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van Drunen, M.Z.; Helberger, N.; Ó Fathaigh, R.

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# The beginning of EU political advertising law: unifying democratic visions through the internal market

Max Zeno van Drunen<sup>\*</sup>, Natalie Helberger<sup>†</sup> and Ronan Ó Fathaigh<sup>‡</sup> 

## ABSTRACT

The regulation of political advertising has traditionally been a sensitive issue—unsurprisingly so, as it determines if and how political actors can pay to communicate with voters. Given the differences between national electoral systems and the lack of a consensus on the best regulatory approach, until recently neither the EU, the Council of Europe nor the European Court of Human Rights laid out strict standards. Following mounting concerns over the impact of opaque and manipulative targeted advertising in the 2016 US election and Brexit referendum, the EU’s proposal for a regulation on the transparency and targeting of political advertising breaks with this trend. This article analyses how the proposal is set to regulate political advertising, and evaluates how the proposed regulation fits into the EU’s competences to regulate democratic processes and affects existing national legal frameworks. The article concludes by assessing the new roles the EU and the Member States assume in political advertising regulation.

**KEYWORDS:** political advertising; platforms; transparency; targeting; legal basis

## INTRODUCTION

With its new proposal for a Regulation on the transparency and targeting of political advertising (RPA), the EU has moved into a sensitive space that has traditionally been reserved almost exclusively for Member States.<sup>1</sup> In line with the EU’s historically limited competences regarding national democratic processes, EU legislation that touched upon political advertising mainly consisted of soft law (such as the Communication on disinformation) and horizontal legal

<sup>\*</sup> Postdoctoral Researcher, Institute for Information Law, University of Amsterdam, Amsterdam, The Netherlands. E-mail: [m.z.vandrunen@uva.nl](mailto:m.z.vandrunen@uva.nl)

<sup>†</sup> Distinguished University Professor Law & Digital Technology, Institute for Information Law, University of Amsterdam, Amsterdam, The Netherlands. E-mail: [n.helberger@uva.nl](mailto:n.helberger@uva.nl)

<sup>‡</sup> Senior Researcher, Institute for Information Law, University of Amsterdam, Amsterdam, The Netherlands. E-mail: [r.f.fahy@uva.nl](mailto:r.f.fahy@uva.nl)

<sup>1</sup> Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising 2021 (COM/2021/731 final). <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2021%3A731%3AFIN>>.

frameworks (such as the General Data Protection Regulation [GDPR]).<sup>2</sup> The European Court of Human Rights (ECtHR) similarly leaves Member States a wide margin of discretion in the context of political advertising regulation. In justification, the Court points to the differences between Member States' electoral systems, the different democratic visions on the regulation of political advertising and the lack of a consensus on the best regulatory approach.<sup>3</sup>

In the absence of European standardization, Member States have developed diverging approaches to the regulation of political advertising. The spectrum ranges from bans on political advertising on television or during electoral periods (eg Germany) to legal frameworks that leave political advertising largely self- or unregulated (eg the Netherlands).<sup>4</sup> The RPA will for the first time harmonize parts of this patchwork of national legislation with one European set of definitions and rules on the transparency and targeting of political advertisements. This raises fundamental questions about the way the EU expands its competences into the regulation of national democratic processes, as well as practical questions about the RPA's impact on the different national legal frameworks that have traditionally applied to political advertising.

This article evaluates how the RPA restricts and relates to the national regulation of political advertising in EU Member States. Section 2 describes the origins, scope and substance of the RPA. Section 3 explores the historical sensitivity of European standards on political advertising, and compares the implications for the regulation of political advertising in EU Member States. Section 4 evaluates how the EU legislator exercised its competence. Section 5 provides a forward-looking perspective on the role the EU and Member States assume in political advertising regulation following the RPA. Section 6 concludes.

## THE PROPOSED POLITICAL ADVERTISING REGULATION

### The origins of EU political advertising law

The RPA is preceded by several years of EU initiatives aiming to safeguard the democratic process from negative consequences arising from the use of digital technology. EU attention for this issue intensified after controversies emerged over efforts to use online advertising on platforms to target and potentially manipulate voters in the 2016 Brexit referendum and US election. The European Commission's 2018 Communication and follow-up self-regulatory Code of Practice on disinformation, in particular, emphasized the need to regulate political advertising, framing it as a potential way to target voters with disinformation.<sup>5</sup> Indeed, the Communication, Code of

<sup>2</sup> Tom Dobber, Ronan Ó Fathaigh and Frederik J Zuiderveen Borgesius, 'The Regulation of Online Political Micro-Targeting in Europe' (2019) 8 *Internet Policy Review* <<https://policyreview.info/articles/analysis/regulation-online-political-micro-targeting-europe>> accessed 31 August 2021; Joris van Hoboken and others, *The Legal Framework on the Dissemination of Disinformation through Internet Services and the Regulation of Political Advertising* (Instituut voor Informatierecht, Amsterdam 2019). <[https://www.ivir.nl/publicaties/download/Report\\_Disinformation\\_Dec2019-1.pdf](https://www.ivir.nl/publicaties/download/Report_Disinformation_Dec2019-1.pdf)>.

<sup>3</sup> *Animal Defenders International v United Kingdom* [2013] ECtHR 48876/08 [123]; *VgT Verein gegen Tierfabriken v Switzerland* [2001] ECtHR 24699/94 [70]; *TV Vest* [2008] ECtHR 21132/05 [67].

<sup>4</sup> Victoria Ekstrand and Ashley Fox, 'Regulating the Political Wild West: State Efforts to Disclose Sources of Online Political Advertising' (2021) 47 *Journal of Legislation* 81 <<https://scholarship.law.nd.edu/jleg/vol47/iss1/3>>; Jean-François Furnémont and Deirdre Kevin, 'Regulation of Political Advertising: A Comparative Study with Reflections on the Situation in South-East Europe' (Council of Europe, Strasbourg 2020) <<https://rm.coe.int/study-on-political-advertising-eng-final/1680a0c6e0>> accessed 3 September 2021; ERGA, 'Notions of Disinformation and Related Concepts' (ERGA 2021) 43 <<https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>> accessed 3 March 2022.

<sup>5</sup> European Commission, 'EU Code of Practice on Disinformation' (2018) 3 <[https://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=54454](https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454)>; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Online Disinformation: A European Approach' (2018) COM(2018) 236 7 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018D0236>> accessed 8 February 2022. van Hoboken and others (n 2) 107; Iva Nenadić, 'Unpacking the "European Approach" to Tackling Challenges of Disinformation and Political Manipulation' (2019) 8 *Internet Policy Review* <<https://policyreview.info/articles/analysis/unpacking-european-approach-tackling-challenges-disinformation-and-political>> accessed 17 March 2020.

Practice and the evaluations that followed touch upon many of the issues now regulated in the RPA, including the fragmented (operationalizations of) definitions of political and issue-based ads, the need for transparency to individuals, the lack of norms on targeted political ads, and the need to permanently attach labels to organically shared political advertisements.<sup>6</sup>

The EU's efforts to address political advertising through disinformation policy have been complemented by piecemeal efforts to amend and better enforce existing legislation in order to address threats to the electoral process. Particularly relevant to the RPA are the slew of policy documents on the way existing data protection law can be enforced to address political micro-targeting. These focus, in particular, on the fact the GDPR already requires transparency about the way personal data are processed, and imposes a conditional ban on the use of sensitive data and profiling technologies.<sup>7</sup> The Regulation on EU political parties has also been amended to prohibit European parties or foundations from using a violation of data protection law to influence European Parliamentary elections.<sup>8</sup> More generally, the EU has invested in election cooperation networks and encouraged Member States and European and national political parties to increase the transparency of 'online paid political advertisements'.<sup>9</sup> Finally, the Digital Services Act (DSA) includes further transparency requirements and a ban on targeted advertising using sensitive data or directed at minors, while requiring very large online platforms to mitigate systemic risks that result from their services, including inauthentic uses with (foreseeable) negative effects on democratic values or electoral processes.<sup>10</sup> In 2020, the von der Leyen Commission put forward a Democracy Action Plan to structure its efforts to address the challenges to democracy. The first substantive point of this plan was its announcement it would propose a new political advertising regulation.<sup>11</sup>

### The RPA's definitions and scope

The RPA aims to capture a large swath of the political advertising ecosystem. To that end, it introduces a new definition of political advertising. This definition covers 'the preparation, placement, promotion, publication or dissemination, by any means, of a message' which is

<sup>6</sup> European Commission, 'EU Code of Practice on Disinformation' (n 5) 3, 5, 7, 13. European Commission, 'Assessment of the Code of Practice on Disinformation - Achievements and Areas for Further Improvement' (2020) SWD(2020) 180 final 7, 13, 14; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions European Commission Guidance on Strengthening the Code of Practice on Disinformation' (2021) COM(2021) 262 final 1, 3, 9 <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:262:FIN>> accessed 8 February 2022.

<sup>7</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR) 2016 article 9, 22; European Commission, 'Guidance on the Application of Union Data Protection Law in the Electoral Context A Contribution from the European Commission to the Leaders' Meeting in Salzburg on 19–20 September 2018' (2018) COM/2018/638 final <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0638>> accessed 25 February 2022; EDPS Opinion on online manipulation and personal data 2018; EDPB, 'Guidelines 8/2020 on the Targeting of Social Media Users' (2021) <[https://edpb.europa.eu/system/files/2021-04/edpb\\_guidelines\\_082020\\_on\\_the\\_targeting\\_of\\_social\\_media\\_users\\_en.pdf](https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf)> accessed 3 March 2022; European Commission, 'Recommendation on Election Cooperation Networks, Online Transparency, Protection against Cybersecurity Incidents and Fighting Disinformation Campaigns in the Context of Elections to the European Parliament' (2018) C(2018) 5949 final 7 <[https://ec.europa.eu/info/sites/default/files/soteu2018-cybersecurity-elections-recommendation-5949\\_en.pdf](https://ec.europa.eu/info/sites/default/files/soteu2018-cybersecurity-elections-recommendation-5949_en.pdf)>.

<sup>8</sup> Regulation (EU, Euratom) No 1141/2014 of the European Parliament and of the Council of 22 October 2014 on the statute and funding of European political parties and European political foundations 2019 article 10a. See Ronan Ó Fathaigh and others, 'Microtargeted Propaganda by Foreign Actors: An Interdisciplinary Exploration' [2021] Maastricht Journal of European and Comparative Law 1023263X211042471, 875 <<https://doi.org/10.1177/1023263X211042471>> accessed 24 November 2021.

<sup>9</sup> European Commission, 'Recommendation on Election Cooperation Networks, Online Transparency, Protection against Cybersecurity Incidents and Fighting Disinformation Campaigns in the Context of Elections to the European Parliament' (n 7) 7.

<sup>10</sup> 'DSA: Commission Welcomes Political Agreement' (European Commission, 23 April 2022) <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_22\\_2545](https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545)>; Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC 2020 [COM/2020/825 final].

<sup>11</sup> European Commission, 'On the European Democracy Action Plan' (2020) COM(2020) 790 final 4 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>> accessed 16 December 2020.

either (i) by, for, or on behalf of a political actor (unless it is purely private or commercial), or (ii) liable to influence the outcome of an election or referendum, the legislative process or voting behaviour.<sup>12</sup>

This definition of political advertising is broad.<sup>13</sup> It includes *activities* that take place well before a political message is published. The recitals provide several concrete examples, such as political consultants or ad agencies that prepare the message, or data analytics and ad-tech companies that help decide how to disseminate it.<sup>14</sup> The definition also includes political advertising on any *medium*. Though the EU's initial approach to political advertising focused on online disinformation and targeted advertising, the RPA is also set to cover political advertising on TV and in print.<sup>15</sup> Additionally, to determine what constitutes *political* advertising, the RPA takes a two-pronged approach. The first prong captures ads by political actors, which include political parties, political alliances, election candidates, elected officials and campaign organizations.<sup>16</sup> But importantly, the second prong seeks to capture so-called issue-based ads, such as those run by NGOs, which are 'liable to influence' a regulatory process or voting behaviour. Indeed, the Recitals confirm that ads on 'societal or controversial' issues 'may' be captured by this definition.<sup>17</sup> And finally, it should be noted that the definition of political *advertising* does not require that the content in question is distributed for payment. Though purely private or commercial speech by political actors is excluded, expressions that are liable to influence voting behaviour fall under the definition of political advertising regardless of whether they are paid for or not.

The breadth of the definition of political advertising is limited by the fact the RPA imposes most of its obligations on political advertising services. These are defined as economic activities normally provided for remuneration that consist of political advertising.<sup>18</sup> The RPA's recitals explicitly clarify that political views expressed without remuneration in print or broadcasting, or by individuals acting in their personal capacity, are excluded. Additionally, the definition of political advertising services contains a carve-out for online intermediary services that are provided without consideration for the placement, publication or dissemination of a specific message.<sup>19</sup> Concretely, this means TikTok provides a political advertising service when it is paid to promote a political message, but not when it allows users to upload political messages for free. Of course, those users still provide a political advertising service when they themselves are paid to post a political message.<sup>20</sup>

By focusing on political advertising services, the RPA avoids capturing non-commercial political speech. However, the success of this strategy is limited, as the RPA also imposes obligations on political advertising publishers, which bring political advertising into the public domain (such as platforms or newspapers). Furthermore, the provisions on targeted political advertising primarily apply to controllers.<sup>21</sup> The RPA borrows the 'controller' concept from the

<sup>12</sup> RPA article 2(2), recital 1, 42.

<sup>13</sup> Susanne Lindroos-Hovinheimo, 'The Proposed EU Regulation on Political Advertising Has Good Intentions, But Too Wide a Scope' (*European Law Blog*, 23 February 2022) <<https://europeanlawblog.eu/2022/02/23/the-proposed-eu-regulation-on-political-advertising-has-good-intentions-but-too-wide-a-scope/>> accessed 4 May 2022; Paul Kreijger, 'De Verordening Transparantie En Gerichte Politieke Reclame – Een Eerste Verkenning' [2022] *Mediaforum* 46 <<https://www.mediaforum.nl/scripts/download.php?id=5213>>.

<sup>14</sup> RPA recital 1.

<sup>15</sup> RPA recital 21.

<sup>16</sup> RPA article 2(4)(a)–(h), recital 16.

<sup>17</sup> RPA recital 17.

<sup>18</sup> RPA articles 1(1)(a), 2(1), and (5).

<sup>19</sup> RPA article 2(5), recitals 27, 29.

<sup>20</sup> See on influencers and political advertising regulation Giovanni De Gregorio and Catalina Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) 23 *German Law Journal* 204 <<https://www.cambridge.org/core/journals/german-law-journal/article/influencer-republic-monetizing-political-speech-on-social-media/C96153D8918E8F5B2C0E24EF233678D5>> accessed 23 March 2022.

<sup>21</sup> RPA article 1(1)(b), 2(12), recitals 12–13; the concept of political advertising publisher similarly lacks a payment criterion, Kreijger (n 13) 48.

GDPR to capture actors that exercise control over the means and purposes for which personal data are used to target or amplify political advertising (such as political parties that supply data used to target their advertisement, or platforms that offer targeting criteria).<sup>22</sup> However, neither the definition of controllers nor of political advertising publishers includes a payment requirement. This would mean the requirements the RPA imposes regarding the use of targeting and amplification technologies also apply to non-commercial political speech.<sup>23</sup>

### Restrictions on targeted political advertising

Concerns over interference with the democratic process through highly effective targeted political messages were arguably what led the Commission to finally regulate political advertising. The RPA's recitals and impact assessment continue to emphasize the danger that targeted political advertising is used to segment voter groups and exploit their vulnerabilities by exposing them to messages to which they are particularly susceptible.<sup>24</sup> However, though the regulation dedicates a full chapter to targeted political advertising, this chapter contains only two provisions on the use of targeted political advertising. Articles 12(1) and (2) ban targeting and amplification techniques that involve sensitive data (revealing, eg, ethnic origin, sexual orientation or political beliefs) in the context of political advertising, except when the GDPR exceptions for processing sensitive data based on consent or by non-profits (including political parties) apply.

Under the general rules of the GDPR, processing sensitive data is already prohibited. Though the RPA cuts down the list of exceptions to this ban from 10 to 2, most of the exceptions it removes were already irrelevant in the context of political microtargeting (as they concern processing in specific contexts such as social security, health or scientific research).<sup>25</sup> Moreover, the DSA (passed after the RPA was proposed) bans all targeted advertising based on sensitive data.<sup>26</sup> This lends further weight to a critique of the RPA made particularly forcefully by the EDPS: 'in practical terms, article 12 of the Proposal does not appear to offer any additional protection.'<sup>27</sup> The most significant implication of article 12(1)-(2) RPA may, therefore, be that it brings the use of targeted political advertising into the scope of EU law—providing a foundation for future regulation or amendments in the course of the RPA's legislative process.

There are ways in which the ban on sensitive data in article 12(1)-(2) can (be strengthened to) have added value in light of the DSA. The DSA applies only to online intermediaries, while a wide variety of actors in the online advertising value chain (including the party supplying the data used for targeting and businesses facilitating compliance with data protection law) potentially qualify as controllers.<sup>28</sup> Furthermore, the RPA explicitly also applies not only to targeting

<sup>22</sup> RPA article 2(12); GDPR article 4(7); Cristina Blasi Casagran and Mathias Vermeulen, 'Reflections on the Murky Legal Practices of Political Micro-Targeting from a GDPR Perspective' (2021) 11 *International Data Privacy Law* 348 <<https://doi.org/10.1093/idpl/ipab018>> accessed 3 January 2022.

<sup>23</sup> This may be avoided by the fact the RPA primarily relies on sponsors to self-declare political advertisements (article 5). However, the sponsors are not the only parties that may identify political advertising under the RPA (see article 9), and the RPA's reliance on self-disclosure by sponsors has significant implications for its effectiveness. MZ van Drunen and others, 'Transparency and (No) More in the Political Advertising Regulation' [2022] *Internet Policy Review* <<https://policyreview.info/articles/news/transparency-and-no-more-political-advertising-regulation/1616>>.

<sup>24</sup> RPA recital 5, 47; RPA rec. 5, 47; European Commission, 'Impact Assessment Report Accompanying the Proposal for a Regulation of the European Parliament and of The Council on the Transparency and Targeting of Political Advertising' (2021) SWD(2021) 355 3, 4 <[https://ec.europa.eu/info/sites/default/files/4\\_1\\_177594\\_pol-ads-ia\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/4_1_177594_pol-ads-ia_en_0.pdf)> accessed 4 March 2022.

<sup>25</sup> Blasi Casagran and Vermeulen (n 22). Colin J Bennett, 'Voter Databases, Micro-Targeting, and Data Protection Law: Can Political Parties Campaign in Europe as They Do in North America?' (2016) 6 *International Data Privacy Law* 261, 266 <<https://doi.org/10.1093/idpl/ipw021>> accessed 9 September 2021; EDPB (n 7) 32. Bennett argues the exemption for data made public by the data subject was relevant in the context of political microtargeting.

<sup>26</sup> 'DSA: Commission Welcomes Political Agreement' (n 10).

<sup>27</sup> Dobber, Ó Fathaigh and Borgesius (n 2) 6; Bennett (n 25) 266; 'Opinion 2/2022 on the Proposal for Regulation on the Transparency and Targeting of Political Advertising' (EDPS 2022) 9 <[https://edps.europa.eu/system/files/2022-01/edps\\_opinion\\_political\\_ads\\_en.pdf](https://edps.europa.eu/system/files/2022-01/edps_opinion_political_ads_en.pdf)>.

<sup>28</sup> Blasi Casagran and Vermeulen (n 22); Michael Veale, Midas Nouwens and Cristiana Santos, 'Impossible Asks: Can the Transparency and Consent Framework Ever Authorise Real-Time Bidding After the Belgian DPA Decision?' (2022) 2022 *Technology and Regulation* 12 <<https://techreg.org/article/view/11594>> accessed 10 February 2022.

but also amplification techniques, which are used to increase the reach of a political advertisement.<sup>29</sup> There are, however, important questions surrounding the utility of the RPA's focus on the data used to target political advertising, rather than the political nature of the challenges involved in targeting different voters with different messages.<sup>30</sup> Limiting the use of sensitive data has a long history in data protection law, where it rests on the assumption that the processing of certain types of data by their nature poses a particularly high risk to fundamental rights, freedoms and interests.<sup>31</sup> However, the RPA's focus on sensitive data leaves fundamental concerns about the impact of political targeting on fundamental rights and the fairness of political advertising unaddressed. For example, how can Member States ensure voters are not targeted with advertisements that exploit their anxieties or other vulnerabilities, or that are specifically aimed at demobilising or even manipulating voters, forms of excluding particular sections of voters (red-lining)<sup>32</sup> and how can Member States retain a level playing field when platforms charge political parties different prices to target voters (and charge higher prices to reach out to voters that have not traditionally engaged with their messages)?<sup>33</sup> These questions concern the relationship between targeting technologies, criteria and democratic values.<sup>34</sup> The extent to which these questions can be addressed by banning data considered sensitive in general is limited.

### Transparency of (targeted) political advertising

The other obligations in both chapters of the RPA focus on transparency. The RPA first imposes record-keeping obligations intended to enable the transparency of political advertising. Political advertising service providers must retain information about the specific service they provided, the amounts they received in return, the connected advertisement or campaign, and the identity of the sponsor. Controllers must retain information about the targeting and amplification techniques they use. Both are required to transmit this information to the party who makes the political advertisement for which they have provided services available to the public (the political advertising publisher). The publisher must aggregate the information supplied by the political advertising service providers and controllers, and relay it to the public.<sup>35</sup> The regulation sets up a multi-tiered transparency system in which progressively more information is made available to (i) individuals, (ii) the public, and (iii) regulators and interested entities.<sup>36</sup>

*Individuals* must be provided with a few pieces of information when they see an ad. At present, this information includes a disclosure that the message is a political ad, the identity of its sponsor and a link to a transparency notice. The political advertising publisher must use labels that allow individuals to easily identify the advertisement, and ensure this labelling stays in place

<sup>29</sup> RPA article 12(1), recital 5.

<sup>30</sup> van Drunen and others (n 23).

<sup>31</sup> Paul Quinn and Gianclaudio Malgieri, 'The Difficulty of Defining Sensitive Data—The Concept of Sensitive Data in the EU Data Protection Framework' (2021) 22 German Law Journal 1583, 1585 <<https://www.cambridge.org/core/journals/german-law-journal/article/difficulty-of-defining-sensitive-data-the-concept-of-sensitive-data-in-the-eu-data-protection-framework/SEC5932AAC5703E31D2C90045813F6C6>> accessed 22 April 2022.

<sup>32</sup> Natali Helberger, Tom Dobber and Claes de Vreese, 'Towards Unfair Political Practices Law: Learning Lessons from the Regulation of Unfair Commercial Practices for Online Political Advertising' (2021) 12 JIPITEC <<http://www.jipitec.eu/issues/jipitec-12-3-2021/5338>>.

<sup>33</sup> Muhammad Ali and others, 'Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes' (2019) 3 Proc. ACM Hum.-Comput. Interact. 199:1 <<http://doi.acm.org/10.1145/3359301>> accessed 18 November 2019; Frederik J Zuiderveen Borgesius and others, 'Online Political Microtargeting: Promises and Threats for Democracy' (2018) 14 Utrecht Law Review 82 <<http://www.utrechtlawreview.org/articles/abstract/10.18352/ulr.420/>> accessed 31 August 2021.

<sup>34</sup> E Groen-Reijman, 'Deliberative Political Campaigns: Democracy, Autonomy and Persuasion' <<https://dare.uva.nl/search?identifier=4f305207-9e4a-4559-b1c9-8a29fc127d31>> accessed 29 April 2022.

<sup>35</sup> RPA articles 6(3), 12(4)(7).

<sup>36</sup> Paddy Leerssen, 'The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems' (2020) 11 European Journal of Law and Technology 20, 37 <<https://www.ejlt.org/index.php/ejlt/article/view/786/1012>> accessed 11 November 2021.

when the advertisement is further disseminated (eg by social media users sharing a paid political post by an influencer).<sup>37</sup> These requirements overlap with traditional transparency requirements in advertising regulation (including those in the DSA), though the RPA puts heavier emphasis on the need to disclose the political nature of the message and the need for labels to be prominent and permanently attached to the advertisement.<sup>38</sup> The transparency notice linked to the advertisement contains further information concerning the (political) context of the advertisement, including its funding, reach, targeting, linked election or referenda, and individuals' legal rights.<sup>39</sup>

Very large online platforms are required to make these transparency notices available to the broader *public* through ad libraries. Ad libraries are publicly accessible databases containing copies of and further information about all advertisements that have been displayed on a platform. The DSA requires platforms to create ad libraries containing a basic set of information about all advertisements. The transparency notices add additional information for political advertisements, in particular, about funding and targeting.<sup>40</sup> This information is intended to enable scrutiny of political advertisers and analysis of the political advertising ecosystem, including by 'researchers in their specific role to support free and fair elections.'<sup>41</sup> The RPA uses annexes to spell out in significant detail what information the transparency notices (and as a result, the ad libraries) must contain. For example, article 12(3)(c) RPA states controllers must provide information about 'the use of third-party data'. Annex II(c) states this includes 'the source of the personal data [used for targeting and amplification], including, where applicable, information that the personal data was derived, inferred, or obtained from a third party and its identity as well as a link to the data protection notice of that third party for the processing at stake'.

Under the RPA, the European Commission will be empowered to use delegated acts to remove, modify or (with regard to information that does not fall under the chapter on targeting) add elements to the list of information required under the annexes.<sup>42</sup> Delegated acts may be adopted in order to respond to technological developments or (in the case of targeting) developments in scientific research or supervision and guidance by the competent institutions.<sup>43</sup> Both the Council and the European Parliament may veto delegated regulations, and the Commission's power to adopt delegated regulations ends in 2026, when the RPA is first evaluated.<sup>44</sup> Additionally, under EU law, any delegation must be sufficiently specific (meaning the objectives, content, scope and duration must be set out) and not concern the essential elements of the underlying regulation (meaning political choices falling within the responsibility of the legislature cannot be delegated).<sup>45</sup> For the RPA, the latter test is particularly important, as the Commission is empowered to add and remove transparency requirements from a regulation that consists almost entirely of transparency requirements.

<sup>37</sup> RPA articles 7(1)(a–c), 12(3)(c), 12(5). Information about the targeting must be provided "together with" the advertisement, but it is unclear whether this means it can be included in the transparency notice.

<sup>38</sup> Article 24 DSA proposal.

<sup>39</sup> RPA Annex I and II.

<sup>40</sup> RPA article 7(6), DSA Proposal article 30.

<sup>41</sup> RPA recital 42.

<sup>42</sup> Thomas Christiansen and Mathias Dobbels, 'Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts' (2013) 19 *European Law Journal* 42 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/eulj.12012>> accessed 28 January 2022.

<sup>43</sup> RPA article 19.

<sup>44</sup> RPA articles 19(2), 18. An amendment of the RPA would be needed to extend the Commission's power to adopt delegated acts.

<sup>45</sup> Merijn Chamon, 'Limits to Delegation under Article 290 TFEU: The Specificity and Essentiality Requirements Put to the Test' (2018) 25 *Maastricht Journal of European and Comparative Law* 231 <<https://doi.org/10.1177/1023263X18760548>> accessed 26 January 2022; Alexander H Türk, 'Legislative, Delegated Acts, Comitology and Interinstitutional Conundrum in EU Law – Configuring EU Normative Spaces' 26 *European Law Journal* 415 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/eulj.12400>> accessed 26 January 2022.



Finally, the RPA provides ‘national regulators’ and ‘interested entities’ a right to request information from political advertising service providers and controllers.<sup>46</sup> Interested entities are defined as researchers, members of a civil society organization, political actors, electoral observers and journalists. They must be independent of commercial interests, and are required to be authorized or accredited at a relevant national, European, at international level. These interested entities and regulators are entitled to request the records advertising service providers and controllers must retain (including about the specific service they provided, the amounts they invoiced, and the identity of the sponsor) as well as the transparency notices political advertising publishers make available.

The substantive scope of the right to request data under the RPA is more limited than the right to request data provided under the DSA.<sup>47</sup> Where the RPA spells out what information may be requested, the DSA provides a more open-ended right to request the data necessary to understand systemic risks (including negative effects on democratic values and electoral processes that result from manipulation of platforms’ service).<sup>48</sup> However, the personal scope of the RPA’s right to request data is wider. Under the DSA, data may only be requested from very large online platforms by the Commission or supervisory authority of the main establishment (including on behalf of vetted researchers or civil society actors). The RPA directly empowers a wider group of actors (including journalists and political actors) to request data from a wide variety of actors involved in political advertising, including small platforms, ad agencies, data brokers, ad tech providers and influencers.<sup>49</sup>

## NATIONAL PERSPECTIVES: THE RPA’S IMPLICATIONS FOR NATIONAL POLITICAL ADVERTISING REGULATION

### Background and context of European standards in political advertising law

This section examines the possible implications of the RPA for EU Member States, particularly relating to existing national approaches to the regulation (or non-regulation) of political advertising.<sup>50</sup> This is a particularly important issue, given that during three decades of EU audiovisual media regulation, from the 1989 Television without Frontiers Directive to the amended 2018 Audiovisual Media Services Directive, the EU never once laid down rules on political advertising in broadcasting.<sup>51</sup> Indeed, as mentioned above, the RPA will not only lay down rules for political advertising online and in broadcasting, but will also extend to political advertising in print media,<sup>52</sup> and will be the first time EU legislation specifically targets rules applicable to election-related expression during national elections.

To understand the historical hesitancy for pan-European standards on political advertising, it is helpful to mention the approach of the Council of Europe (a 46-Member State intergovernmental human-rights organization distinct from the EU), which has long set standards related

<sup>46</sup> Supervisory authorities’ right of access does not include information about targeting. It is unclear whether this is an oversight. European Commission, ‘RPA Impact Assessment’ (n 24) 162–170.

<sup>47</sup> DSA proposal article 31.

<sup>48</sup> RPA article 31(2), 26(1)(b)(c) DSA.

<sup>49</sup> Information can be requested from political advertising service providers under article 11 RPA, and controllers under article 13 RPA.

<sup>50</sup> RPA article 2(2).

<sup>51</sup> Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities 1989; Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities (AVMSD 2018) 2018.

<sup>52</sup> RPA recital 21 (‘Advertisements include the means by which the advertising message is communicated, including in print, by broadcast media or via an online platforms service.’).

to elections and media regulation and was always quite circumspect in its recommendations on political advertising. For example, the Council of Europe's Committee of Ministers has issued several influential standard-setting recommendations on media coverage of elections. Notably, in its Recommendations on measures concerning media coverage of election campaigns, the specific recommendations on political advertising were limited to only Member States 'where political parties and candidates are permitted to buy advertising space for electoral purposes'.<sup>53</sup> Further, the Recommendations only stated that Member States 'may consider' introducing regulatory frameworks for limiting the amount of political advertising space that can be purchased, and it was never recommended that Member States should regulate per se political advertising. This was because of varying 'different positions' of Member States in the regulation of political advertising, and as such, the recommendations did not 'take a stance on whether this practice should be accepted or not', and did not specify whether it is desirable to set any precise limits on the amount of paid advertising, as 'it is considered that the decision on this matter should be taken at the national level'.<sup>54</sup>

Indeed, the Grand Chamber of the ECtHR has specifically emphasized this hesitancy, stating that '[s]uch is the lack of consensus' in the regulation of political advertising, the Council of Europe's Committee of Ministers 'declined to recommend a common position on the issue'.<sup>55</sup> This was because there is a 'substantial variety of means employed' by Member States to regulate political advertising, and crucially, this reflected the 'wealth of differences in historical development, cultural diversity, political thought and, consequently, democratic vision of those States'.<sup>56</sup> As Dobber, Ó Fathaigh and Zuiderveen Borgesius point out, political advertising and election regulation involve a 'particularly complex balancing of interests, and is tied to national culture and political history'.<sup>57</sup> Indeed, the ECtHR has explicitly recognized the different rationales for regulating political advertising, namely to protect public debate and opinion from distortion by 'powerful financial groups', and guaranteeing 'equality of opportunity' for different voices in society.<sup>58</sup> Notably, the ECtHR's Grand Chamber has tied the regulation of political advertising to protecting pluralism and pluralistic debate, and the State may have a positive obligation to intervene to guarantee effective pluralism.<sup>59</sup>

Given the above context, the first issue that must be examined is to what extent the RPA pre-empts the national regulation of political advertising. Article 3 of the RPA prohibits Member States from maintaining or introducing, on grounds of transparency, diverging national legislation. It is important to note in this context that the RPA conceptualizes transparency broadly. The chapter on transparency not only includes disclosures to ad viewers, but also to regulators, authorized private actors and through ad libraries. At the same time, the RPA does not preclude transparency measures that fall outside its scope.<sup>60</sup> Member States can, therefore, still impose transparency obligations that do not directly concern targeting or the provision of political or related services, for example, by requiring political parties to be transparent about their

<sup>53</sup> Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns' (Council of Europe 1999) <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805e3c6b](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805e3c6b)> accessed 8 April 2022; Council of Europe, 'Recommendation of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns' (2007) CM/Rec(2007)15 <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805d4a3d](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805d4a3d)> accessed 10 June 2019.

<sup>54</sup> Explanatory Memorandum to Recommendation No. R (99) 15 of the Committee of Ministers to Member States on measures concerning media coverage of election campaigns; and 2007 Recommendation Rec(2007)15 revised R(1999)15.

<sup>55</sup> *Animal Defenders International v United Kingdom* (n 3) para 123.

<sup>56</sup> *Animal Defenders International v United Kingdom* (n 3) para 123.

<sup>57</sup> Dobber, Ó Fathaigh and Borgesius (n 2) 14.

<sup>58</sup> *VgT Verein gegen Tierfabriken v. Switzerland* (n 3) para 72.

<sup>59</sup> *Animal Defenders International v United Kingdom* (n 3) para 112.

<sup>60</sup> Stephen Weatherill, 'The Fundamental Question of Minimum or Maximum Harmonisation' in Sacha Garben and Inge Govaree (eds), *The Internal Market 2.0* (1st edn, Hart Publishing 2020) <<http://www.bloomsburycollections.com/book/the-internal-market-2-0/ch12-the-fundamental-question-of-minimum-or-maximum-harmonisation/>> accessed 22 February 2021.

funding.<sup>61</sup> The RPA also does not prohibit Member States from regulating political advertising on grounds that do not relate to transparency. It states explicitly that its rules should not affect the content of political ads, silence periods, or national definitions of political parties, political aims, or campaign periods.<sup>62</sup> The impact assessment notes these are ‘essential parts of the organization of elections, which remains largely a national competence’.<sup>63</sup> Similarly, under the RPA, Member States remain free to regulate the use of targeted political advertising, as long as they do not do so in a way that contravenes the RPA’s limited ban on the use of sensitive data in the context of political advertising. Of course, other sources of EU law (such as the GDPR) may still limit the extent to which Member States can regulate the use of personal data for targeted political advertising.

### The RPA’s implications for Member States

It is no overstatement to remark that the RPA will have profound and far-reaching implications for Member States, including for how Member States define political advertising. Indeed, the legislative choices made around the definition of political advertising are crucial, given that the definition will determine which actors are subject to regulation, and during what periods. The implications for Member States of the RPA’s proposed broad definition of political advertising are readily apparent when grouping how Member States currently approach political advertising: (i) the implications for EU Member States that have a definition of political advertising and a national regulatory framework that has been used for many decades (Germany, Ireland, etc.); (ii) the implications for EU Member States that do not have specific legislative rules on paid political advertising, including election ads and issue ads (eg Sweden, the Netherlands, etc.); (iii) the implications for EU Member States that do not have specific regulation for issued-based advertising (nearly all EU Member States) and (iv) the implications for Member States that regulate the transparency of online political advertising (eg France).

First, there are distinct implications for Member States that already have definitions of political advertising and a national regulatory framework that has been used for many decades. While the RPA focuses on the implications for online platforms and other cross-border services, the national regulatory frameworks are familiar to, and have been relied upon by, national media organizations, political parties and national regulators. In this regard, there is a plethora of approaches to the concept of political advertising in EU Member States. In the first place, political advertising can be defined with a focus on whether a political candidate purchased an advertisement (ie financial dimension or actor-based approach). For example, in Cyprus, a political advertisement is an ‘announcement or message of any kind of broadcast in return for payment or for a similar consideration’ by a candidate in presidential elections, parliamentary elections, elections of the European Parliament or any other elections.<sup>64</sup> Second, some Member States prohibit political advertising in a broad sense (ie purpose or objective dimension). Examples are Norway, which prohibits advertisements to ‘promote belief systems or political messages’, and Ireland, which prohibits advertisements directed towards a ‘political end’.<sup>65</sup> Further, in Germany, political, ideological and religious advertisements are prohibited in broadcasting and on-demand media services.<sup>66</sup> This approach aligns with the ECtHR’s approach of treating political advertising in a very broad sense, that is, concerning matters of public interest, and not

<sup>61</sup> RPA article 1.

<sup>62</sup> RPA recital 13, 25.

<sup>63</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 35.

<sup>64</sup> The Radio & Television Organizations Law of 1998. (7(I)/98.

<sup>65</sup> See Norway’s Broadcasting Act, section 3-1; and Ireland’s Broadcasting Act 2009, section 43(1).

<sup>66</sup> Medienstaatsvertrag article 8(9).

merely election-related advertisements.<sup>67</sup> In addition, there are those Member States that define political advertising in a narrow sense related to elections and candidates (ie actor dimension), such as Romania, which prohibits ‘political advertising, whether positive or negative, in connection to political parties, politicians, political messages’ (except during elections).<sup>68</sup> Similarly, in Croatia, advertising of political parties, coalitions and independent members of representative bodies is prohibited (except during elections).<sup>69</sup>

Having regard to these varying approaches to defining political advertising, the RPA’s definition will impose a uniform approach to the definition of political advertising, focusing on messages ‘by, for or on behalf of a political actor’ and messages ‘liable to influence’ the outcome of an election or referendum, a legislative or regulatory process or voting behaviour. However, the question does arise as to whether it will mandate a different approach by EU Member States that have existing definitions of political advertising, especially given the wording of Article 3 RPA, namely ‘Member States shall not maintain or introduce, *on grounds related to transparency*, provisions or measures diverging from those laid down in this Regulation’ (emphasis added). This seems to only apply to national provisions ‘on grounds related to transparency’. Crucially, however, many of the national provisions on political advertising relate to its ‘prohibition’, where the rationales for prohibitions may not be on grounds of transparency, but on grounds of protecting pluralism and democratic debate.

Second, there are EU Member States that do not have specific legislative rules on political advertising (for various historical and cultural reasons), such as Austria, Bulgaria, Luxembourg, Malta and the Netherlands; and indeed, in 2006, Sweden actually deregulated political advertising.<sup>70</sup> Further, some Member States, such as the Netherlands, utilize self-regulatory frameworks,<sup>71</sup> rather than legislative regulation. For these Member States, the RPA will herald a new regulatory framework for political advertising, meaning that a choice made at the national level to not impose legislative restrictions in the form of transparency requirements on election-related advertising and issue-based advertising may now be removed. This will also mean national regulatory authorities becoming involved in the enforcement of the RPA, which may not have the institutional experience of regulatory activity in election-related advertising. For example, in several Member States, such as France, Spain and Italy, there are specific electoral commissions and media commissions, which have long had the competence to ensure that the myriad of rules under electoral legislation, including political advertising, silence periods, opinion poll and campaign finance rules, are complied with.<sup>72</sup> However, there are also those Member States such as the Netherlands, which have not regulated political advertising, where the media commission has only experience in setting free-airtime allocations for political parties and has never had to deal with paid political advertising regulation.<sup>73</sup>

Third, the implications for Member States that specifically regulate the transparency of online political advertising. For example, in France, under its 2018 Law on Combatting the Manipulation of Information, new transparency rules were introduced targeting paid political content on online platforms. The law provides that during the three months to elections, online

<sup>67</sup> *Animal Defenders International v United Kingdom* (n 3) para 99 (political advertising includes advertising on “matters of broader public interest”).

<sup>68</sup> See Regulatory Code of Audiovisual Content, article 139.

<sup>69</sup> Electronic Media Act, article 30(3).

<sup>70</sup> van Hoboken and others (n 2) 155.

<sup>71</sup> ‘First National Code of Conduct on Online Political Advertising in the European Union Signed by Dutch Political Parties and Global Online Platforms’ (IDEA, 9 February 2021) <<https://www.idea.int/news-media/news/first-national-code-conduct-online-political-advertising-european-union-signed-dutch>> accessed 8 April 2022.

<sup>72</sup> Ernesto Apa and others, *Media Coverage of Elections: The Legal Framework in Europe* (Maja Cappello ed, European Audiovisual Observatory 2017) <<https://rm.coe.int/16807834b2>>.

<sup>73</sup> Apa and others (n 72).

platforms must provide users with ‘fair, clear and transparent information’ on who paid for the ‘promotion of content relating to a debate of general interest.’<sup>74</sup> France already prohibits political advertising (termed ‘election propaganda’) during the six months prior to an election, and the 2018 Law sought to target paid content on matters of general interest. This also aligns with the ECtHR’s conception of political advertising, which covers expression on matters of public interest.<sup>75</sup> As such, the RPA will require a narrowing of this definition of political advertising from content on matters of public interest, so only advertising which is ‘liable to influence’ an election, referendum, legislative or regulatory process, or voting behaviour is covered. As such, the 2018 Law will need to be brought into line with the RPA, and indeed, France’s 2018 Law is one of the few national laws specifically targeting the transparency of online political advertising.

Fourth, the RPA’s application to issue-based advertising will arguably be most pronounced, given that, as multiple reports from the European Regulators Group for Audiovisual Media Services have demonstrated, EU Member State legislation on political advertising does not specifically define such issue-based advertising.<sup>76</sup> Instead, some national legislation took the approach of using very broad concepts to define political advertising such as political, political purpose or political end. The RPA will specifically capture some issue-based advertising, and this may have implications for how Member States regulate online campaigning by civil society and NGOs in particular. Indeed, the Impact Assessment emphasises the use of issue-based advertising by ‘well-known’ NGOs such as Greenpeace and Save the Children.<sup>77</sup> In particular, the RPA’s definition of issued-based advertising is arguably quite unclear and may leave considerable discretion to regulatory authorities in deciding whether an issue-based ad by an NGO is ‘liable to influence’ a regulatory process or voting behaviour. Indeed, the Recitals further complicate the definition, stating that ‘account should’ be taken of factors ‘such as’ (i) the content of the message, (ii) language used, (iii) context, (iv) objective of the message and (v) means of publication or dissemination.<sup>78</sup> It should be remembered that ‘transparency’ legislation has been used in some EU Member States to target civil society and NGOs that engage in criticism of government policy.<sup>79</sup> Though the obligations the RPA imposes on sponsors (under Article 5) are quite limited, there may be a danger that NGOs are cut off from the advertising ecosystem because advertisers are deterred from offering advertising due to fear of sanctions, or simply do not want to deal with the compliance costs. Indeed, when France introduced its law on transparency of paid public interest content, Twitter, Google and Microsoft responded by prohibiting public-interest advertising in France.<sup>80</sup>

## EU PERSPECTIVES: THE DIFFICULT QUESTION OF COMPETENCES

The legal bases for the RPA are articles 16 (for the provisions on targeting) and 114 TFEU. In the following, we will concentrate on discussing article 114 TFEU—the Internal Market competence, as it is this article that has been used in the past years by the European Commission to determine very actively the shape of national and European information law. Article 114 TFEU entitles the European Commission to take measures that are necessary to ensure the establishment and functioning of the internal market. The realization of the European Digital Single

<sup>74</sup> LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l’information (1) 2018 (2018-1202).

<sup>75</sup> *Animal Defenders International v United Kingdom* (n 3) para 93.

<sup>76</sup> ERGA, ‘Report on Disinformation: Assessment of the Implementation of the Code of Practice’ (2020) 18 <<https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>>; ERGA (n 4) 45.

<sup>77</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 92.

<sup>78</sup> RPA recital 17.

<sup>79</sup> *European Commission v Hungary* [2020] CJEU [GC] C-78/18.

<sup>80</sup> Dobber, Ó Fathaigh and Borgesijs (n 2) 11.

Market continues to be a primary objective for the European Commission,<sup>81</sup> on its ‘path to a Digital Decade’ that must ‘ensure that the European Union achieves its objectives and targets towards a digital transformation of our society and economy in line with the EU’s values.’<sup>82</sup>

Article 114 TFEU is an important, albeit limited competence. Article 114 TFEU marks a careful balance between the regulatory competences of the European Commission vis-a-vis national competences, and as such touches upon more fundamental questions about the conferral of powers, the interests of the Union vis-a-vis those of individual Member States, but also national sovereignty and democratic legitimacy within the EU.<sup>83</sup> The Court of Justice has made it clear that the internal market competence cannot be read as ‘a general power to regulate the internal market’ as this would be contrary to the principle of subsidiarity.<sup>84</sup> Instead, the internal market competence must be focused on the ‘abolition of all obstacles to the free movement of goods, persons, services, and capital.’<sup>85</sup>

In the impact assessment of the RPA, the European Commission lists a wide set of problems around political advertising (regulation), including the lack of an EU-wide definition of political advertising and divergent approaches in the Member States, differences between the way commercial and political advertising is being regulated, a lack of transparency and ensuing risks of the misuse of algorithmic targeting, interference, and manipulation of democracy in Europe; as well as the fact that some members states have regulated or intend to regulate political advertising, resulting in a patchwork of national rules. Based on these observations, the Commission then develops a two-pronged reasoning: a market-related argument, saying that the resulting ‘patchwork of national rules’ leads to the impediment of providers of political ads related services across different Member States, and a democracy-related argument, namely that the divergences in national approaches result in oversight issues, lack of transparency and ‘poor regulatory outcomes’ that can ‘undermine[] the integrity of electoral processes and citizens’ confidence.’<sup>86</sup>

The fact that there are economic and non-economic issues involved in itself does not prevent the EU legislator from relying on article 114 TFEU as a legal basis.<sup>87</sup> And yet, the explicit and prominent reference to democracy-related arguments in the impact assessment can be interpreted in the sense of a more ambitious ‘push for European democracy.’<sup>88</sup> With the European Democracy Action Plan, the von der Leyen Commission has clearly expressed its ambition to take the European project further than the realization of a Digital Single Market, and in addition strengthen the resilience of EU democracies. It is also in this context that the RPA has been first announced. Put differently, what we are observing here is potentially a not-so-subtle re-interpretation of the very concept of the Internal Market from a neoliberal project to a more comprehensive understanding of the internal market as a tool to bring about a more resilient European democracy.

<sup>81</sup> Ursula von der Leyen, ‘Political Guidelines for the next European Commission 2019-2024’ (European Commission 2019) <[https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission\\_en\\_0.pdf](https://ec.europa.eu/info/sites/default/files/political-guidelines-next-commission_en_0.pdf)> accessed 8 April 2022.

<sup>82</sup> Proposal for a Decision of the European Parliament and of the Council establishing the 2030 Policy Programme “Path to the Digital Decade” 2021 [COM/2021/574 final].

<sup>83</sup> Davies, Gareth, ‘The Competence to Create an Internal Market: Conceptual Poverty and Unbalanced Interests’ in Garben, Sacha and Govaere, Inge (eds), *The Division of Competences between the EU and the Member States* (Hart 2017) 75. <<https://research.vu.nl/en/publications/6683e0c8-a447-48c6-90fc-5318961b90e4>> accessed 8 April 2022.

<sup>84</sup> *Tobacco Advertising I* [2000] CJEU Case C-376/98 [83].

<sup>85</sup> *Tobacco Advertising I* (n 84) para 82.

<sup>86</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 6.

<sup>87</sup> Bruno de Witte, ‘Exclusive Member State Competences. Is There Such a Thing?’ in Sacha Garben and Inge Govaere (eds), *The Division of Competences Between the EU and its Member States* (Hart Publishing 2017) 63; European Commission, ‘RPA Impact Assessment’ (n 24) 22–23.

<sup>88</sup> von der Leyen (n 81) 19.

The legal scholar Davies writes ‘there is nothing neutral about the proposition that establishing a market requires merely movement and competition.’<sup>89</sup> Like no other area, the issue of (online) political advertising demonstrates how difficult the concept of the Internal Market as a strictly economic project is to maintain in the digital environment. In the digital environment and data-driven services in particular, the political and economic aspects of the internal market are often two sides of the same coin. The actors, means and mechanisms for political and commercial advertising are increasingly difficult to separate, and often identical.<sup>90</sup> The increasingly important role that multi-purpose platforms fulfil as the digital infrastructure across which data flows only further highlight how closely the economic, political and cultural aspects are intertwined in the digital single market. However, this also means that article 114, and also article 16 TFEU, become very powerful competences to address almost all aspects of the digital single market, be they economic, cultural or political in nature. As such, the regulation of political advertising could be seen as a primary example of what Garben and Govaere term the ‘inherently dynamic nature of the competence arrangement’. According to Garben and Govaere, ‘[i]n light of changing political, legal and societal realities, some areas may see such an increase in European integration that they move from complementary to shared, or from shared to exclusive.’<sup>91</sup>

The regulation of political advertising, however, is also a prime example of how much the European integration project can then reach into core aspects of national sovereignty. The RPA demonstrates quite clearly how the data-driven integration of the economic, cultural and political also affects a shift of regulatory activity from the national to the European level, even in areas that so far were at the heart of national competences, such as political campaigning and the organization of the democratic process. As explained in Section 3, it is exactly that close relationship between the regulation of political advertising and aspects of national cultural and political history and the way they reflect the ‘historical development, cultural diversity, political thought and, consequently, democratic vision’<sup>92</sup> of the individual Member States that have caused both the ECtHR, as well as the Council of Europe, to be very reserved in their standardization efforts. The RPA takes exactly the opposite approach and cuts through the diversity of national approaches.

The political sensitivity of the subject matter—political advertising—places extra pressure on the need to justify the European legislators’ intervention. Unfortunately, it is exactly here that the RPA is lacking. The draft Regulation and the underlying impact assessment leave many questions open, starting with the question if there is a problem at all that would require such a far-reaching intervention into a politically sensitive area; and whether the regulation’s focus on transparency and a narrow set of issues around targeted advertising is the most effective and proportionate solution.

The impact assessment cites fragmented rules and definitions as well as unclear procedures and the resulting legal uncertainty as the first and foremost problem for cross-border providers of political advertising.<sup>93</sup> The mere finding of disparities and abstract risks of obstacles to the exercise of fundamental (market) freedoms, however, is not sufficient to trigger the internal market competence.<sup>94</sup> The impact assessment does not substantiate that there is a market for cross-border political advertising services, and how and to what extent it is being affected by the current differences between national approaches. This assessment is also shared by the

<sup>89</sup> Davies, Gareth (n 83) 84.

<sup>90</sup> Helberger, Dobber and de Vreese (n 32).

<sup>91</sup> Sacha Garben and Inge Govaere, *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart 2017) 10. <<http://dx.doi.org/10.5040/9781509913503.ch-001>> accessed 8 April 2022.

<sup>92</sup> *Animal Defenders International v United Kingdom* (n 3) para 123.

<sup>93</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 7.

<sup>94</sup> *Tobacco Advertising I* (n 84) para 84.

European Commission's Regulatory Scrutiny Board, which concludes that the Commission needs to better define the exact nature, scope and scale of the internal market problem, as well as how transparency and targeting issues are linked with the internal market legal basis.<sup>95</sup>

But it seems that (potential) differences between national regulations are not the only, or even main concern, of the Commission. The Impact Assessment identifies differences in the terms of services of some of the main economic actors in this area (Facebook/Instagram, Google/YouTube, Snap, Twitter and TikTok) and concludes that 'by taking such actions, private actors – in particular if they are gateway intermediaries – act as de facto enablers and/or quasi-regulators of political ads. Their decisions can have the effect of further partitioning the internal market or otherwise affecting its functioning.'<sup>96</sup> This observation points to another tension with article 114 TFEU as the legal basis. As the European Commission rightly observed, in the digital marketplace, regulatory differences are not any longer the exclusive result of diverging national rules but also of differences in the terms of use and community policies of a small number of tech platforms that essentially set the rules for the online world. It is not even clear if the wording of article 114 TFEU supports such an interpretation of the legislative competences ('adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States') (emphasis added). Even more problematic is that by using differences in the terms of use of the key economic players as a justification for harmonization measures, the European Commission essentially turns the internal market argument on its head: because economic actors use economic freedoms differently, and in so doing create new obstacles to the internal market, national laws need to be approximated. Article 114 TFEU is, in this context, not even used to harmonize divergent national laws, but to introduce legislation for a number of private actors that are at the same time the parties most likely to benefit from harmonisation. As such, article 114 TFEU seems on its way to evolving to a super-competence for the European Commission to regulate where it deems such regulation necessary for the better functioning of the internal market.

The next open question is: why transparency? In the impact assessment, the European Commission cites a range of potential divergences in national regulations, from the definition of political advertising to the regulation of the availability of the ads and the advertisements themselves. The Commission then concludes that the RPA will focus on the transparency requirements as a 'key aspect of the regulation of political advertising'<sup>97</sup> and the 'key available area for harmonization, which de facto allows for shaping the emerging market for political advertising services in a way that minimizes fragmentation, barriers and costs for economic actors.'<sup>98</sup> Harmonizing national rules about all other aspects of political advertising regulation is, according to the Commission, not necessary for the functioning of the internal market (because it is sufficient to harmonize transparency). Doing so is, according to the Commission, also not appropriate in the light of the division of competences: 'Such rules are intrinsic to national electoral law and do not form part of the functioning of the internal market.'<sup>99</sup>

It is difficult to see why divergent transparency and labelling requirements between Member States are an obstacle to providing transborder political advertising services, while divergences between the rules that either ban, restrict or allow political advertising in Member States are not. As such, it is difficult to follow the argument that transparency is the 'key area for harmonization'. This is all the more problematic since, as Section 3 of this article has illustrated, transparency

<sup>95</sup> 'Regulatory Scrutiny Board Opinion: Impact Assessment/ Transparency of Political Advertising' (European Commission 2021) SEC(2021) 575 final 2. <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI\\_COM:SEC\(2021\)575&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:SEC(2021)575&from=EN)> accessed 8 April 2022.

<sup>96</sup> European Commission, 'RPA Impact Assessment' (n 24) 12.

<sup>97</sup> European Commission, 'RPA Impact Assessment' (n 24).

<sup>98</sup> European Commission, 'RPA Impact Assessment' (n 24) 9.

<sup>99</sup> RPA p. 6.



and the regulation of political targeting and amplification techniques, are now among the areas that hardly any member state has regulated. This makes it difficult to see how (the lack of) fragmentation can serve to justify the need for harmonization, while the RPA leaves it up to Member States to adopt additional rules or maintain their national divergences concerning all other aspects of (online) political advertising that are not regulated. A pragmatic explanation would be that the Commission, intent on intervening in this area, considered transparency as an area Member States were most likely to accept European Commission intervention.<sup>100</sup> Indeed, it is worth noting that the Commission speaks of the ‘key available area for harmonisation’ (emphasis added).<sup>101</sup> This still leaves the question, unaddressed by the impact assessment, why the regulation of transparency is available for harmonization but other areas not; other than that ad transparency is thus not so much a ‘key aspect of the regulation of political advertising’, but an EU intervention that would not risk protest from Member States that see their competences being eroded.<sup>102</sup>

Finally, there is the question of who will exactly benefit from the regulation. The impact assessment speaks of ‘operators, especially SMEs, which could offer the political-ads-related services in different Member States’, without offering much insight into who these SMEs are, and how big the issue potentially is, except for a footnote referring to one stakeholder that allegedly reported that ‘smaller companies may be prevented from entering political advertising markets due to the costs of complying with the applicable regulations’. The impact assessment also refers to ‘many economic actors providing novel ad-related services, including data-driven analysis and programmatic ads.’<sup>103</sup> To date, the most prominent category of providers of such novel ad-related services are a handful of very large Silicon Valley platforms and some internationally operating specialized campaign companies.<sup>104</sup> Put differently, in the absence of a truly competitive market for political advertising services, the parties that are likely to benefit most from legal certainty and the abolition of divergent national regulations are Facebook, YouTube, TikTok & Co., as well as large pan-European or even non-European advertising agencies.<sup>105</sup> This raises another fundamental question about the internal market competence, the underlying conceptualization of the internal market, and whether it is legitimate to invoke article 114 TFEU if a significant share of the parties that are likely to benefit the most are non-European actors.

## THE EU’S AND MEMBER STATES’ NEW ROLE IN POLITICAL ADVERTISING LAW

Further, the RPA will now also alter the role the EU and Member States adopt in political advertising regulation. Traditionally, the EU focused its efforts on soft law and coordination and left Member States considerable discretion to determine how to (not) regulate political advertising. With the RPA, the EU asserts its legislative powers to provide one set of definitions, transparency measures and targeting rules in all Member States. Moreover, if the history of European media law is any indication, the RPA’s scope may be expanded through future revisions. In that

<sup>100</sup> Compare European Commission, ‘RPA Impact Assessment’ (n 24) 35. ‘There are specificities, traditional and historic characteristics accompanying the advertising in political context that have to be taken into account and, in contrast, horizontal transparency and measures applicable to economic operators was indicated as something Member States would be willing to support’.

<sup>101</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 9.

<sup>102</sup> European Commission, ‘RPA Impact Assessment’ (n 24).

<sup>103</sup> European Commission, ‘RPA Impact Assessment’ (n 24) 6 fn. 25.

<sup>104</sup> Glenn Kefford and others, ‘Data-Driven Campaigning and Democratic Disruption: Evidence from Six Advanced Democracies’ [2022] Party Politics 1354068822.1084040 <<https://doi.org/10.1177/13540688221084039>> accessed 4 May 2022; Daniel Kreiss and Shannon C McGregor, ‘Technology Firms Shape Political Communication: The Work of Microsoft, Facebook, Twitter, and Google With Campaigns During the 2016 U.S. Presidential Cycle’ (2018) 35 Political Communication 155. <<https://doi.org/10.1080/10584609.2017.1364814>> accessed 4 May 2022.

<sup>105</sup> Interestingly, the Impact Assessment itself contends in a footnote that ‘[l]arge non-EU platforms have a prominent market position in the EU’ European Commission, ‘RPA Impact Assessment’ (n 24) fn. 28.

context, it is useful to evaluate the new roles the EU and the Member States are likely to assume in political advertising regulation.

### The EU as a political advertising legislator

Ultimately, the RPA can be seen as part of an ongoing trend of the EU to regulate media-related aspects, including those that so far have been reserved for national competences. Digitization, datafication, the prominent role of social media as transborder platforms for the provision of all kinds of digital services, as well as the huge differences in negotiation power between those platforms as multinational global players and national Member States, are all factors that point to the need for more centralized EU involvement. In particular, the RPA must be seen in the context of other initiatives in this area, such as the Digital Services Act, the Digital Markets Act and the Media Freedom Act, all of which are responses to the change in decision and political power in the algorithmic society, and an attempt by the EU to secure more control over a number of internationally operating, often non-European technology firms, and safeguard fundamental rights and European values.

And yet, of all of the more recent regulatory initiatives, the RPA also reveals like no other initiative the growing tension with national competences and spheres of influence, exactly because the issue of political advertising is so close to the core of national electoral laws and the organization of the democratic process as the very essence of what defines a national state. The RPA being a regulation—and maximum harmonization—only further emphasizes the tension with national competences. The issue of political advertising also makes it abundantly clear how much relying on article 114 TFEU is stretching the internal market competence *ad absurdum*. Regulating transparency in political advertising and political targeting is not about harmonizing national laws, as only a few Member States have regulated the issue at all. It is about setting European-wide standards for the protection of voters, and creating some European regulatory counter-power to the large social media platforms that, with their terms and conditions, increasingly determine the rules for the digital world. As legitimate as we may view these reasons for European intervention, it does not take away that claiming article 114 TFEU as the appropriate legal basis is increasingly dubious, and the need for reforms becomes more pronounced. If the EU is to play the role of European legislator in the digital economy, new solutions are needed to create an adequate competence base, while respecting the role of national parliaments and the need for overall democratic legitimization.

### Member States as enforcers of political advertising law

In addition, it must be asked what will be the new role of Member States within the EU legal framework on political advertising. In this regard, a major role for Member States will be in establishing the regulatory infrastructure to ensure compliance with the RPA's rules. Notably, instead of streamlining the enforcement of political advertising regulation, the RPA will embed several different regulatory ecosystems for enforcing the RPA's rules. This may result in an overly complex system for enforcement. First, Article 15(1) RPA provides that national data protection authorities 'shall be competent to monitor the application' of Article 12 RPA, namely the rules on microtargeting.<sup>106</sup> Then Article 15(2) RPA provides that Member States must designate competent authorities to monitor the compliance of 'providers of intermediary services' (within the meaning of the Digital Services Act) with the obligations laid down in Articles 5 to 11 and 14 RPA. Further, the provision states that competent authorities designated under the DSA 'may also' be one of the competent authorities designated to monitor the compliance

<sup>106</sup> RPA Article 15(1). Strangely, national data protection authorities are only responsible for one of the RPA's provisions on microtargeting (Article 12), but not on the second provision—Article 13—which concerns transmission of information concerning targeting or amplification to interested entities.

of 'online intermediaries' with the obligations laid down in Articles 5–11 and 14 RPA. As such, existing data protection authorities will police the rules under Article 12 RPA, while Member States must designate an authority to enforce the rest of the rules for providers of intermediary services and online intermediaries under the RPA, which can be the new Digital Services Coordinators to be established when the DSA is enacted. Thus, national DPAs and DSCs will both enforce different aspects of the RPA.

However, to further complicate matters, the RPA also applies to broadcast and print, and taking this into account, Article 15(3) also provides that each Member State shall designate competent authorities to be responsible for the application and enforcement of provisions of the RPA 'not referred to' in Article 15(1) and (3). Thus, depending on the national regulatory infrastructure already in place, these authorities could include broadcast and media commissions, press councils, and election commissions. As such, the RPA's approach is for numerous regulatory authorities to be involved in its enforcement.

Thus, while a major weakness of current regulatory approaches to political advertising, pre-RPA has been the number of regulator authorities with various competences over political advertising rules, the RPA does not seem to, in effect, streamline the enforcement of the rules under the RPA.<sup>107</sup> Perhaps with this realization apparent, Article 15(6) does try to bring some regulatory coherence into the mix, by placing an obligation on Member States to 'ensure cooperation among competent authorities in particular in the framework of national elections networks, to facilitate the swift and secured exchange of information on issues connected to the exercise of their supervisory and enforcement tasks pursuant to this Regulation'.<sup>108</sup> This cooperation should include jointly identifying infringements, sharing findings and expertise, and liaising on the application and enforcement of relevant rules.<sup>109</sup> As such, Member States will have the crucial role of actually coordinating enforcement among different regulatory authorities, and it can be argued that the RPA does not solve the enforcement difficulties associated with political advertising regulation, but rather offloads it to the Member States. Indeed, it can be argued that the RPA requires a lot of cooperation between supervisory authorities to function, but its provisions on what this cooperation should look like are rather limited.

Finally, Article 15 does address some of the issues of cooperation between supervisory authorities in different Member States. In this regard, Article 15(8) RPA provides that where a provider of political advertising services is providing services in more than one Member State, the competent authority in the respective Member States 'shall cooperate with and assist each other as necessary'.<sup>110</sup> Importantly, Article 15(8) places an obligation on the national authorities to consult the competent authorities in the other Member States concerned on the supervisory and enforcement measures taken and their follow-up. Crucially, a competent authority may request (in a 'substantiated, justified and proportionate manner') that another competent authority, 'where it is better placed', take relevant supervisory or enforcement measures. As such, the RPA does go some way in facilitating regulatory cooperation among regulatory authorities in different Member States.

### Member States' remaining legislative role in political advertising

Finally, it is important to consider what the RPA is not designed to do. Its scope is restricted to transparency and targeting, and does not cover important aspects of political advertising regulation such as rules on the substance of political ads or spending limits.<sup>111</sup> Furthermore, contrary

<sup>107</sup> For a discussion of enhancing national enforcement in the digital single market, see Agustin Reyna, 'Optimizing Public Enforcement in the Digital Single Market Through Cross-Institutional Collaboration' (31 January 2020). [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3529198](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529198).

<sup>108</sup> RPA Article 15(6).

<sup>109</sup> RPA Article 15(6).

<sup>110</sup> RPA Article 15(8).

to the transparency obligations, its rules on targeting are minimum harmonisation. The RPA leaves Member States the task of determining what additional conditions, if any, are needed to ensure fair political practices in the context of increasingly sophisticated advertising techniques. In short, the RPA does not absolve Member States of their obligation to safeguard the democratic process in the face of digital amplification and targeting strategies.<sup>112</sup>

There are at least two possible future scenarios for the way Member States will proceed. One scenario is that the RPA will have a quasi-harmonizing effect beyond its actual scope by setting the regulatory agenda and narrowing Member States' focus to matters of transparency and selected aspects of targeting. Under this scenario, Member States will consider the RPA (in combination with other recent EU legislation, particularly the DSA) adequate to address the most important concerns around online political targeting and refrain from additional regulation. Under the second scenario, the RPA will create momentum for Member States to engage in further-reaching reforms to adjust national advertising regulations to new digital campaign strategies. This momentum could be strengthened by the increased data the RPA provides to researchers, journalists and civil society organizations, facilitating more evidence-based calls for new forms of online political advertising regulation, such as targeting and amplification strategies that are not yet regulated under the RPA. This would, in turn, result in new fragmentation on substantial matters of political advertising regulation. The question will then be whether such a situation triggers new legislative action on the EU level, using the RPA as a stepping stone, or the stopping point of harmonized EU regulation in this area because national approaches and cultural and democratic traditions are simply too diverse.

## CONCLUSION

Where the EU regulates political advertising, it leaves little room for Member States. The proposed RPA takes the form of a regulation rather than a directive. It is maximum harmonization with regard to the transparency norms that make up most of its obligations. It empowers the Commission to amend these transparency norms through delegated regulations. And it not only covers the developments in targeted and online advertising that first motivated the Commission to push for more stringent (self-)regulation, but also advertising on TV and in print. In this context, Member States' control over political advertising shifts to the enforcement of EU political advertising law, and the design of the norms that should apply in addition to transparency. This marks a turning point in the European regulation of political advertising. As the scope of EU law expands to meet new challenges to the democratic process, it is important to consider how its regulatory efforts interface with existing national approaches to regulate political advertising, but also how long the Internal Market competence can still be considered a firm constitutional basis for the European Commission's ambitious democratic project.

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<sup>111</sup> RPA p. 6.

<sup>112</sup> *Mathieu-Mohin and Clerfayt v Belgium* [1987] ECtHR 9267/81 [54]; *Informationsverein Lentia and Others v Austria* [1993] ECtHR 13914/88; 15041/89; 15717/89; 15779/89; 17207/90 [38]; Helberger, Dobber and de Vreese (n 32).