpretation of the notions “*liable to influence*”<sup>40</sup> and “*voting behaviour*”, lots of content could fall into the scope of the definition of the draft Regulation. The “influence” on the vote might be difficult to demonstrate in numerous cases. For example:
  - it is unclear if an interest/issue-based ad could include such political topics such as ‘climate change’, ‘housing’, ‘war’ or other key issues for the Member States which may be policy issues as opposed to legislative, regulatory matters or matters relating to an election or referendum;
  - any advertising regarding an economic issue could be deemed political advertising as soon as it includes any link to a formalised political process;
  - narratives promoting a sustainable way of life would have to be labelled as political advertising when disseminated close to an election as the content may link to a political party.

The European Partnership for Democracy (EPD)<sup>41</sup>, specifically on the definition of issue-based ads, explains that *“the definition stands and falls with the mechanisms for identifying an ad as political. If in practice this definition means that platforms may employ a list of ‘political issues’ linked to elections or legislative processes that are automatically marked as political ads, this could unnecessarily restrict fundraising or mobilisation activities of NGOs working on LGBTQ+, migration or climate issues - topics that have typically been controversial around elections. Moreover, the question remains whether such a definition will capture the disinformation and foreign interference campaigns the Commission is targeting. Further clarification on the interpretation of when ads are liable to influence elections, referenda, legislative or*

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<sup>39</sup> In the website <https://europeanlawblog.eu/2022/02/23/the-proposed-eu-regulation-on-political-advertising-has-good-intentions-but-too-wide-a-scope/>, professor Susanna Lindroos-Hovineho stresses that *“the proposal apparently seeks to promote harmonisation by making the definition of political advertising as broad as possible. The lack of precision of the term is likely to pose a problem with regards to the fundamental right of freedom of expression”* and that *“Sub-paragraph b, in particular, raises concerns as to whether the definition may be overly broad. The dissemination of a message that may affect the outcome of an election or, for example, the legislative process, can concern almost anything. Any kind of reflection or criticism of a political system, which is typical in open democratic debate, could be captured by Article 2(2)(b).”*

<sup>40</sup> Recital 17 of the proposed regulation states that *“In order to determine whether the publication or dissemination of a message is liable 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.”*

<sup>41</sup> EPD reaction to the Commission proposal for a Regulation on the transparency and targeting of political advertising.

*regulatory processes or voting behaviour is needed to prevent arbitrariness in the enforcement and undue restrictions on public interest campaigners. Detail is lacking on the resources dedicated by platforms – particularly (VLOPs) – to classifying political and commercial ads.”*

In order to solve this problem, Google, Facebook/Meta draft lists of issues which may have political relevance during the elections, and which may be well considered issue-based ads. Taking into account this element, **ERGA recommends that the Regulation includes a provision that gives the possibility (not the obligation) to the competent authority of each Member State to draft and update a list of issues of political relevance for that Member State and believes that the only competent bodies who can deal with the identification of issue-based ads are the national audiovisual regulators;**

- In addition, **ERGA recommends making specific reference to the criterion of “purpose”<sup>42</sup> of the ad**: an issue-based ad should not only be “liable to influence” a voting behaviour but should “be designed” to influence a voting behaviour or the political views of voters/electors. As highlighted by the ERGA Report on “Notion of disinformation”, the criterium of purpose is already adopted in the definition of some Member States. **A possible definition of issue-based advertising might therefore be “a message which is liable and designed to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour”.**
- As underlined above, the importance of the identification of the issue-based ads is underlined also by Recital 17 of the proposed Regulation, according to which *“In order to determine whether the publication or dissemination of a message is liable 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”.* However, the proposed Regulation fails to identify the body/organization which will have the power/competence to assess whether a message is “liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour” and can be considered a political advertising or not. **ERGA believes that independent national audiovisual media services regulators should be designed as the competent**

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<sup>42</sup> The need to refer to the criterium of the “purpose” of the political ad is also highlighted by the Report “Regulation of political advertising: a comparative study with reflections on the situation in Southeast Europe”, available at <https://rm.coe.int/study-on-political-advertising-eng-final/1680a0c6e0>, in which Jean-François Furnémont and Deirdre Kevin stress that “it is equally important to define the scope and purpose of such advertising”. For example, “The definition of political advertising in the law of the United Kingdom provides a broad and comprehensive outline of what the scope and purposes of such advertising are relevant for that jurisdiction: advertisements related to political organisations, those that attempt to influence the outcome of elections or referendums, or to bring about changes of the law, or to influence policies or decisions, or legislative processes, or are connected with an industrial dispute”.

**authorities to determine whether a message meets the requirements to be considered an issue-based political ad.** This task should be properly addressed in the proposed Regulation.

-- with regards to the definitions of political advertising services, Article 2, Paragraph 5, and sponsors, Article 2. Paragraph 7:

- ERGA believes that the definitions of political advertising services and sponsors, can be usefully refined. For instance, the Recitals could be expanded by making concrete examples of services and adding a more detailed description of the activities carried out and of the relative actors in the different phases of the value chain. These additions would facilitate the interpretation and application of the Regulation by the national authorities and by market parties.

In addition, with regards to the notion of targeting and amplification techniques, Article 2, Paragraph 8, ERGA highlights that:

- Article 2, Paragraph 8, defines targeting or amplification techniques as “techniques that are used either to address a tailored political advertisement only to a specific person or group of persons or to increase the circulation, reach or visibility of a political advertisement”. As it is apparent from their definitions, targeting and amplification techniques are two completely different activities and have two different purposes: in light of this, **ERGA recommends having two different definitions;**
- since political advertising is not a service like others, because it can potentially influence the public opinion and have a disruptive impact on our democracies, **ERGA believes that both targeting or amplification techniques should be strictly regulated and limited** (see *infra*, section 4.5).

### 4.3 – The political advertising value chain and the obligations foreseen in the proposed Regulation

The market for political advertising services is a complex and fast evolving environment. The analysis carried out by ERGA, presented in Annex 3 to this Paper, shows that this market is characterized by a variety of different players and by the progressive growing relevance of online services. The expansion of political advertising services also follows the change in the dynamics of online advertising and, at the same time, it reflects the importance acquired by online platforms and more generally by online media for the public political debate.<sup>43</sup>

In view of the complexity of this market, the proposed Regulation adopts a broad approach and addresses all players within the value chain involved in financing, preparing, placing,

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<sup>43</sup> See Recitals 1, 2, 33 of the proposed Regulation.

promoting and disseminating political advertising.<sup>44</sup> In addition, it aims at covering in the same way both online and offline activities and means of disseminating political advertising.

On the other hand, as already stated before, the objective of the proposed Regulation is quite specific and focuses essentially on the transparency of the political advertisements and campaigns for users. Indeed, the content of political advertisements remains regulated on the basis of relevant national and EU law, which means that, beyond the transparency obligations, the initiative does not interfere with the substantive content of political messages, with the only exception of some restrictions for targeting which essentially concern the ways in which the advertisement is processed and distributed.

In this framework, the proposed Regulation imposes asymmetric transparency obligations to all actors, according to the role they play in the value chain. Specifically, there are two main distinct sets of obligations (Fig. 2):

- one set concerns general transparency obligations for all players along the value chain,
- the other one contains additional specific obligations for publishers.

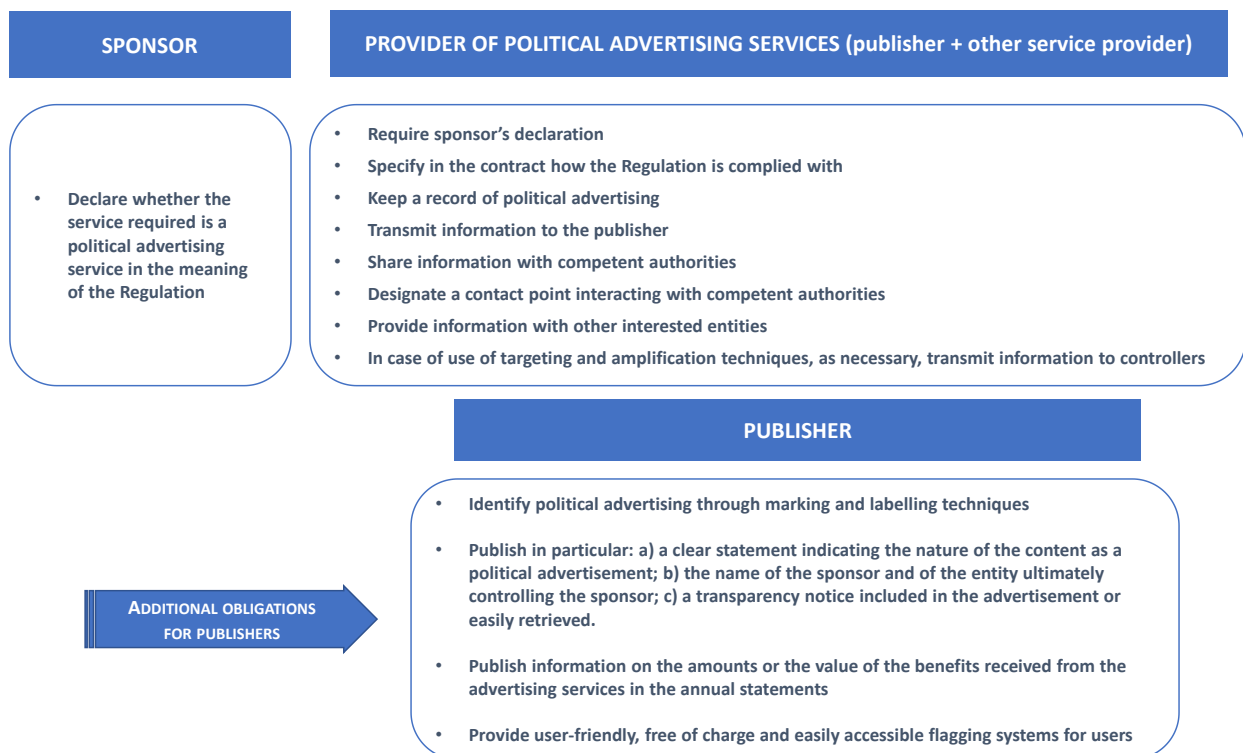


Fig. 2 – Obligations scheme along the value chain as from the proposal of Regulation

The first set of general obligations targets the sponsor and all the services providers involved in preparing, placing, promoting, publishing, and disseminating political advertising, who will have to “ensure that the relevant information they collect in the provision of their services,

<sup>44</sup> Indeed, according to Recital 26, “In order to cover the broad range of relevant service providers connected to political advertising services, providers of political advertising services should be understood as comprising providers involved in the preparation, placement, promotion, publication and dissemination of political advertising”.

including the indication that an advertisement is political, is provided to the political advertising publisher”<sup>45</sup>. In particular, the sponsor (or any provider acting on behalf of the sponsor) is obliged to declare whether the advertisement constitutes a political advertising service within the scope of the proposed Regulation (Article 5, Paragraph 1). All the service providers are obliged to:

- Acquire the declaration from the sponsor identifying political advertisements (Article 5, Paragraph 1).<sup>46</sup>
- Specify in the contract for the provision of the political advertising service how the relevant provisions of the Regulation are complied with (Article 5, Paragraph 2).<sup>47</sup>
- Keep records (and retain them for five years after the ad’s last publication) of their involvement in the specific political advertising (Article 6, Paragraph 1 and 2) in terms of service provided, political advertisement or campaign for which the service is provided, remuneration received for the service or other benefits, identity of the sponsor and contact details.
- Forward the information to the publisher (Article 6, Paragraph 3).
- Share information with competent authorities within 10 days from the receipt of their request (Article 10).<sup>48</sup>

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<sup>45</sup> Recital 34 states: “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”.

<sup>46</sup> Article 5, Para 1 states: “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”.

<sup>47</sup> Article 5, Paragraph 2 states: “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.”

<sup>48</sup> Article 10: “Competent national authorities shall have the power to request that a provider of political advertising services transmits the information referred to in Articles 6, 7 and 8. The transmitted information must be complete, accurate and trustworthy, and provided in a clear, coherent, consolidated and intelligible format. Where technically possible, the information shall be transmitted in a machine-readable format. The request shall contain the following elements:

- (a) a statement of reasons explaining the objective for which the information is requested and why the request is necessary and proportionate, unless the request pursues the objective of the prevention, investigation, detection and prosecution of criminal offences and to the extent that the reasons for the request would jeopardise that objective;
- (b) information on the redress available to the relevant service provider and to the sponsor of the political advertising service.

2. Upon receipt of a request pursuant to paragraph 1, providers of political advertising services shall, within two working days, acknowledge receipt of that request and inform the authority of the steps taken to comply with it. The relevant service provider shall provide the requested information within ten working days.

- Designate a contact point interacting with the competent national authorities (Article 10, Paragraph 3).
- Provide information to other interested entities, like researchers, journalists, or civil society organisations (Article 11).<sup>49</sup>
- In case targeting and amplification techniques are used, when necessary, forward information to the monitoring bodies as required by Article 12 of the proposed Regulation.<sup>50</sup>

The second set of rules applies only to publishers of political advertising because of their central role in disseminating political advertising among users. According to the proposal of Regulation, they should enable citizens to understand the political nature of the advertising and the wider context in which the content is included through the publication of many details (e.g., the sponsor, the amount spent, the sources of the funds).<sup>51</sup> In addition, publishers should make available systems for users to report to them that a particular political advertisement

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*3. Providers of political advertising services shall designate a contact point for the interaction with competent national authorities. Providers of political advertising services which are SMEs within the meaning of Article 3 of Directive 2013/34/EU may appoint an external natural person as contact point."*

<sup>49</sup> In particular, Article 11, Paragraph 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. Where the provider of political advertising services is a political advertising publisher, it shall also take the appropriate measures to transmit the information referred to in Article 7 to interested entities upon request and without costs."*

<sup>50</sup> Article 12, Paragraph 7: *"Providers of advertising services shall, as necessary, transmit to the controller the information necessary to comply with paragraph 3."*

<sup>51</sup> Recital 38 states: *"Transparency of political advertising should enable citizens to understand that they are confronted with a political advertisement. Political advertising publishers should ensure the publication in connection to each political advertisement of a clear statement to the effect that it is a political advertisement and of the identity of its sponsor. Where appropriate, the name of the sponsor could include a political logo. Political advertising publishers should make use of labelling which is effective, taking into account developments in relevant scientific research and best practice on the provision of transparency through the labelling of advertising. They should also ensure the publication in connection to each political advertisement of information to enable the wider context of the political advertisement and its aims to be understood, which can either be included in the advertisement itself, or be provided by the publisher on its website, accessible through a link or equivalent clear and user-friendly direction included in the advertisement"*.

Recital 42 states: *"Since political advertising publishers make political advertisements available to the public, they should publish or disseminate that information to the public together with the publication or dissemination of the political advertisement. Political advertising publishers should not make available to the public those political advertisements not fulfilling the transparency requirements under this Regulation. In addition, political advertising publishers which are very large online platforms within the meaning of Regulation (EU) 2021/XXX [Digital Services Act] should make the information contained in the transparency notice available through the repositories of advertisements published pursuant to Article 30 Regulation [Digital Services Act]. This will facilitate the work of interested actors including researchers in their specific role to support free and fair elections or referendums and fair electoral campaigns including by scrutinising the sponsors of political advertisement and analysing the political advertisement landscape"*.

which they have published does not comply with the Regulation.<sup>52</sup> Specifically, the additional transparency obligations for the publishers are the following:

- Including for each advertisement several information, through efficient and prominent marking and labelling techniques, including: a) a clear statement indicating the message is a political advertisement; b) the name of the sponsor and of the entity ultimately controlling the sponsor; c) a transparency notice included in the advertisement or easily retrieved (Article 7).<sup>53</sup>
- Publishing in the annual financial statements' information on the amounts or the value of the benefits received from the advertising services they provide (Article 8).<sup>54</sup>
- Adopting user-friendly, free of charge and easily accessible (also from the transparency notice) flagging systems enabling citizens to flag the ads that do not comply with the Regulation (Article 9).<sup>55</sup> The notification is submitted by electronic means and the

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<sup>52</sup> Recital 45 states: "Political advertising publishers providing political advertising services should put in place mechanisms to enable individuals to report to them that a particular political advertisement which they have published does not comply with this Regulation. The mechanisms to report such advertisement should be easy to access and use and should be adapted to the form of advertising distributed by the advertising publisher. As far as possible, these mechanisms should be accessible from the advertisement itself, for instance on the advertising publisher's website. Political advertising publishers should be able to rely on existing mechanisms where appropriate. Where political advertising publishers are online hosting services providers within the meaning of the Digital Services Act, with regards to the political advertisements hosted at the request of the recipients of their services, the provisions of Article 14 of the Digital Services Act continue to apply for notifications concerning non-compliance of such advertisements with this Regulation".

<sup>53</sup> Article 7, Paragraph 1, states: "*In the context of the provision of political advertising services, each political advertisement shall be made available with the following information in a clear, salient and unambiguous way: (a) a statement to the effect that it is a political advertisement; (b) the identity of the sponsor of the political advertisement and the entity ultimately controlling the sponsor; (c) a transparency notice to enable the wider context of the political advertisement and its aims to be understood, or a clear indication of where it can be easily retrieved. In this regard, political advertising publishers shall use efficient and prominent marking and labelling techniques that allow the political advertisement to be easily identified as such and shall ensure that the marking or labelling remains in place in the event a political advertisement is further disseminated*".

<sup>54</sup> According to Article 8, Paragraph 1: "*Where they provide political advertising services, advertising publishers shall include information on the amounts or the value of other benefits received in part or full exchange for those services, including on the use of targeting and amplification techniques, aggregated by campaign, as part of their management report within the meaning of Article 19 of Directive 2013/34/EU in their annual financial statements*".

<sup>55</sup> Article 9: "*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*".

publisher must provide information about the actions taken, eventually in a collective manner in case of many notifications on the same advertisement.

The **transparency notice** is the centrepiece of the obligations for the publishers; it must contain specific information (Article 7, Paragraph 2 and Annex I to the Regulation)<sup>56</sup>, aimed at raising the users' awareness. It must be easily accessible and, if possible, available in machine-readable format. The information in the notice is to be facilitated to the publisher by the sponsors and service providers in accordance to this Regulation and should show the identity and place of establishment of the sponsor (including name, address, telephone number and email address, and whether the sponsor is a natural or legal person); the period during which the advertisement is disseminated and, if known, an indication of past periods during which the same content was circulated; the aggregated amount spent or the value of the benefits (provisional and final once known) for the providers deriving from the provision of the advertising services along the entire value chain; the sources of the funds used for the specific advertising or the campaign; information about the calculation methodology for determining the amount spent; information about the flagging systems for users to notify possible illegal ads; the link to the publisher's ads repository in case the publisher is a Very Large Online Platform or Search Engine (VLOPSE) in the meaning of the proposed Digital Service Act<sup>57</sup>; in case of use of targeting and amplification techniques, information about their adoption so that users understand the logic and the analytical techniques; information about internal policies provided for according to Article 12 of the proposed Regulation. Given the relevance

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<sup>56</sup> Article 7, Paragraph 2 states: *"The transparency notice shall be included in each political advertisement or be easily retrievable from it, and shall include the following information:*

- (a) the identity of the sponsor and contact details;*
- (b) the period during which the political advertisement is intended to be published and disseminated;*
- (c) based among others on information received in line with Article 6(3), information on the aggregated amounts spent or other benefits received in part or full exchange for the preparation, placement, promotion, publication and dissemination of the relevant advertisement, and of the political advertising campaign where relevant, and their sources;*
- (d) where applicable, an indication of elections or referendums with which the advertisement is linked;*
- (e) where applicable, links to online repositories of advertisements;*
- (f) information on how to use the mechanisms provided for in Article 9(1);*
- (g) The information to be included in the transparency notice shall be provided using the specific data fields set out in Annex I".* See also Recitals 39, 40, 41, 42 for a description of the transparency notice contents.

<sup>57</sup> Recital 79 states: *This information should be provided in a transparency notice which should also include the identity of the sponsor, in order to support accountability in the political process. The place of establishment of the sponsor and whether the sponsor is a natural or legal person should be clearly indicated. Personal data concerning individuals involved in political advertising, unrelated to the sponsor or other involved political actor should not be provided in the transparency notice. The transparency notice should also contain information on the dissemination period, any linked election, the amount spent for, and the value of other benefits received in part or full exchange for the specific advertisement as well for the entire advertising campaign, the source of the funds used and other information to ensure the fairness of the dissemination of the political advertisement. Information on the source of the funds used concerns for instance its public or private origin, the fact that it originates from inside or outside the European Union. Information concerning linked elections or referendums should include, when possible, a link to information from official sources regarding the organisation and modalities for participation or for promoting participation in those elections or referendums. The transparency notice should further include information on how to flag political advertisements in accordance with the procedure established in this Regulation. This requirement should be without prejudice to provisions on notification according to Article 14, 15 and 19 of Regulation (EU) 2021/XXX [Digital Services Act].*



and complexity of the provisions of Article 7, **ERGA welcomes the provision of Codes of Conduct that facilitate the application of Paragraph 2 of Article that defines the content of the transparency notice.**

As highlighted in the Statement on the proposed Regulation published last March, **ERGA agrees with the broad approach adopted by the Commission imposing obligations on the whole value chain of political advertising** (that is, on all the “political advertising service providers”) **and not only on online platforms, appreciating the forward looking and technologically neutral features of this approach.** The inclusion of all parties operating along the value chain of political advertising services contributes to greater effectiveness of the transparency measures adopted and allows end users to access a complete set of information that helps them understand the context in which the advertisement circulates.

Moreover, this approach is consistent with the most recent evolution of the political advertising market, which (as shown in Annex 3) is characterised by heterogeneity of players and activities, by a variety of formats that advertising content can take<sup>58</sup> and by the significant use of technology, especially online<sup>59</sup>, and has been enriched with new services and new players in all phases of the value chain: from financing, to brokerage and consulting services based on analysis of audience data and user profiling, up to the distribution of advertising content. In addition, the integration between traditional political advertising services offered by offline media and those offered online by various types of publishers makes it logical to adopt a uniform regulatory framework for all means of dissemination of political advertising.

That said, **ERGA calls for an additional clarification of the activities carried out within each of the phases of the value chain of political advertising services: a more precise description of the characteristic activities in the phases of production, placement, promotion, publication and dissemination of political advertising** can be useful to ensure the proper transmission of information between political advertising service providers and publishers. The publishers, in fact, are required to collect and aggregate a series of information from a multiplicity of different subjects for each advertisement or campaign. In this regard, on the one hand, the obligations of publishers must not be understood as a general obligation to monitor political content intermediation service providers, as specified in Recital 37 of the proposed Regulation; on the other hand, publishers could be required to make best efforts to obtain complete information. The Regulation gives discretionary power to the publisher to evaluate if the information is complete or not.

For this reason, **ERGA welcomes the identification of asymmetric transparency obligations for the various individuals:** sponsors, political advertising service providers and service providers who play the role of publisher. The imposition of general obligations on all providers and on the sponsor and additional obligations for publishers is consistent with the different role that each of the actors plays within the value chain. The specific transparency obligations

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<sup>58</sup> For example, paid content (included so called issue-based ads), promotion in rankings, sponsored search results, paid targeted content, promotion of political views within commercial advertisements or through endorsers and influencers, organic advertising

<sup>59</sup> At every stage of the value chain, political advertising is very often assisted by different technological resources, such as software for content creation, web analytics, artificial intelligence systems, technological platforms to manage advertising transactions, algorithms which incentivise the process of spreading online content, rank the various content showed in search results and personalise the content received. These technologies are useful for targeting audience, designing content, buying and selling advertising spaces, optimizing political campaigns

imposed on the publisher towards the end user are justified by the “intermediary” role that it covers: the publisher represents the interface with the end user and is placed at the end of the value chain, therefore it must make available a lot of information to the user.

## 4.4 – The repositories

The proposed Regulation does not expressly impose on the publishers' specific obligations regarding the keeping of political advertising repositories, even if the issue has been expressly mentioned in Article 7<sup>60</sup> and in Recital 42 with specific reference to the advertising repositories that the Very Large Online Platforms and Search Engines (VLOPSEs) should keep according to Article 30 of Digital Services Act.<sup>61</sup> Now, based on its specific experience gathered when monitoring the platforms' compliance to the provisions of the Code of Practice on disinformation precisely with reference to the transparency of political ads, **ERGA believes that the lack of a provision on repositories seriously reduces the effectiveness of the Regulation and risks jeopardizing the efficiency of any compliance monitoring activity.**

Since advertisements are their main source of income, all digital platforms and social media (especially Google and Facebook/Meta) have developed very thorough repositories of ads and political ads. This is a fact. The experience of ERGA, entrusted by the EU Commission to monitor the implementation of the 2018 Code of Practice on disinformation<sup>62</sup>, has shown that each digital platforms has adopted a different approach in creating the political ads repositories and that regulators, researchers and other stakeholders have faced (and are still facing) enormous difficulties in accessing and analysing the data. In its first Assessment Report<sup>63</sup>, expressly dedicated to the monitoring of the Code of Practice's pillar B<sup>64</sup> during the 2019 European Elections campaigns, ERGA highlighted that the platforms' repositories required further developments in order to provide the tools and data necessary to be the basis for an effective monitoring, since they presented data only in aggregated form, without the

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<sup>60</sup> The current version of Article 7, Paragraph 6, of the proposed Regulation states that "*Political advertising publishers which are very large online platforms within the meaning of Article 25 of Regulation (EU) 2021/xxx [the DSA] shall ensure that the repositories that they make available pursuant to Article 30 of that regulation [Digital Services Act] make available for each political advertisement in the repository the information referred to in paragraph 2*".

<sup>61</sup> The actual Article 30 of Digital Services Act imposes to very large online platforms that display advertising on their online interfaces to compile and make publicly available through application programming interfaces a repository containing some pieces of information (e.g., the content of the advertisement, the natural or legal person on whose behalf the advertisement is displayed, the period during which the advertisement was displayed).

<sup>62</sup> See EU Commission, Action Plan against disinformation, 5 December 2018, [https://ec.europa.eu/info/sites/default/files/eu-communication-disinformation-euco-05122018\\_en.pdf](https://ec.europa.eu/info/sites/default/files/eu-communication-disinformation-euco-05122018_en.pdf)

<sup>63</sup> ERGA (2019), *Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation*, [https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06\\_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf](https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf)

<sup>64</sup> According to the EU Commission Report on the implementation of the Communication "Tackling online disinformation: a European Approach" information about the actions taken by the Signatories to enable public disclosure of political advertising, including number of records added to public disclosure repositories, amounts received from political parties, candidates, campaigns and foundations for political or issue-based advertising, and policies to verify the identity of political ads providers, should be collected in monitoring the implementation of *Pillar B. Political and issue-based advertising* by the online platforms Signatories of the CoP.

necessary level of detail.<sup>65</sup> In the following report<sup>66</sup>, ERGA highlighted that these repositories were not databases themselves but mere searching tools, not accessible in real time and with pre-defined filters, that allowed the regulators and the general public to access data and information that the platforms had previously filtered and organized. The online platforms had designed their ad repositories in different manners and provided APIs that allowed very limited search options. Some NRAs found that the bulk of paid content was not reported via the platform disclosures, while most NRAs found that the API and/or datasets available provided little information other than the advertiser, the date, and the ad itself: for example, results were not presented country by country or over an extended period, and there was no information on reach or targeting: as a matter of fact, very little data (if any) was available on micro-targeting of the users.<sup>67</sup>

For these reasons, *inter alia*, ERGA encouraged the Code's Signatories and the EU Commission to improve the Code and its measures by requiring that all of the platforms comply with the same obligations in a uniform manner and adopt more precise definitions and harmonized repositories, procedures and commitments.<sup>68</sup>

With the increase of the monitoring activities carried out by the ERGA members<sup>69</sup> in the last 2 years, the problem of the data access in particular, with specific reference both to regulators/public authorities and researchers, has become more and more relevant. ERGA has repeatedly called for systematic and generalised access to data owned by online platforms<sup>70</sup>, supporting the idea that only the access to APIs or raw data could be useful to academic and independent research activities.<sup>71</sup> It also invited the EU Commission and the online platforms to find specific measures aimed at identifying procedures by which public sector stakeholders could access data needed for their monitoring and supervising activities (e.g., the provision of a basic set of raw data regarding specific issues such as content moderation, partnership with fact-checkers, tackling hate speech and cyberbullying).

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<sup>65</sup> For example, spending information tends to be reported as a total over a period of time. By contrast, spend per adverts would facilitate a better understanding of increases and decreases in spends before and during elections.

<sup>66</sup> ERGA (2020), *Report on disinformation: Assessment of the implementation of the Code of Practice*, <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>

<sup>67</sup> ERGA (2020), *Report on disinformation*, *cit.*

<sup>68</sup> *Ibidem.*

<sup>69</sup> BAI (2021). *COVIDCHECK. Assessing the implementation of the EU Code of Practice on Disinformation in relation to COVID-19*, <https://www.bai.ie/en/new-report-recommends-development-of-robust-procedures-for-reporting-and-monitoring-online-disinformation/>; CSA (now ARCOM) (2021). *Lutte contre la manipulation de l'information sur les plateformes en ligne : bilan des mesures mises en œuvre en 2020*

<sup>70</sup> ERGA (2021), *Improving the relationships between Code of practice signatories and researchers*, <https://erga-online.eu/wp-content/uploads/2022/02/ERGA-Report-Improving-the-relationships-between-Code-of-Practice-signatories-and-researchers-June-2021.pdf>

<sup>71</sup> According to the above-mentioned ERGA Report, researchers need indeed to analyse unstructured data, study the ways these data have been generated and therefore have access to an amount as wide as possible of data to being managed and scrutinised. access to application programming interface (APIs) for research purposes, or availability of a tool allowing researchers to access to raw data (even regarding deleted pieces of content), and free access to ad archives (or similar archives) APIs.

For this reason, when called to express its position about the strengthened Code of Practice on disinformation, ERGA emphasized the need for improving the assessment and the monitoring of Signatories' commitments, asking the EU Commission to impose to the online platform Signatories the obligation to provide more granular and country-specific data and to allow independent researchers to access the data. Specifically, recalling the EU Commission Guidance on Strengthening the Code of Practice on disinformation, ERGA recommended that the ad repositories *"include a set of minimum functionalities, as well as a set of minimum search criteria that enable users and researchers to perform customised searches to retrieve real-time data in standard formats and allow for easier cross-platform comparison, research and monitoring"*. In the meantime, the digital platforms have improved their processes aimed at gathering data on their advertisements.<sup>72</sup> Thanks to the experience already made in monitoring the platforms' advertisements repositories, in its Statement on the Political Ads Regulation published in March 2022, ERGA formally called for the introduction of an obligation for the platforms to keep an improved version of their repositories of political ads, which should:

- grant access in real time to the repositories data, not to batches of data that could be filtered or organized by the platforms;
- be comprehensive, that is providing more data granularity on each individual advertising message published but also allowing analyses of the whole campaign;
- be harmonized, which means designed and structured in the same manner, respecting precise format standards provided by guidelines drafted by ERGA or by the Commission. In any case, they should be comparable and allow benchmarking;
- be easily accessible, which means be accessible online and possibly be developed in machine-readable format;
- contain all the information listed in Article 7, Paragraph 1), Annex I and Annex II (of the Regulation) for each and every political ad.

In particular, through such repositories, public authorities and citizens should be able to link the ads they see to the political actor on whose behalf the ad is published and its political and sponsored nature, see how much has been spent on the ads or on the campaign, see why they are targeted with an ad and what data source was used for this targeting.

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<sup>72</sup> For example, Meta and Google launched a campaign aimed at showing how they collect data on their advertisements. Several NRAs participated in these meetings and noted how the political ads repositories kept by the two companies differ from each other. With regard to the publicly available data, while Meta offers various search tools and different kind of reports to be easily explored by any citizen or stakeholder, Google offers limited chances to investigate its own repository, allowing searches only by advertiser or geographical area. In any case, both the online platforms give any user the chance to search specific ads collected in its own repository by appropriate filters and to download data regarding any political ad (in any EU country for Facebook/Meta, in the EU-UK area for Google) in a .csv file, with limited variables (advertiser, amount spent, region, etc.). With regard to the access to raw data, Meta gives researchers and other interested stakeholders the chance to access it through an API (with a specific access procedure). On the contrary, a public data set including the political ads across Search, Display, YouTube and DV360 in supported ad formats is available on Google Cloud Big Query, and the users can only download a subset of the ads or access them programmatically. No APIs regarding the political ads' repository is planned by Google.

ERGA acknowledges that in the 2022 Code of Practice on disinformation, the Signatories have committed to set up dedicated, searchable repositories of political and issues ads<sup>73</sup>, and to provide application programming interfaces (APIs) or other interfaces enabling customised searches.<sup>74</sup>

The creation of such repositories would represent an effective mechanism for the provision of aggregated data and would ensure more effective enforcement of the rules set out by this Regulation over political advertising service providers and greater accountability of political actors.

The options for the development of harmonized and standardized repositories are mainly two:

- a) to build a single, centralized, political ad repository, which should be filled in by the political ads publishers. This repository might be kept by the EU Commission, or by an ad hoc Agency;
- b) to allow each publisher of political ads to keep its own political ad repository, which must be designed in accordance with standards identified by ERGA or by the EU Commission in a set of guidelines.

The latter solution seems the most practical one: **ERGA recommends that each publisher of political ads (irrespective of its size) should be obliged to keep its own political ad repository, which must be accessible in real time and designed in accordance with precise standards identified by ERGA or by the EU Commission in a set of guidelines. Given the paramount importance of this obligation for the monitoring of the compliance to its provisions, ERGA recommends that the proposed Regulation dedicates a specific article to the ad repositories.**

The political ads repositories held by different online platforms should anyway all be designed in the same manner. They should all have the same filter options of the results (for instance: sort out the results by date, amount spent, sponsor, country of the sponsor, country targeted by the ad, micro-targeting criteria...), filters allowing to know the reach of the advertising; be accessible in real time (especially in the period of elections); be exhaustive, user friendly, and public.

In case the second option is adopted, **ERGA recommends as well that all the publishers should provide APIs (always designed according to guidelines drafted by ERGA or by the EU Commission) that allow the competent authorities, as well as the researchers and other relevant stakeholders, to access the political ad repositories in real time** and carry out an in-depth analysis of the data, and at the same time to be able to compare the results of the

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<sup>73</sup> The 2022 Code provides inter alia that "Relevant Signatories will set up and maintain dedicated searchable ad repositories containing accurate records (in as close to real time as possible, in particular during election periods) of all political and issue ads served, including the ads themselves. This should be accompanied by relevant information for each ad such as the identification of the sponsor; the dates the ad ran for; the total amount spent on the ad; the number of impressions delivered; the audience criteria used to determine recipients; the demographics and number of recipients who saw the ad; and the geographical areas the ad was seen in." Measure 10.1 at p. 13.

<sup>74</sup> The 2020 Code of Practice provides inter alia that "Relevant Signatories' APIs or other interfaces will provide a set of minimum functionalities and search criteria that enable users and researchers to perform customised searches for data in as close to real time as possible (in particular during elections) in standard formats, including for instance searches per advertiser or candidate, per geographic area or country, per language, per keyword, per election, or per other targeting criteria, to allow for research and monitoring. Measure 11.1 at p. 14.

analysis carried out among various repositories. Of course, also the APIs should be designed in the same manner, so that the data can be accessed and compared efficiently. The European Digital Media Observatory (EDMO), body with which ERGA cooperates in its efforts to counter disinformation, should also be consulted on the type of standards requirements that should be applied to the repositories and the APIs.

The specific requirements applicable to the publicly available repositories and the APIs could vary from a set of universal minimum data, such as instances and durations (easily quantified), purpose, cost, sponsor, reach of the advertising, to data with a sufficient geographical granularity in order to allow national authorities to collect the information that are relevant for them, in line with the ERGA recommendations for the revised Code of Practice. Granularity is in fact a key factor for being able to compare data from any number of different sources, even if it is being collected in a centralised manner.

Furthermore, any researcher or stakeholders should be able to retrieve, through the APIs, targeting data and audience reach data for any political ad. As it has been pointed by some scholars<sup>75</sup>, more precise targeting categories, such as specific views or interests (typically inferred from browsing and search activities), should be available through the political ads repositories APIs.

**Naturally, the obligations regarding political advertising repositories and related APIs should be calibrated on the size of the publishers and might contain some exemptions or a lighter approach for SMEs and start-ups.** For example, a temporary exemption of one or two years may be introduced for smaller actors.

Finally, ERGA notes that Article 30 of the Digital Services Act imposes only to the VLOPSEs (and not to all the online platforms) the obligation to keep a general ad repository. Since the sale of advertising slots and spaces is one of the main sources of income of the online platforms, however, it seems obvious that each and every online platform (and not only the VLOPSEs) keep their own general ad repository, because such repository is essential for their business model. Consequently, keeping the ad repository will probably not be a particular burden and the obligation to keep it could easily be imposed to all the platforms. Although the scope of this Opinion does not cover the provisions of the DSA, it does not seem wrong to mention that, for a more effective monitoring of the compliance to the provisions of the proposed Regulation on Political Ads, it seems vital that the platforms keep a political ads repository and that this repository is a part of a more general ad repository. Only in this way, in fact, the competent authorities will have the chance to monitor whether the political ads repository includes all the political ads published by a platform or whether there were political ads that were not considered as such and were not included in the political ads repository. For the aforementioned reasons, **ERGA believes that all the online platforms, not only the VLOPSEs mentioned in Article 30 of Digital Services Act, should be obliged to keep a general ad repository in addition to the repository of political ads.** Of course, also in this case,

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<sup>75</sup> See Tromble, R., Jacobs, K., & Louwerse, T. (2019). *Transparency in digital political advertisements during the 2019 European Parliament elections: country report on the Netherlands*. The Hague: Netherlands Helsinki Committee; Brussels: European Partnership for Democracy; Asbjørn Møller, L., Bechmann, A. (2019). *Research Data exchange (and transparency) solution with platforms. Methods and Analysis for disinformation modeling*. Social Observatory for Disinformation and Social Media Analysis, <https://www.disinfobservatory.org/wp-content/uploads/2020/05/D2.2-Research-data-exchange-solution-v1.0-SOMA-825469.pdf>

exemptions (for example a temporary exemption lasting one or two years) or a lighter approach could be adopted for SMEs and start-ups.

#### 4.5 - Targeting and amplification techniques

Targeting and amplification of political advertising are dealt with by Chapter III (Articles 12<sup>76</sup> and 13<sup>77</sup>) of the proposed Regulation.

As explained in section 4.2 (Definitions), targeting and amplification techniques are defined by Article 2, Paragraph 8, as “techniques that are used either to address a tailored political advertisement only to a specific person or group of persons or to increase the circulation, reach or visibility of a political advertisement”. But, as it is apparent from their definitions, targeting and amplification techniques are two completely different activities and have two different purposes; because of that **ERGA recommends that their definitions should be separated.**

The use of targeting and amplification techniques in the context of political advertising is extremely relevant and worth of attention by the EU and national legislators because it is potentially able to increase the negative impact that online advertising may have on electoral processes and democratic debate.<sup>78</sup> Because of that, **ERGA believes that both targeting and**

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<sup>76</sup> Article 12 of the proposed Regulation lays down specific requirements related to targeting and amplification techniques, including the prohibition of targeting and amplification techniques that involve the processing of personal data referred to in Article 9(1) of Regulation (EU) 2016/679 and Article 10(1) of Regulation (EU) 2018/1725.

At the same time, Article 12(2) highlights that the above-mentioned prohibition shall not apply to the situations referred to in Article 9(2)(a) and (d) of Regulation (EU) 2016/679 and Article 10(2)(a) and (d) of Regulation (EU) 2018/1725, ruling specific exemptions for the personal data processing carried out by foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim.

Furthermore, Article 12(3) calls for specific requirements which the controllers, conceived as the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data, should comply with, when using targeting or amplification techniques in the context of political advertising involving the processing of personal data. Among these requirements, it is worth mentioning the adoption and implementation of an internal policy describing the use of such techniques to target individuals or amplify the content and the provision, together with the political advertisement, of 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, comprising the elements set out in the Annex II of the Regulation.

This provision should be intended to support citizens getting transparent information (and being better informed) on political communications (including with better tools to deal with techniques like microtargeting), even going beyond the specific obligations set in the GDPR.

The following paragraphs of Article 12 call for specific transparency requirements political advertising publishers or providers of advertising services making use of targeting or amplification techniques should comply with, while the final paragraph of Article 12 provides for a specific task of the EU Commission regarding the adoption of delegated acts to amend Annex II by modifying or removing elements of the list of information to be provided pursuant to paragraph 3(c) of Article 12.

<sup>77</sup> Article 13 regards the transmission of information concerning targeting or amplification to other interested entities, such as the providers of political advertising services.

<sup>78</sup> According to the Inception Impact Assessment of the proposed Regulation, “recent elections, including the 2019 European parliamentary elections, have provided indications that online advertising and some dynamics



**amplification techniques should be strictly regulated and limited.** This issue has become more and more sensitive in the public sphere, and consequently in this specific policy arena, from the moment the Cambridge Analytica scandal has been disclosed.<sup>79</sup>

According to several reports, recent elections in the EU have shown that the impact and the use of targeting is increasing, and targeted ads account for an increasing proportion of overall political campaign spending.<sup>80</sup> The transparency on the use of such targeting techniques, including the amounts being spent in such techniques and publicly available information on the techniques used, remains insufficient. Considering that the attitudes of the public are generally more positive towards commercial applications of personalized online services (and towards the use of their personal data and information in order to offer those services) than towards personalized political information<sup>81</sup>, European citizens, when specifically asked about this issue, declare to be strongly opposed to personalization in political campaigning, stating that personalized political advertising is unacceptable to them.<sup>82</sup> Several studies in the EU

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associated with the overall digitalisation of political campaigning can have negative impacts on electoral processes and on the democratic debate. Disinformation is on the rise and attempts to interfere in elections and manipulate the democratic debate have intensified. Political advertising is one way that disinformation and other manipulated information, and divisive and polarising narratives can be disseminated, directed and amplified, and through which interference can be achieved. This has created new challenges for citizens, relevant political and private sector actors and the competent authorities” (p. 3). According to the Recital 4 of the proposed EU Regulation, “political advertising can be a vector of disinformation in particular where the advertising does not disclose its political nature, and where it is targeted”, too.

<sup>79</sup> After some revelations, the Cambridge Analytica scandal has been definitively disclosed by the publication of Carole Cadwalladr’s investigative article in *The Guardian* on 17 March 2018, including the statements made by the whistle-blower Christopher Wylie. The article revealed how personal data belonging to Facebook users were illegally processed by Cambridge Analytica, pretending to collect those data for academic use (the users personal and sensitive data were collected in fact using an app developed by Alexander Kogan, a data scientist from Cambridge University.). The company developed elaborated psychological profiles and offered its consulting services to various political campaigns, targeting voters without consent with messages designed to influence their vote. Facebook data, including Like data, on more than 87 million users were used by the company it to target voters during elections. According to the Impact Assessment of the EU Regulation here discussed, the Cambridge Analytica scandal brought to light unauthorised interference in elections (including by foreign state actors), exploitation of online social networks to mislead voters, and manipulation of the debate and their choices (including via the spreading of disinformation, in which ads can play an important role), using psychographic profiling and opaque practices that conceal or misrepresent key information (in particular, the origin and political intent behind political communications, their sources and funding). Anyway, targeting of political ads has been argued to be problematic *per se*, even in the absence of psychographic profiling techniques such as those ones used by Cambridge Analytica (see Dobber, T. & Ó Fathaigh, R. & Zuiderveen Borgesius, F. J. (2019). The regulation of online political micro-targeting in Europe. *Internet Policy Review*, 8(4)).

<sup>80</sup> IDEA (2020), *Online Political Advertising and Microtargeting: the latest legal, ethical, political and technological evolutions*, <https://www.idea.int/publications/catalogue/online-political-advertising-and-microtargeting-latest-legal-ethical>; and UNESCO, *Elections and Media in Digital Times*, <https://unesdoc.unesco.org/ark:/48223/pf0000371486/PDF/371486eng.pdf.multi>

<sup>81</sup> See Ipsos MORI for the Centre for Data Ethics and Innovation and Sciencewise (2020), *Public Attitudes Towards Online Targeting*, <https://www.ipsos.com/sites/default/files/ct/publication/documents/2020-02/attitudes-to-online-targeting-full-report.pdf>

<sup>82</sup> Kozyreva, A., Lorenz-Spreen, P., Hertwig, R. *et al.* (2021). Public attitudes towards algorithmic personalization and use of personal data online: evidence from Germany, Great Britain, and the United States. *Humanities and Social Sciences Communication*, 8, 117.

context have found out a potential reciprocal relation between attitude toward political behavioural targeting and privacy concerns, which may form a negative reinforcing spiral dynamic, that could result in undesirable behaviour of the voter from a democratic viewpoint (e.g., chilling effects)<sup>83</sup>. Furthermore, according to some scholars, especially in the US context (that is quite different from the EU one<sup>84</sup>), the application of targeting techniques in political advertising could even lead to a serious lack of accountability in the use of race and ethnicity in data-marketing products related to the digital electoral campaigns.<sup>85</sup>

But there is more: it is well known that the younger generations, who try to find out new ways of accessing information in the digital media ecosystem<sup>86</sup>, rely on active search for information on the Internet (especially on search engines and social network) to get informed about politics and institutional processes -such as the EU ones.<sup>87</sup> Therefore, targeting and amplification techniques in the political advertising published by social media does seem to have a serious impact in the political-electoral decisions among the so-called Millennials (that is, the young generation). Also for this reason, **ERGA considers amplification techniques in the case of political advertising as high-risk artificial intelligence systems, as defined within the proposed Artificial Intelligence Act (AI Act)<sup>88</sup> and recommends therefore to designate them as such.** AI Act proposal describes the “High-risk AI systems” as AI systems that pose significant threats to the health and safety or fundamental rights of persons. Consequently, these AI systems will have to comply with a set of horizontal mandatory requirements for trustworthy AI and follow conformity assessment procedures before those systems can be placed on the Union market. Until the AI Act is adopted, therefore ERGA recommends that the amplification techniques on political ads are either banned or very strictly regulated and limited.

In its Statement published in March 2022, in line with the Opinion on the proposed Regulation by the European Data Protection Supervisor (EDPS) published on 20 January 2022<sup>89</sup>, stating that the safeguards in the proposal with regard to processing of personal data in the context

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<sup>83</sup> Dobber T., Trilling D., Helberger N., de Vreese C. (2019). Spiraling downward: The reciprocal relation between attitude toward political behavioural targeting and privacy concerns. *New Media & Society*, 21(6):1212-1231.

<sup>84</sup> Already in 2016, German scholars have underlined how German 'data-driven' canvassing in political campaigning cannot be compared with the highly sophisticated US campaigns, the first one being mainly limited to geographical targeting (Kruschinski, S. & Haller, A. (2017). Restrictions on data-driven political micro-targeting in Germany. *Internet Policy Review*, 6(4)).

<sup>85</sup> Chester, J., Montgomery, K. C. (2017). The role of digital marketing in political campaigns. *Internet Policy Review*, 6(4).

<sup>86</sup> AGCOM (2020), *News Media challenged by younger minds*, <https://www.agcom.it/documents/10179/17939957/Allegato+20-3-2020/1e5d2154-2699-44c0-8b99-285d39182157?version=1.0>

<sup>87</sup> EU Commission, Standard Eurobarometer 94 Winter 2020 – 2021, *Media use in the European Union*.

<sup>88</sup> Proposed Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>

<sup>89</sup> EDPS (European Data Protection Supervisor) (2022), *Opinion 2/2022 on the Proposal for Regulation on the transparency and targeting of political advertising*, <https://edps.europa.eu/data-protection/our-work/publications/opinions/edps-opinion-proposal-regulation-transparency-and-en>

of political advertising and, in particular, the use of targeting and amplification techniques should be further strengthened<sup>90</sup>, ERGA highlighted that microtargeting for political purposes should be limited and, at the same time, that further restrictions should be introduced as regards the categories of data that may be processed for the purposes of political advertising. ERGA stresses the need for further enhancing and developing specific rules aimed at providing specific requirements that the publishers of political advertising should respect in the use of targeting techniques in political advertising.

It is useful to recall that, in the recent political agreement on the text of the Digital Services Act reached on 3 April 2022, the EU institutions decided that online targeted advertising cannot be based on any user's sensitive personal data (this could include ethnicity, religion, sexual orientation, or beliefs) and that any user registered as a minor on any web platform cannot be served targeted advertisements.<sup>91</sup> There also must be complete disclosure about the ads being served: meaningful information about advertising and targeted ads: who sponsored the ad, how and why it targets a user.

Needless to say, being political advertising a much more "intrusive" type of service than any other commercial ad, potentially able to shape public opinion and affect European democratic values, targeting in the context of Political advertising should be more carefully addressed.

In this scope, we must observe that the main online platforms have different approaches regarding this issue: Twitter has already prohibited any form of political advertising on its own platform already in 2020; Facebook/Meta, on the contrary, imposes specific requirements to the advertisers eager to operate in the specific field of elections and related issues on its own platforms, but then applies to the political ads the same (micro-)targeting criteria that can be used for any kind of advertising, only some geographical restrictions and placements being excluded; Google instead has stricter rules on political ads than those applying to other kinds of advertising, since the only criteria that may be used to target election ads on its own platform, or using its advertising services, in the regions where election ads verification is required, including EU, are geographic location, gender, age and contextual targeting – including options such as ad placement, topics, keywords against sites, pages, apps and videos –, the latter one being the only targeting criterium potentially matter of concern.

The preparatory activity to the drafting of this position paper has allowed ERGA members to analyse some specific implications that the use of political targeted advertising could have in the shaping of the public discourse. In this scope, some reports and stakeholders highlighted how the political ads could avoid scrutiny by being narrowly targeted to (and hence by being only visible to) certain audiences or profiles, thus allowing political actors to make irreconcilable promises to different segments of the electorate and manipulate the public<sup>92</sup>;

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<sup>90</sup> In the above-mentioned opinion, EDPS has recommended indeed to a) provide for a full ban of microtargeting for political purposes, i.e. selecting the messages and/or intended audience of political advertising according to the perceived characteristics, interests or preferences of the individuals concerned; b) introduce further restrictions of the categories of data that may be processed for the purposes of political advertising, including targeting and amplification, in particular to prohibit targeted advertising based on pervasive tracking, i.e. the processing of information concerning an individuals' behaviour across websites and services with a view of targeted advertising on the basis of profiling.

<sup>91</sup> <https://www.euractiv.com/section/digital/news/eu-institutions-reach-agreement-on-digital-services-act/>

<sup>92</sup> IDEA, *Online Political Advertising and Microtargeting*, *op. cit.*

moreover, according to some scholars, political micro-targeting *per se* impacts the fundamental right of the non-targeted citizens to receive information, and consequently, the democratic public discourse.<sup>93</sup> With specific regard to the exemption provided by Article 12(2), besides, the same stakeholders also highlighted that not always consent is given by citizens in full knowledge and informational capacity about the scope of the personal data processing<sup>94</sup>, and that some categories of personal data are also inferred from and combined with other information, both online and offline.<sup>95</sup> According to several experts, including the EDPS, it would be worthwhile reiterating the GDPR ban on the use of special category data when specific consent has not been granted.<sup>96</sup> ERGA agrees on this point.

Tailored restrictions would in fact limit the availability of targeting services in the context of the dissemination of political advertising, and this would be outweighed by opportunities for providers of political advertising services resulting from increased trust among citizens and regulators in the technique and from greater legal certainty of compliance in its use in the political context<sup>97</sup>. On the contrary, an eventual ban on the use of targeting in the context of political advertising would certainly increase the cost of political advertising and may unduly affect the freedom of expression of the political actors and the functioning of the political advertising internal market. For example, prohibiting the submission of invitations via digital means of communication to a local event or face-to-face meetings, which are part of micro-targeting strategy in political and electoral communication, to members of an association who could have given their consent to the processing of personal data for political and electoral purposes (typical exemptions described in the Regulation Proposal Article 12, Paragraph 2) could strongly limit the range of actions that political parties could bring on in electoral period and the chances of performing in the field of political-electoral communication by advertising and public relations specialists (such as those one operating in electoral consulting firms).

For this reason, while not calling for the complete prohibition in the context of political advertising, due to the peculiar nature and goal of the political ads, **ERGA recommends that the Regulation explicitly mentions that all the obligations of the GDPR apply also to targeting activities for political ads and that further restrictions are introduced as regards the categories of data that may be processed for the purposes of political advertising.**

**In particular, ERGA recommends limiting the targeting and amplification activities only to the data for which the user has provided explicit consent (i.e. gender, age, location, and other identity data that are provided by the users) and prohibiting the targeting on the basis of**

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<sup>93</sup> Bayer J. (2019). Double harm to voters: data-driven micro-targeting and democratic public discourse. *Internet Policy Review*, 9(1).

<sup>94</sup> Bayer J. (2021). *New EU rules on political advertising*, <https://inform.org/2021/11/30/new-eu-rules-on-political-advertising-here-you-go-read-the-fine-print-judit-bayer/>

<sup>95</sup> As pointed out by the EDPS in the above-mentioned Opinion on the Proposal of Regulation here discussed.

<sup>96</sup> Bayer J. (2021). *New EU rules on political advertising*, <https://inform.org/2021/11/30/new-eu-rules-on-political-advertising-here-you-go-read-the-fine-print-judit-bayer/> and <https://euobserver.com/opinion/153649>

<sup>97</sup> According to the Impact Assessment Report itself, harmonised transparency and specific limits could reduce the scope of problematic targeting tactics such as the inauthentic amplification of certain ads, or those uncovered in the Cambridge Analytica scandal. These measures should enhance trust in the use of political ads, and more generally in the political debate and the integrity of the electoral process, contributing to a higher resilience of the EU electoral system to information manipulation and interference.

**data inferred by the platform** (and not provided by the user), **at least as regards the inferred data that allow companies to show the political preferences of the user**. Recital 47 of the proposed Regulation explains that inferred data *“is increasingly used to target political messages”* and that *“this negatively impacts the democratic process”*. As many experts state, a ban on using such data - which lacks meaningful user consent - would mitigate a variety of the dangers of political micro-targeting.<sup>98</sup>

In any case, **the competent authorities, including audiovisual media services regulators, should be given the task to adopt specific guidelines, in addition to those mentioned in Article 12, Paragraph 3, aimed at further limiting the use of targeting or amplification techniques**, by VLOPSEs, coherently with other obligations imposed by the Digital Services Act.

Data protection and media regulation are not always inspired by the same demands, the competence to oversee the implementation of the provisions on targeting and amplification techniques should not be given solely to data protection regulators. ERGA and the audiovisual media services NRAs should be called to cooperate with the privacy regulators and to discuss specific guidelines and actions with online platforms publishing political advertising messages. Therefore, believing that issues regarding the distribution of content are highly relevant for media oversight (see the ERGA Statement on this proposed Regulation published in March 2022), **ERGA recommends that also media oversight bodies must be equipped with data access, regulatory and enforcement powers in this area in order to be able to assess phenomena like illegal targeting and illegal amplification techniques and that cooperation with personal data regulators should be improved.**

## 4.6 – Enforcement, remedies and sanctions

The matter of enforcement and sanctions is dealt with by the proposed Regulation in Article 16 and in Recital 63.<sup>99</sup>

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<sup>98</sup> Bayer J. (2021). *New EU rules on political advertising*, <https://inform.org/2021/11/30/new-eu-rules-on-political-advertising-here-you-go-read-the-fine-print-judit-bayer/> and <https://euobserver.com/opinion/153649>

<sup>99</sup> Article 16 states that “Member States shall lay down rules on sanctions including administrative fines and financial penalties applicable to providers of political advertising services under their jurisdiction for infringements of the present Regulation, which shall in each individual case be effective, proportionate and dissuasive”.

Recital 63 states that “Member States authorities should ensure that infringements of the obligations laid down in this Regulation are sanctioned by administrative fines or financial penalties. When doing so, they should take into account the nature, gravity, recurrence and duration of the infringement in view of the public interest at stake, the scope and kind of activities carried out, as well as the economic capacity of the infringer. In that context, the crucial role played by the obligations laid down in Article 7 for the effective pursuit of the objectives of the present Regulation should be taken into account. Furthermore, they should take into account whether the service provider concerned systematically or recurrently fails to comply with its obligations stemming from this Regulation, including by delaying the provision of information to interested entities, as well as, where relevant, whether the provider of political advertising services is active in several Member States. Financial penalties and administrative fines shall in each individual case be effective, proportionate and dissuasive, with due regard to the provision of sufficient and accessible procedural safeguards, and in particular to ensure that the political debate remains open and accessible”.

The logic behind the decision to let the Member States lay down their own rules in sanctions is clear: the proposed Regulation does not intend to interfere with other nationally regulated aspects and does not want to deprive the Member States from their freedom to choose what sanctions may be suitable and adequate for the breaches to the Regulation's provisions. For this reason, Article 16 states that *"in relation to Articles 5 to 11, 13 and 14 Member States shall lay down rules on sanctions including administrative fines and financial penalties applicable to providers of political advertising services under their jurisdiction for infringements of the present Regulation"*, and leaves to the privacy regulators the task to impose administrative fines for the violation of article 12.

ERGA, however, has a different opinion: since online advertising services are very often provided on a cross-border basis, gained in adjacent sectors (e.g. the audiovisual sector), it would only take a single Member State not to adopt adequate sanctions to jeopardize the success of the Regulation. Therefore ERGA recommends that Article 16 should introduce a more coordinated and consistent sanctioning regime and an additional framework for proportionate, dissuasive, and effective sanctions in all Member States.

The following paragraphs will present the various options connected to the adoption of a harmonized sanctioning system.

Hence, ERGA would recommend that the Regulation would give the competent authorities the corrective powers not only to issue a warning against a non-compliant provider but also to be able to issue an adequately reasoned order to any actor of the value chain to remedy the damage, when and where this possible, by taking the necessary measures.

First of all, ERGA recognizes that the main aim of this draft Regulation is to foster transparency of political ads (and thus protect the democratic process) and to encourage and facilitate compliance. In ERGA's view, therefore, the initial reaction to a breach of the Regulation's provisions should be aimed at restoring the transparency, by promptly correcting the errors and repairing the damage done. Only in case the publisher does not correct the mistake and repair the damage (or in case it is too late to do so) a financial penalty should be applied. Following this approach, **ERGA recommends the adoption of a two-tier sanctioning system (which seems perfectly in line with the provision of Article 15, Paragraph 5 of the proposed Regulation<sup>100</sup>), initially imposing the publisher to remedy the damage done by the violation of the rules:**

1. the Regulation should give the competent authorities the corrective powers, once the infringement has been spotted, not only to issue a warning against a non-compliant provider but also to issue an adequately reasoned order to any actor of the value chain to promptly correct the errors and repair the damage done<sup>101</sup>;

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<sup>100</sup> The proposed Regulation at Article 15 Paragraph 5 states: Competent authorities referred to in paragraph 3, where exercising their enforcement powers in relation to this Regulation, shall have the power to: (a) issue warnings addressed to the providers of political advertising services regarding their non-compliance with the obligations under this Regulation; (b) publish a statement which identifies the legal and natural person(s) responsible for the infringement of an obligation laid down in this Regulations and the nature of that infringement; (c) impose administrative fines and financial penalties

<sup>101</sup> The order might as well be accompanied by a moderate financial penalty: without a financial penalty, in fact, the publishers might be less stimulated to check the correctness of the transparency note, knowing that the competent authority's initial reaction would be only a letter asking to correct the ad

2. a higher financial penalty should be issued at a later stage by the competent authority, only if the order has not been complied with in the specified timeline. And the financial penalty should be addressed to the actor responsible for the offence, which is not necessarily the publisher.

This two-tier system would solve the problem of restoring the damage done by the violation, because it would impose on the publisher the obligation to correct the ad to ensure adequate transparency, also (if possible) by sending a message to all the users who have already seen the ad. Once again, this approach is not new at all, as it has already been adopted by some EU Member States: in Italy, Law 28/2000 is aimed at granting fair (=equal) access to the media to the political actors during the electoral periods. For this reason, in case the political actors are represented in an uneven manner, the law<sup>102</sup> only allows the competent authority (AGCOM) to issue an order against the broadcaster aimed at restoring the balance of the representation of the actors involved in the electoral competition. Only where the restoring order is not complied with, the legislator provides for the imposition of a (serious) financial penalty against the broadcaster.

In case there is the need of issuing a financial penalty, to ensure that the Member States have sufficient autonomy, **ERGA recommends the identification of minimum and maximum penalty ranges**. Both ranges are needed: the minimum range, in particular, is highly needed because some Countries might decide not to sanction the breaches to the Regulation on political ads, or to apply pecuniary fines that are irrelevant in order to induce the publishers to establish their headquarters in the Country. These ranges may be expressed as fixed amounts of money or in percentages, and the percentages may refer to the turnover of the company or to the value of the political ad campaign. The most common solution is to refer the percentage to the turnover of the company, but this solution has two disadvantages:

- if the political campaign is financed by a candidate/natural person, he will not have any “turnover”;
- if the company is located in a different Country, finding out its turnover may prove to be very complicated, if not impossible.

On the other hand, referring the percentage to the value of the campaign would lead to a very high sanction if the value of the campaign is very high, and an irrelevant sanction if the value of the campaign is very low.

ERGA proposes two options for identifying the minimum and the maximum percentages:

1. the fine could be calculated in percentage of the turnover: in line with the provisions of the Digital Service Act, the maximum fines “*should not exceed 6% of the total turnover in the previous financial year*” or “*should not exceed 1% of the total turnover in the previous financial year (depending on the provision that was breached)*”. The minimum fine could be no less than 0.2% of the total turnover in the previous financial year”. Of course this option is valid if the actor responsible for the breach is known;
2. the fine could be a mix of fixed amounts and percentage, in order to give the Member States greater flexibility (for instance: a maximum fine up to 1 million euro or 1% of the turnover and a minimum fine of 50.000 euro). This solution is adopted in Italy, by

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<sup>102</sup> Art 10, Italian law 28/2000



the Decree 87/2018 that prohibits advertisements on gambling and betting: the Decree provides for maximum pecuniary sanctions amounting to “5% of the value of the sponsorship or advertising campaign, and in any case not less than 50,000 euros for each violation”.

Special exemptions or reduction of the penalties may be introduced for micro and small enterprises in order not to undermine the good functioning of the market and the emergence of new players and start-ups.

Finally, it might be worthwhile clarifying to whom the sanction should be addressed: in other words, should the sanction be imposed onto the specific political ad provider which has failed to comply with the provisions or should it be imposed onto any of the subjects of the value chain, who will then use its contractual agreements with the other subjects of the same value chain to be reimbursed (if he had no responsibility for the breach)? Ideally, of course, the first option would be preferable, because it would target only the subject who failed to comply with the provisions of the Regulation and would not address responsibilities to those who did not make any infringements. However, there may be cases in which the actor within the value chain which failed to comply with the obligations of the Regulation is located outside the EU or in case it is impossible for the competent authority to identify it. In these cases, as a last resort, ERGA suggests that the sanction may be imposed on different actors of the value chain, not necessarily the one that has failed to comply with the obligations of the Regulation, thus introducing a sort of “strict liability” regime. Obviously, in accordance with the principle of “*ne bis in idem*”, the same sanction cannot be issued more than once for the same breach (that is, it cannot be imposed on more than one subject of the value chain) and, in order to decide its amount, the competent authority will have to analyze the different roles of the various subjects and will assess whether there have been more than one violation. To support ERGA’s recommendation, it is worthwhile mentioning that this approach, which imposes one single sanction to only one of the subjects of the value chain, is already adopted in many Member States. For example, in Italy Article 9 of the Decree 12 July 2018, n. 87, which prohibits the advertisements on gambling and betting activities, allows AGCOM to impose the sanction to only one of the subjects who contribute to a violation of the Law, even if this actor is not the one who has actually breached the rule. The internal contractual relation among the subjects who are part of that value chain, will then allow the subject that was sanctioned to be reimbursed by the other actor who actually breached the rule.

#### **4.7 – Governance and consistency with the Digital Services Act**

The provisions relating to the Governance of the proposed Regulation are dealt with by Article 15 (Competent authority and contact points) and by Recitals 56 to 62.

Article 15, Paragraph 1 states that the national Data Protection Authorities (DPAs) appointed under the GDPR would supervise and enforce rules in relation to targeting and content amplification.

Article 15, Paragraph 2 states that Member States shall designate competent authorities to monitor the compliance of providers of intermediary services within the meaning of the proposed Digital Services Act, with the obligations laid down in Articles 5 to 11 (transparency obligations for political advertising services) and 14 (the service provider’s legal



representative) of the proposed Regulation. The competent authorities designated under the proposed Digital Services Act may also be one of the competent authorities designated to monitor the compliance of online intermediaries with the obligations laid down in Articles 5 to 11 and 14 of the Political ads Regulation. Recital 57 clarifies that *“Digital Services Coordinators, pursuant to Regulation (EU) Digital Services Act, in each Member State should in any event be responsible for ensuring coordination at national level in respect to those matters and engage, where necessary, cross-border cooperation with other Digital Services Coordinators following the mechanisms laid down in Regulation (EU) [Digital Services Act]”*.

For any aspect not referred to in Paragraphs 1 and 2, each Member State shall designate one or more competent authorities to be responsible for the application and enforcement of the aspects of the proposed Regulation (Article 15, Paragraph 3). Each competent authority designated under paragraph 3 shall structurally enjoy full independence both from the sector and from any external intervention or political pressure. It shall in full independence effectively monitor and take the measures necessary and proportionate to ensure compliance with the proposed political ads Regulation. Paragraphs 4 and 5 complete the list of powers that competent authorities designed according to paragraph 3 should be equipped with in order to effectively carry out their tasks. Essentially, these are the requisites of independent regulatory authorities. In fact, Recital 58 clarifies that Member States may designate, in particular, the national regulatory authorities or bodies under Article 30 of the AVMS Directive.<sup>103</sup>

Paragraphs 2 to 5 show once again the consistency of the proposed Regulation with the DSA, Article 5, Paragraphs 6, 7 and 9 raise the issue of the cooperation among competent authorities, and provide that *“Each Member State shall designate one competent authority as a contact point at Union level for the purposes of this Regulation. [...] Contact points shall meet periodically at Union level in the framework of the European Cooperation Network on Elections to facilitate the swift and secured exchange of information on issues connected to the exercise of their supervisory and enforcements tasks pursuant to this Regulation”*. On the same point, Recital 60 explains that *“Authorities competent for the oversight of this Regulation should cooperate with each other both at national and at EU level making best use of existing structures including national cooperation networks, the European Cooperation Network on Elections as referred to in Recommendation C(2018) 5949 final, and the European Regulators Group for Audiovisual Media Services established under Directive 2010/13/EU”*.

**ERGA appreciates the consistency of the proposed Regulation with the DSA** as regards the treatment of the providers that are not based in the EU (Article 14), the way the transparency notices should be made visible and user-friendly (Article 7); the identification of competent authorities and the requested independence features and specific powers such as:

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<sup>103</sup> Recital 58 states that *“For the oversight of those aspects of this Regulation that do not fall within the competence of the supervisory authorities under Regulation (EU) 2016/679, Regulation (EU) 2018/725 Member States should designate competent authorities. To support the upholding of fundamental rights and freedoms, the rule of law, democratic principles and public confidence in the oversight of political advertising it is necessary that such authorities are structurally independent from external intervention or political pressure and are appropriately empowered effectively monitor and take the measures necessary to ensure compliance with this Regulation, in particular the obligations laid down in Article 7. Member States may designate, in particular, the national regulatory authorities or bodies under Article 30 of Directive 2010/13/EU of the European Parliament and of the Council.”*

- a) requesting to access data, documents or any necessary information from providers;
- b) issuing warnings to the providers for the non-compliance with the Regulation;
- c) publishing a statement which identifies the legal and natural person(s) responsible for the infringement and the nature of that infringement;
- d) imposing sanctions including administrative fines and financial penalties.

**ERGA also appreciates the explicit reference to the national regulatory authorities or bodies under Article 30 of the AVMS Directive (Recital 58), as well as to ERGA itself, as a suitable body to ensure cooperation among authorities competent for the oversight of the Regulation (Recital 60), together with the European Cooperation Network on Elections.** However, it is not clear why only the European Cooperation Network on Elections, and not ERGA, is mentioned by Article 15, Paragraph 9, when referring to the meetings of contact points aimed at facilitating the swift and secured exchange of information. **Since both the European Cooperation Network on Elections and ERGA are considered “existing structures” that should be used to facilitate the cooperation among competent authorities, this should be reflected in Article 15, Para. 9, where also ERGA should be mentioned.**

However, ERGA raises some concerns with regards to the identification of the single point of contact at EU level (Article 15, Paragraph 7), aimed at ensuring the effectiveness of the cross border cooperation among competent authorities. The concerns are based on the following considerations:

- In one of its clauses, Recital 62 stipulates that “the contact point should, if possible, be a member of the European Cooperation Network on Elections.”<sup>104</sup> ERGA highlights that not many national regulatory authorities under Article 30 of the AVMS Directive are also part of the European Cooperation Network on Elections. Consequently, if Recital 62 was applied, the audiovisual regulators would have fewer chances to be appointed “contact point”. But the logic of this clause is difficult to understand: if the main goal of the contact points is to ensure proper coordination among Member States and between Member States and the Commission, ERGA firmly acknowledges the importance of the cooperation and it has proved in many occasions to be able to foster synergies between the Commission and its NRAs, who (on the other hand) have enough competences and experience to be tasked with the responsibility to monitor the implementation of this Regulation. There is no reason, therefore, to limit the chances of the audiovisual regulators to be appointed “contact points” only because they are not part of the European Cooperation Network on Elections. For this reason, **ERGA recommends that the mentioned clause in Recital 62 is deleted.**
- As regards the coordination needed to solve cross-border cases and the role of the digital service coordinators and the reference (made by Article 15, Paragraph 2, of the proposed Regulation to Article 45 and 46 of the DSA), **ERGA confirms the substantial**

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<sup>104</sup> Recital 62 states that “Member States should designate a contact point at Union level for the purpose of this Regulation. The contact point should, if possible, be a member of the European Cooperation Network on Elections. The contact point should facilitate cooperation among competent authorities between Member States in their supervision and enforcement tasks, in particular by intermedating with the contact points in other Member States and with the competent authorities in their own”.

**concerns expressed with reference to the DSC in its position paper related to the DSA** published in June 2021 (pages 21-23)<sup>105</sup>: operationally speaking, the coordination of all the competent national authorities by one of them would raise severe practical problems and undermine the enforcement's efficiency, as these authorities have fundamentally different competences, fields of expertise and operating logics. In practice, the contact points' efforts in liaising with other relevant authorities every time a new implementation issue comes up are likely to bring unnecessary costs and delays and lead to more disadvantages than benefits. **Therefore, ERGA deems it useful to distinguish between two different types of cases that might arise under the Regulation on Political ads: (i) Cases which require coordination among Member States across different activities/markets/sectors and (ii) Cases which require cross-border coordination among Member States within the same activity/market/sector:**

- In the first type of cases, when dealing with cross-sectoral issues in which different fields of expertise are involved, different institutions have to be heard and a working coordination has to be ensured, **ERGA agrees that it is helpful to establish mechanisms to ensure consistent application of the DSA rules throughout the different regulatory sectors involved and, moreover, to allow Member States to appoint a particular independent authority as a focal point for inter-sectoral cross-border enforcement issues.** However, **ERGA clarifies that its remit should be focused on a set of transversal, essentially administrative and coordination, functions.** It should be clarified that in any case, the DSC/contact point would have no hierarchical/ supervision role towards other NRAs involved in the operational enforcement of the Regulation
- In the second type of cases, if the cross-border case only concern NRAs from the same regulatory field, **ERGA is convinced that there is no need for the involvement of the DSC/contact points and that sector-specific cross-border enforcement mechanisms between only the sectoral authorities of the countries involved, are more effective to solve the issues at stake.** Therefore ERGA proposes that cases be dealt with only between sector-specific NRAs directly involved in the (sector-specific) matter. If mediation processes become necessary on a case concerning only systemic online content Regulation, they should be handled within ERGA (the corresponding sector-specific network), which is already equipped with a mediation function and with a very effective mechanism (the Memorandum of Understanding).

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<sup>105</sup> See the ERGA Proposals Aimed at Strengthening the Digital Services Act (DSA) with Respect to Online Content Regulation published on the Webpage <https://erga-online.eu/wp-content/uploads/2021/06/2021.06.25-ERGA-DSA-Paper-final.pdf>, pages 4 and 21-23.

