



## **Regulation on the transparency and targeting of political advertising ERGA priorities for the trilogue negotiations**

The regulation of political advertising comes at a key moment when the very fundamental principles of democracy are under threat. The members of the European Regulators' Group for Audiovisual Media Services (ERGA) have [followed](#) the development of the draft legislation since its inception in 2020. During the past two years, ERGA has adopted several publications on the topic including [a statement](#) in March 2022 and, more recently, a detailed position [paper](#) on the Regulation in August 2022.

Having passed the European Parliament and the Council, the file has now headed for the trilogue negotiations. ERGA notes with satisfaction that most of the points raised in its 2022 position are echoed in the modifications suggested by the co-legislators. In light of this development, ERGA would like to comment on some of the proposed changes introduced by the co-legislators as well as to reiterate the importance of some measures that are key to ensuring fair and transparent electoral campaigns. In particular, ERGA recommends that co-legislators adopt a more comprehensive definition of issue-based political advertisement and develop a joint approach to targeting and amplification techniques as well as transparency notices, wherein the required repositories ought to follow a set of minimum functionalities and provide access via application programming interfaces (APIs). Besides these issues, ERGA would like to highlight its position on competent authorities, sanction regimes, and the consistency of the Regulation with the Digital Services Act.

The views presented in the following sections are based on ERGA members' long-standing expertise in matters pertaining to audiovisual media legislation and on the experience gained by ERGA members in monitoring the digital platforms' commitments in the area of political ads<sup>1</sup>. ERGA shares the ambition of the co-legislators to establish a level playing field for all providers of advertising services as well as to strengthen, in line with the DSA, the transparency obligations for the largest online advertising publishers.

### **1. Definitions**

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<sup>1</sup> See the reports on the monitoring of the Code of Practice's obligations, published on the ERGA website: [https://erga-online.eu/?page\\_id=14](https://erga-online.eu/?page_id=14).

ERGA appreciates the efforts made by the co-legislators to refine further the definitions in art. 2 of the draft legislation respective recitals. For the regulation to have its desired effect, ERGA deems appropriate definitions necessary. Overall, ERGA welcomes the proposed changes to art. 2 of the proposal. Notably, ERGA appreciates the assurance that the Regulation should not threaten the fundamental principles of freedom of expression and other fundamental rights enshrined in the Charter of Fundamental Rights (EP AM 11, 107; Council rec. 31a).

Furthermore, ERGA acknowledges the clarification of particular aspects of the definition of political advertising in the Regulation recitals. The proposed changes by the co-legislators ensure further clarity on the circumstance that political advertising is a service provided not only for remuneration but also for benefit in kind (EP AM 39; Council rec. 3,14), whose definition should be clarified, for instance, in light of the Electronic Communication Code (recital 16) and AVMS Directive<sup>2</sup>. ERGA welcomes the clarification of concepts of ‘purely private nature’ and ‘purely commercial nature’ referred to in the definition of political advertising (EP AM 18; Council art. 2, rec. 16). Having asked for further refinement of the definitions of political advertising services and sponsors, ERGA appreciates the additions made to the Regulation recitals clarifying the activities undertaken by such actors (EP AM 29-31; Council rec. 26a,b) and the criteria set in order to identify a political advertisement (Council art. 2a).

For the further refinement of art. 2, ERGA recommends that co-legislators adopt a more comprehensive definition of issue-based political advertisements by explicitly referencing the criterion of purpose. Since only the Council presented a definition of issue-based advertising, ERGA suggests keeping the Council's proposed definition of issue-based political advertising, which provides anticipated clarification (Council art. 2, rec. 17). ERGA welcomes the clarification of the co-legislators of what does not constitute political advertising, in particular EP AM 105 and Council art. 2 (2i).

Lastly, ERGA appreciates the concurrence of the co-legislators regarding the distinct definitions for targeting and amplification techniques. As ERGA believes that such techniques are very different activities with very different purposes, the group would agree with the proposed changes that two separate definitions are required (EP AM 127, Council art. 2 (8, 8a)).

## **2. The repositories**

Considering ERGA's extensive experience with monitoring platforms' compliance with the provisions of the Code of Practice on Disinformation, the group of regulators believes that the lack of a precise provision on repositories could eventually derail the success of the Regulation by undermining the efficiency of compliance monitoring activities.

ERGA notes with much interest the minimal functionalities required for such repositories. The changes proposed by the Parliament include a common data structure, standards and application programming interface (API) for the exchange of information with publishers. Besides, the repositories shall be publicly available in real-time in a machine-readable format and allow the processing of multicriteria queries (EP AMs 55, 177).

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<sup>2</sup> AVMSD operates with a terminology similar to benefit in kind when referring to “a return for payment or for similar consideration” in art. 1 (1h).

In contrast, the Council maintains that only VLOPSEs (as pursuant to art. 25 DSA) acting as political advertising publishers ought to make transparency notices available via repositories established pursuant to art. 39 DSA. The Council requires that such information is kept update and provided according to an agreed industry standard for accessibility, data structure and accessed via APIs (Council art. 7 (6)).

ERGA believes that imposing the obligation to keep repositories only on VLOPSEs could eventually hinder compliance monitoring efforts as such a requirement precludes monitoring of political advertising publishers that are not VLOPSEs (as pursuant art. 25 DSA). For this, ERGA considers it important that all platforms acting as political advertising publishers make information in transparency notices available in advertising repositories that include a set of minimum functionalities, such as common data structure and real-time access via APIs that facilitate compliance monitoring by competent authorities. This obligation should be, however, calibrated on the size of the concerned publishers and may contain exemptions for SMEs and start-ups, as per ERGA's position paper published in August 2022.

Should the Commission find the Parliament's proposal on creating a publicly accessible European repository of political advertisements providing aggregated data from all European publishers in real-time through a common API feasible, ERGA is ready to provide its expertise based on the monitoring of the Code of Practice on Disinformation.

### **3. Targeting and amplification techniques**

ERGA considers amplification techniques high-risk AI systems as per their definition in the EU AI Act<sup>3</sup>. For this, amplification and targeting techniques should be strictly limited and regulated. ERGA welcomes the decision of the co-legislators to separate the definitions of targeting and amplification techniques as they are completely different activities needing separate provisions, one focusing on targeting the content and the other on reach or visibility of a political advertisement (EP AMs 127, 128; Council art. 2 (8, 8a)).

In line with the position of the European Data Protection Supervisor (EDPS), ERGA deems it important for the Regulation to contain an explicit reference to the obligations of the GDPR. As such, ERGA appreciates that both co-legislators proposed changes to art. 12, which effectively prohibits the processing of special categories of personal data without the data subject's explicit consent (EP AM 202; Council art. 12).

The regulation of targeting and amplification techniques is effective only insofar as user data is sufficiently protected. Following the trail of proxy discrimination scandals<sup>4</sup>, ERGA believes the targeting and amplification techniques should be limited only to data for which the user has provided his/her explicit consent and completely prohibited when using data inferred by the platform. In this

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<sup>3</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://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206>

<sup>4</sup> Prince, Anya and Schwarcz, Daniel B., Proxy Discrimination in the Age of Artificial Intelligence and Big Data (August 5, 2019). 105 Iowa Law Review 1257 (2020).

regard, ERGA notes with interest Parliament's proposed version of art. 12 (AMs 70, 207) including such provisions despite the absence of a satisfactory enforcement mechanism which could be provided, for instance, by giving the competent authorities the task to adopt specific guidelines aimed at further limiting the use of the aforementioned techniques by VLOPSEs.

#### **4. Sanctions and competent authorities**

The proposed regulation does not intend to interfere with the existing national rules regarding the content or presentation of political advertising. For this, ERGA welcomes the addition to recital 13 wherein both co-legislators further clarify the applicable scope of the regulation (EP AM 11; Council rec. 13). The same is, however, not applicable to the sanction regime as proposed by the Commission. The services covered by the Regulation are often provided on a cross-border basis, requiring a coordinated and consistent approach to sanctions enforceable by adequately equipped competent authorities.

For this, ERGA appreciates the Parliament's proposal to establish a permanent Network of National Contact Points within the framework of the European Cooperation Network on Elections serving as a platform for structured cooperation between national contact points while also appreciating the explicit reference to ERGA (AM 90 and 244). However, ERGA contends the explanation provided for in recital 62 stipulating that national contact points should be members of the European Cooperation Network on Elections. ERGA notes this could effectively prevent some national audiovisual regulators from partaking in the permanent network. This exclusion of some national regulatory authorities could therefore jeopardize the success of the whole Regulation as it would preclude the establishment of a coherent, coordinated, and consistent sanctioning regime.

ERGA suggests deleting the reference to the European Cooperation Network on Elections in recital 62. ERGA reiterates its position as a body relevant for the oversight of this Regulation and highlights the importance of compliance with the Regulation beyond electoral periods.

As for the competencies of the competent authorities, ERGA welcomes the Council's art. 15 (5)) and Parliament's (AM 231) approach granting competent authorities the corrective powers 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 remedy the damage by taking the necessary measures. In effect, this would mean adopting a two-tier sanctioning system fostering transparency and prompt harm mitigation rather than resorting to sanctions as the only corrective mechanism. Following the ERGA position paper, such measures should be imposed only once for the same breach on only one agent within the value chain. The internal contractual relation among the subjects who are part of that value chain will allow the actor sanctioned to be reimbursed by the other actor who actually breached the law.

In the case a financial penalty is to be issued, ERGA welcomes Council's addition to art. 16 wherein a maximum amount of a financial sanction is set to 4% of either the annual income, budget, or worldwide turnover of the sponsor or the provider of political advertising services. This provision, however, covers only the upper ceiling of a pecuniary penalty, not its minimum amount. ERGA deems it important to secure an effective implementation of the Regulation, to include a minimum amount of a financial sanction for the Regulation to have a comprehensive, dissuasive and effective sanction

regime. ERGA recommends setting the minimum amount of a pecuniary fine to at least 0.2% of the actor's total turnover in the previous financial year.

#### **5. Governance and consistency with the DSA**

The consistency of the proposed Regulation with the DSA is acknowledged and has a firm support of ERGA as regards the provisions introduced in the Commission's proposal in art. 7, 14, and 15. Although acknowledging the overall standing of the national competent authorities within the legal framework of the Regulation, ERGA recommends adopting an additional provision in granting the possibility (not the obligation) to the competent authority within each Member State to draft and update a list of issues of political relevance valid for that the Member State.

As regards the coordination required to solve cross-border cases, ERGA believes that it is helpful to establish mechanisms ensuring a consistent application of the DSA rules throughout the different regulatory sectors involved. ERGA believes that there is no need for the constant 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 in solving the issues at stake (Council art. 15a, rec. 59a-c).

ERGA stands committed to protecting the European fundamental values enshrined in the Treaties, including democratic principles and free and fair elections. ERGA is prepared to further engage with the relevant stakeholders in constructive exchanges and provide its expertise on the matter.