EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

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Opinion 2/2022

on the Proposal for Regulation on the transparency and targeting of political advertising

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The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation (EU) 2018/1725 'With respect to the processing of personal data… for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3)'…for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'.

Wojciech Rafał Wiewiorówski was appointed as Supervisor on 5 December 2019 for a term of five years.

Under Article 42(1) of Regulation (EU) 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data' and under Article 57(1)(g), the EDPS shall 'advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data'.

This Opinion relates to the EDPS' mission to advise the EU institutions on coherently and consistently applying the EU data protection principles. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725

Executive Summary

The European Commission adopted on 25 November 2021 a Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising ('Proposal'), as part of a larger legislative package on 'Democracy and Integrity of the European Elections'.

The objective of the Proposal is to support the functioning of the single market for political advertising services, as well as to promote high European standards of transparency in political campaigning and free and fair elections in the EU, strengthen the resilience of democratic processes in the EU and combat disinformation, information manipulation and interference in elections.

The EDPS recognises political communication as essential to the participation of citizens, political parties and candidates in democratic life and to the fundamental right to freedom of expression. At the same time, he recalls that these rights and freedoms are interdependent with the rights under Article 7 of the Charter to respect for private and family life, home and communications, and under Article 8 of the Charter to the protection of personal data.

The EDPS welcomes the aim of the Proposal to lay down harmonised rules on the transparency obligations for providers of political advertising and related services and on the use of targeting and amplification techniques. The EDPS has previously expressed serious concerns with regard to the significant risks related to targeted advertising, most recently in his Opinion 1/2021 on the Proposal for a Digital Services Act, as well as in the EDPS Opinion 3/2018 on online manipulation and personal data.

The EDPS agrees that there is a need to complement the provisions applicable to the processing of personal data in the context of political advertising contained in the GDPR and EUDPR. In this regard, the EDPS considers that that the Proposal needs to go even further and to provide additional restrictions on the processing of personal data in the context of targeting political advertising. Given the multitude of risks associated with online targeted advertising, the EDPS urges the co-legislators to consider stricter rules, by (**1) providing for a full ban of microtargeting for political purposes;** and (2) introducing further restrictions of the categories of data that may be processed for the purposes of political advertising, including targeting and amplification, in particular **prohibiting targeted advertising based on pervasive tracking**.

The EDPS also offers in the Opinion other specific comments and recommendations on certain elements of the Proposal, such as the relationship with the existing legal framework on data protection, the roles and responsibilities of the actors involved in the political advertising and the cooperation among the authorities responsible for supervision and enforcement, including data protection authorities.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to 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 (General Data Protection Regulation)[1],

Having regard to Regulation (EC) No 2018/1725 of the European Parliament and of the Council of 23 October2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[2], and in particular Articles 42(1), 57(1)(g) and 58(3)(c) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. The European Commission adopted on 25 November 2021 a Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising ('Proposal')[3]. The Proposal had already been envisaged in the European Democracy Action Plan presented by the Commission in December 2020[4].

2. The Proposal is part of a larger legislative package on 'Democracy and Integrity of the European Elections', which includes also a proposal for a Regulation (recast) on the statute and funding of European political parties and European political foundations[5], and two proposals for a Directive (recasts) on the rights of citizens residing in a Member State of which they are not nationals in European elections and municipal elections. The EDPS has been separately consulted on the other three proposals.

3. The objective of the Proposal, as stated by the Commission, is to support the functioning of the single market for political advertising services, as well as to promote high European standards of transparency in political campaigning and free and fair elections in the EU, strengthen the resilience of democratic processes in the EU and combat disinformation, information manipulation and interference in elections, by laying down harmonised rules on:

   - the transparency obligations for providers of political advertising and related services to retain, disclose and publish information connected to the provision of such services; and

   - the use of targeting and amplification techniques in the context of the publication, dissemination or promotion of political advertising that involve the use of personal data[6].

4. The Proposal complements the proposal for the Digital Services Act ('DSA')[7], which includes certain general transparency obligations for online intermediaries as regards online advertising. Compared to the DSA, it expands the categories of information to be disclosed in the context of political advertising, as well as the scope of the relevant service providers concerned. While the DSA imposes transparency requirements on online platforms, the Proposal seeks to cover the entire spectrum of political advertising publishers, as well as other relevant service providers involved in the preparation, placement, promotion, publication and dissemination of political advertising.[8] Additionally, there is complementarity and synergies with the requirement under the DSA to have assessments of systemic risks by very large online platforms stemming from the functioning and use of systems for selecting and displaying advertisement, with actual or foreseeable effects related to electoral processes[9].

5. On 25 November 2021, the Commission requested the EDPS to issue an Opinion on the Proposal, in accordance with Article 42(1) of Regulation (EU) 2018/1725. The EDPS was also informally consulted during the process of preparation of the Proposal, and communicated his informal comments on 10 November 2021. He welcomes the fact that his views have been sought at an early stage of the procedure and encourages the Commission to continue with this good practice. The comments and recommendations in this Opinion are limited to the provisions in the Proposal that are most relevant from data protection perspective.

2. General Comments

6. The EDPS recognises political communication as essential to the participation of citizens, political parties and candidates in democratic life and to the fundamental right to freedom of expression. At the same time, he recalls that these rights and freedoms are interdependent with the rights under Article 7 of the Charter to respect for private and family life, home and communications, and under Article 8 of the Charter to the protection of personal data[10].

7. Freedom, fairness and transparency are recognised as key principles of democratic elections[11]. Therefore, the EDPS welcomes and fully supports the aim of the Proposal to promote free and fair elections in the EU level, strengthen the resilience of democratic processes and combat disinformation, information manipulation and interference in elections.

8. Personal data are increasingly used to target individuals and specific groups with highly personalised and tailored messages in order to amplify their impact and circulation. In particular, personal data are analysed in order to determine the characteristics of the individuals concerned in order to tailor the content and dissemination of specific advertising messages[12]. The EDPS has already expressed his serious concerns with regard to targeted advertising, most recently in his Opinion 1/2021 on the Proposal for a Digital Services Act[13], as well as in the EDPS Opinion 3/2018 on online manipulation and personal data[14].

9. The existing business models behind many online services have contributed to increased political and ideological polarisation, disinformation and manipulation. Targeted advertising and amplification mechanisms have been instrumental in provoking such harms. The EDPS considers his recommendations about online targeted advertising are even more valid in the political context, having in mind its potential negative impact on the integrity of democracy and its representative institutions.

10. Similar risks have been identified by the European Data Protection Board (EDPB) in its Guidelines on the targeting of social media users[15]. In particular, the EDPB has highlighted the risks of the use of personal data beyond their initial purpose and potential for manipulation undermining individual autonomy and freedom, (e.g. by delivering individualized messages designed to exploit or even accentuate certain vulnerabilities, personal values or concerns)[16].

11. The EDPB also confirmed that targeted advertising can be used to unduly influence individuals when it comes to political discourse and democratic electoral processes. While 'traditional' offline political campaigning intends to influence voters' behaviour via messages that are generally available and retrievable (verifiable), the targeted advertising makes it possible to target individual voters as well as group with tailored messages, specific to the particular needs, interests and values of the target audience[17].

12. The EDPS concurs with the Commission's conclusion that such practices have specific detrimental effects on citizens' fundamental rights and freedoms, including their freedoms of opinion and of information, to make political decisions and exercise their voting rights[18]. Moreover, he is convinced that they present increasing risks not only for the fundamental rights of individuals, but also for society as a whole. Therefore, this Opinion pays particular attention on the proposed rules related to targeting of political messages to citizens using personal data collected directly from them, or indirectly such as inferred data, or derived through their online activity, behavioural profiling and other analysis techniques.

13. The EDPS agrees that there is a need to complement the provisions applicable to the processing of personal data in the context of political advertising contained in Regulation (EU) 2016/679 ('GDPR') and Regulation (EU) 2018/1725 ('EUDPR') and to provide specific additional protection of personal data when it is used in the context of targeting political advertising[19]. He particularly welcomes the Proposal's aim to increase transparency towards data subject in a manner that takes into account the guidance of the EDPB concerning the targeting of social media. Given the multitude of risks associated with online targeted advertising, however, the EDPS considers that the Proposal should go even further and introduce additional safeguards. Therefore, the EDPS urges the co-legislators to consider strict rules going beyond transparency, including full ban on microtargeting for political purposes and further restrictions of the categories of data that could be processed for this purpose (see further in section 3.3).

3. Specific Comments

3.1. Relationship with the existing legal framework on data protection

14. According to the Explanatory Memorandum, the legal basis for the Proposal is in the first place Article 114 of the TFEU, which provides for the adoption of measures to ensure the establishment and functioning of the Internal Market. In addition, the Proposal is based on Article 16 of the TFEU, insofar as it contains specific rules on the protection of individuals with regard to the processing of personal data, *"notably restrictions of targeting techniques considered to negatively affect rights when used in the context of political advertising"*[20].

15. In line with the jurisprudence of the CJEU, Article 16 TFEU provides an appropriate legal basis in cases where the protection of personal data is one of the essential aims or components of the rules adopted by the EU legislature[21]. At the same time, a comprehensive data protection framework adopted on the basis of Article 16 TFEU already exists, consisting of Regulation

(EU) 2016/679 (GDPR), of Regulation (EU) 2018/1725 (EUDPR) and the Law Enforcement Directive (LED)[22]. Therefore, in the interest of legal certainty, the relationship of the Proposal with the existing legal framework on data protection in the EU should be clarified explicitly in the operative text of the Proposal.

16. The EDPS welcomes the statement in the Explanatory Memorandum that the proposed Regulation builds upon and complements the provisions applicable to the processing of personal data in the context of political advertising contained in Regulation (EU) 2016/679 and Regulation (EU) 2018/1725"[23].

17. The EDPS notes, however, that the relationship of the proposed Regulation to the GDPR and EUDPR is not explicitly mentioned in any of its provisions. Moreover, Article 1(4) of the Proposal lists a number of Union legal acts, to which the envisaged Regulation would apply "without prejudice". Neither the GDPR, nor the EUDPR are mentioned in the list. While Article 12(3) of the Proposal indicates that its requirements shall apply "in addition to" the requirements of the GDPR and EUDPR, there is no similar indication in other provisions.

18. For the sake of clarity, the EDPS recommends further specifying in a recital and in Article 1 that the Proposal **complements and is without prejudice** to the application of both the GDPR and the EUDPR as regards the processing of personal data in the context of political advertising. It should also be specified that the Proposal does not replace any of the general obligations under the GDPR, EUDPR and Directive 2002/58/EC[24], such as for instance the rules on consent, data subject rights and the liability of controllers. In addition, the EDPS considers it important to explicitly clarify that the Proposal does not provide *per se* a lawful basis for the processing of personal data for the purpose of political advertising.

3.2. Transparency obligations

19. Chapter II of the Proposal introduces a number of general transparency obligations, addressed to the various actors involved in political advertising, including specific rules on record keeping and reporting.

20. In addition, in case of use of targeting or amplification techniques, Article 12(c) of the Proposal, requires controllers to provide additional information necessary to allow the individual concerned to understand the logic involved and the main parameters of the technique used, and the use of third-party data and additional analytical techniques. This information shall comprise the elements set out in Annex II of the Proposal, which encompasses:

    (a) the specific **groups of recipients targeted**, including the **parameters used to determine the recipients** to whom the advertising is disseminated, with **the same level of detail as used for the targeting**, the **categories of personal data used** for the targeting and amplification, the targeting and amplification **goals, mechanisms and logic** including the inclusion and exclusion parameters and the reasons for choosing these parameters;

    (b) the **period of dissemination**, the **number of individuals** to whom the advertisement is disseminated and indications of the size of the targeted audience within the relevant electorate;

    (c) the **source of the personal data** referred to in point (a), 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;

(d) a **link to effective means to support individuals' exercise of their rights** under Regulation (EU) 2016/679 or Regulation (EU) 2018/1725, as applicable, in the context of targeting and amplification of political advertising on the basis of their personal data.

In accordance with Article 12(8) of the Proposal, the Commission is empowered to adopt delegated acts to amend Annex II by modifying or removing elements of the list of information to be provided in light of technological developments in relevant scientific research, and developments in supervision by competent authorities and relevant guidance issued by competent bodies.

21. The EDPS fully supports the transparency requirements provided for in the Proposal, which take into account and seek to codify elements of the guidance provided by the European Data Protection Board[25]. The EDPS particularly welcomes the requirement that information regarding the parameters used to determine the recipients to whom the advertising is disseminated shall be provided "with the same level of detail as used for the targeting" and recommends reflecting this requirement also in Article 12(3)(c) of the Proposal.

22. At the same time, the EDPS understands that the duty to provide information contained in Proposal is without prejudice to the obligations of under Chapters III and IV of the GDPR and EUDPR respectively (see section 3.1). This may require additional information to be provided, for example, the duty to share the essence of the arrangement that is in place among joint controllers, where applicable (see also section 3.4)[26]. In any event, the EDPS stresses that Article 12 of the Proposal, as well as any modification or removal of elements of the list of information to be provided in accordance with Annex II, may not reduce the obligations of controllers under data protection law.

3.3. Restrictions on the use of targeting or amplification techniques

23. Recital 47 of the Proposal states that political messages are increasingly targeted on the basis of personal data when grouping individuals according to their assumed interests or derived through their online activity, behavioural profiling and other analysis techniques. On the basis of the processing of personal data, in particular data considered sensitive under the GDPR and EUDPR, different groups of voters or individuals can be segmented and their characteristics or vulnerabilities exploited for instance by disseminating the advertisements at specific moments and in specific places designed to take advantage of the instances where they would be sensitive to a certain kind of information/message.

24. Recital 47 of the Proposal also recognises the specific and detrimental effects on citizens' fundamental rights and freedoms with regard to the processing of their personal data and their freedom to receive objective information, to form their opinion, to make political decisions and exercise their voting rights, as well as for the democratic process. The EDPS fully concurs with the conclusion that additional restrictions and conditions compared to the GDPR and EUDPR should be provided.

25. The EDPS positively notes that Article 12(1) of the Proposal lays down a prohibition of targeting or amplification techniques that involve the processing of special categories personal data referred to in Article 9(1) of Regulation (EU) 2016/679 and Article 10(1) of Regulation (EU) 2018/1725. Article 12 also envisages other safeguards, related to transparency and

accountability, such as provision of additional information about the logic involved and the main parameters of the technique used, internal policies and record keeping.

26. However, the EDPS considers that Article 12 of the Proposal in its current form is **not sufficient to achieve the objective of providing specific additional protection** that is complementary to the existing rules applicable to the processing of personal data in the context of targeting political advertising. In particular, he is convinced that there is a need for additional measures to address in particular the risks created by targeted advertising based on other categories of data beyond the special categories of data in Article 9(1) of Regulation (EU) 2016/679.

27. The EDPS notes that the proposed prohibition of certain targeting and amplification techniques is accompanied by two exceptions, already provided in Article 9(2)(a) and (d) GDPR and 10(2)(a) and (c) EUDPR, namely explicit consent and legitimate activities by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim with regard to the members or to former members of the body or persons who have regular contact with it in connection with its purposes and that the data are not disclosed outside that body without the consent of the data subjects.

28. The EDPS considers that, in practical terms, Article 12 of the Proposal does not appear to offer any additional protection in comparison to existing Union legislation on data protection. Indeed, he considers it unlikely that the other exceptions to the general prohibition on the processing of special categories of data, contained in Article 9(1) GDPR and Article 10(1) EUDPR, would be applicable to targeting or amplification techniques that involve the processing of personal data for disseminating political advertising[27].

29. Furthermore, the EDPS finds it very difficult to imagine a justification for collecting and processing of data concerning, for instance, health, sex life, sexual orientation, or genetic data, in order to advance certain political messages. In fact, in many cases, such practices are unlikely to pass the necessity and proportionality tests, as required by the Charter and the Union data protection legal framework. In addition, the EDPS recalls that special categories of personal data and more generally sensitive data could not only be directly collected from the data subject, but could also be inferred from and combined with other information, both online and offline[28].

30. The EDPS is also concerned that the two proposed exceptions to the prohibition would significantly limit its practical effect and its likelihood of addressing the specific detrimental effects that may result from the use of personal data to target political messages to individuals or to small groups of citizens (microtargeting).

31. The current practices of expressing and collecting consent in the digital environment also raise questions about its effectiveness as a safeguard (e.g. the phenomenon of 'consent fatigue'). Furthermore, because of the growing use of complex and often opaque algorithms, as well as AI, in the process of profiling and targeting, it is questionable to what extent the consent of the citizen will actually be sufficiently and meaningfully informed. More fundamentally, however, the EDPS questions whether practices which have been identified by the Proposal of having specific detrimental effects should be allowed at all to take place and whether the individual's consent would be sufficient to mitigate the risks posed by them.

32. The other exception, laid down in Article 9(2)(d) of the GDPR, has also the potential to limit the practical effect of the prohibition. Political parties, as well as the foundations, associations or any other not-for-profit bodies with a political, philosophical, religious or trade union aim

are in practice the main 'sponsors' of political advertising, in the meaning of Article 2(7) of the Proposal, and thus the actors which most likely make use of targeting or amplification techniques for purposes of political advertising.

33. The EDPS considers that the **scope of the envisaged prohibition is too narrow** as it fails to cover a wide variety of (micro) targeting and amplification techniques that may be used to carry out political advertising, which do not involve processing of special categories of personal data *per se*, yet have equally significant specific and detrimental effects. The Commission has already identified some of these risks, in particular those caused by processing by processing of data derived through their online activity, behavioural profiling and other analysis techniques[29].

34. For these reasons, the EDPS is convinced that the safeguards in the Proposal with regard to processing of personal data in the context of political advertising and in particular the use of targeting and amplification techniques should be further strengthened. To this end, the EDPS recommends:

    (**1) providing for a full ban of microtargeting for political purposes**, i.e. selecting the messages and/or intended audience of political advertising according to the perceived characteristics, interests or preferences of the individuals concerned[30]; and

    (2) introducing further restrictions of the categories of data that may be processed for the purposes of political advertising, including targeting and amplification, in particular **prohibiting targeted advertising based on pervasive tracking**, i.e. the processing of information concerning an individuals' behaviour across websites and services with a view of targeted advertising on the basis of profiling.

3.4. Roles and responsibilities

35. A large, diversified and increasing number of services are associated with political advertising such as political consultancies, advertising agencies, "ad-tech" platforms, public relations firms, influencers and various data analytics and brokerage operators[31]. According to the Explanatory Memorandum, the rules on the use of targeting and amplification techniques in the context of political advertising will apply to all controllers, i.e., beyond providers of political advertising services, making use of such targeting and amplification techniques[32].

36. The EDPS recalls that the concepts of controller, joint controller and processor play a crucial role in the application of data protection law, since they determine who shall be responsible for compliance with different data protection rules, and how data subjects can exercise their rights in practice.

37. The EDPS notes that Article 12 of the Proposal refers to several categories of actors, such as "controller(s)", "controllers using targeting or amplification techniques"[33], "political advertising publishers making use of targeting or amplification techniques"[34] and "providers of advertising services"[35]. While the EDPS considers that the last two entities may also be acting as controllers, either alone or jointly with others, the current wording of Article 12 of the Proposal might be read as implying this is not the case. For the avoidance of doubt, the EDPS recommends that the Proposal consistently refer to the "controller using targeting or amplification techniques", particularly in paragraphs 12(4), second sentence and Article 12(7) of the Proposal.

38. The EDPS recalls that, in line with Article 26 GDPR and Article 28 EUDPR, *"where two or more controllers determine the purposes and means of the processing, they shall be joint controllers"*. This specification makes it clear that the concept of controllership does not necessarily refer to one single entity, but can also involve multiple parties playing a role in a processing operation. As a result, and as confirmed by the CJEU, each of the actors involved have obligations under data protection law[36]. Insofar as the various actors act as joint controllers, they *"shall in transparent manner determine their respective responsibilities for compliance with their data protection obligations, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information (...)"*. In that case, the distribution of tasks between them should be specified by means of an arrangement between the joint controllers.

39. The EDPB has already clarified that making use of targeting services offered by a social media provider in many cases gives rise to joint controllership between, on the one hand, the social media provider offering the targeting services and, on the other hand, the entity making use of the targeting services ('targeter')[37]. The EDPS considers that similar considerations apply as regards the relationship between the "controllers using targeting or amplification techniques" and "political advertising publishers making use of targeting or amplification techniques". This is of course without prejudice to the qualification as controller, joint controller or processor of other entities (e.g. sponsors, ad tech platforms etc.), as the case may be[38].

40. The allocation of the responsibilities between the various actors should be clear and accessible in order to ensure that the data subjects can fully exercise their rights under the GDPR. The current wording of Article 12 might be construed as suggesting that only one entity shall be considered as controller. The EDPS therefore recommends clarifying that whenever controllers using targeting or amplification techniques and political advertising publishers making use of targeting or amplification techniques act as joint controllers, they shall together ensure compliance with Article 26 GDPR and Article 28 EUDPR, as applicable.

3.5. Transmission of information to other interested entities

41. The EDPS welcomes the provisions that seek to enhance access to relevant information to vetted researchers, civil society, national or international electoral observers and political actors as authorised under national law (Articles 11 and 13 of the Proposal).

42. The EDPS notes, however, that Article 13 of the Proposal refers to only to "[t]he controller referred to in Article 12", adding that "Article 11(2) to (7) shall apply *mutatis mutandis*." The EDPS considers that wording of this provision may give rise to legal uncertainty, in particular as regards the obligations incumbent upon providers of political advertising services and political advertising publishers.

43. The EDPS therefore recommends explicitly clarifying the obligations of each of the entities mentioned in Article 12 of the Proposal, taking into account also the recommendations under 3.4 of this Opinion.

3.6. Supervision and enforcement

44. Article 15 of the proposal sets up an oversight mechanism, involving a combination of different authorities:

- national data protection authorities and the EDPS shall be competent to monitor the application of Article 12, in their respective field of competence,

- competent authorities designated by Member States as competent 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, where applicable,

- one or more competent authorities designated by each Member State shall to be responsible for the application and enforcement of the other aspects of this Regulation.

45. Article 15 also foresees cooperation among competent authorities and the designation by each Member State of one competent authority as a contact point at Union level for the purposes of this Regulation. Article 15(9) specifies that "*contact points shall meet periodically at Union level in the framework of the European Cooperation Network on Elections to facilitate the swift and secured exchange of information on issues connected to the exercise of their supervisory and enforcements tasks pursuant to this Regulation*".

46. In addition, in the context of the monitoring of targeting and amplification activities pursuant to Article 12, the Proposal also refers to Chapter VII of Regulation (EU) 2016/679, i.e. to the cooperation and consistency mechanism, implemented through the European Data Protection Board.

47. The EDPS positively notes Article 15(6) of the Proposal, dedicated to cooperation between competent authorities. The EDPS has consistently called for an explicit and comprehensive legal basis for the cooperation and exchange of relevant information among the various competent authorities, each acting within their respective areas of competence[39]. As Article 15 of the Proposal refers to both to 'competent authorities' and 'supervisory authorities', the EDPS recommends explicitly referring also to 'supervisory authorities' in Article 15(6) of the Proposal to avoid any legal uncertainty in this respect.

48. At the same time, EDPS is concerned that the current wording of Article 15(1) could be interpreted as limiting the competence of the data protection authorities only to Article 12 (i.e. the use of targeting and amplification techniques). There are other elements of the process of political advertising, which also relate to or affect the processing of personal data, and thus fall under the general supervision of the data protection authorities referred to in Article 51 of Regulation (EU) 2016/679 or Article 52 of Regulation (EU) 2018/1725. The EDPS invites the co-legislators to clarify this aspect in the text of the future Regulation.

49. Finally, the EDPS notes that according to Article 16(6) and (7) of the Proposal the data protection supervisory authorities may within their scope of competence impose administrative fines up to the amount referred to in Article 83(5) GDPR for infringements of the obligations laid down in Article 12.

50. The EDPS supports the need for effective, proportionate and dissuasive financial sanctions in case of infringements related to targeting and amplification. Due to the significant negative impact of such violations, both for individuals and for the society as a whole, he agrees that they should be punished with sanctions in the higher range laid down in Article 83(5) GDPR and Article 66(3) EUDPR. Moreover, such approach is consistent with the provisions on infringements of the rules on consent and on the processing of special categories of data, which are directly applicable in this context.

4. Conclusions

51. In light of the above, the EDPS makes the following main recommendations:

- to further specify that the Proposal complements and is without prejudice to the application of both the GDPR and the EUDPR as regards the processing of personal data in the context of political advertising;
- to provide for a full ban of microtargeting for political purposes and introduce further restrictions of the categories of data that may be processed for the purposes of political advertising, in particular prohibiting targeted advertising based on pervasive tracking;
- to further clarify the roles and responsibilities of the actors involved in political advertising involving the processing of personal data and the use of targeting and amplification techniques;
- to further clarify which actors shall be responsible for the transmission of information to other interested entities;
- to explicitly refer both to 'competent authorities' and 'supervisory authorities' in Article 15(6) of the Proposal.

Brussels, 20 January 2022

[e-signed]

Wojciech Rafał WIEWIÓROWSKI

Notes

[1] OJ L 119, 4.5.2016, p. 1.
[2] OJ L 295, 21.11.2018, p. 39.
[3] COM(2021) 731 final.
[4] COM/2020/790 final https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2250
[5] COM(2021) 734 final.
[6] Explanatory memorandum, p. 6 and Recital (6) of the Proposal (*This Regulation should also address the use of targeting and amplification techniques in the context of the publication, dissemination or promotion of political advertising that involve the processing of personal data. The rules of this Regulation that address the use of targeting and amplification are based on Article 16 of the TFEU*").
[7] COM (2020) 825 final ,https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers and https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services
[8] See Explanatory memorandum, pages 3 and 4.
[9] Idem.
[10] See the EDPS Opinion 10/2018 on the Commission Package on free and fair European elections, available at https://edps.europa.eu/sites/edp/files/publication/18-12-18_opinion_on_election_package_en.pdf
[11] http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)037-e European Commission for Democracy through Law (Venice Commission), 'Report on the timeline and inventory of political criteria for assessing an election' p. 4 and 5, Study no. 558/2009, Strasbourg, 21.10.2010.
[12] See recitals (5) and (33) of the Proposal. See also Explanatory memorandum, p. 3.
[13] EDPS Opinion 1/2021 on the Proposal for a Digital Services Act, 10 February 2021, available at https://edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_services_act_en.pdf.
[14] EDPS Opinion 3/2018 on online manipulation and personal data of 19 March 2018, available at https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf.
[15] European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202008_onthetargetingofsocialmediausers_en.pdf.
[16] For example, an analysis of content shared through social media can reveal information about the emotional state (e.g. through an analysis of the use of certain key words). Such information could be used to target the individual with specific messages and at specific moments to which he or she is expected to be more receptive, thereby surreptitiously influencing his or her thought process, emotions and behaviour. (European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraph 12). See also recital (47) of the Proposal.
[17] European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraph 13.
[18] Explanatory memorandum p. 3. See also the Impact Assessment, p.3 ("*Targeting (directing an ad to a specific group of people based on some shared characteristics) can be very sophisticated . While this can beneficial in addressing political messages to concerned citizens, the Cambridge Analytica scandal revealed a need to address this phenomenon. It brought to light unauthorised interference in elections (including by foreign state actors) , exploitation of online social networks to mislead voters, and manipulation of the debate and their choices, using psychographic profiling and opaque practices that conceal or misrepresent key information*").
[19] See Explanatory memorandum, p. 4.
[20] Explanatory memorandum, p. 6.
[21] Opinion of 26 July 2017, PNR Canada, Opinion procedure 1/15, ECLI:EU:C:2017:592, paragraph 96. See also EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021, paragraph 11.
[22] Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.
[23] Explanatory memorandum, p. 4.

[24] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37–47
[25] Explanatory memorandum, p. 4.
[26] See European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraphs 92-98.
[27] In this regard, the EDPS also recalls that the EDPB has underlined the high threshold that must be in order to rely on the exception contained in Article 9(2)e of the GDPR concerning data manifestly made public by the data subject (European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraph, paragraphs 127-129).
[28] For more information see the EDPB Guidelines 8/2020 on the targeting of social media users https://edpb.europa.eu/system/files/2021-04/edpb_guidelines_082020_on_the_targeting_of_social_media_users_en.pdf
[29] See Recital 47 of the Proposal.
[30] Based on the definition of "microtargeting" specified in the European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraph 25
[31] Recital (1) of the Proposal.
[32] Explanatory memorandum, p. 1.
[33] Article 12(3) of the Proposal.
[34] Article 12(5) of the Proposal.
[35] Article 12(7) of the Proposal.
[36] See Court of Justice of the European Union, Case C-210/16, *Wirtschaftsakademie Schleswig-Holstein*, paragraph 29.
[37] See European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraphs 41-82.
[38] See also European Data Protection Board (EDPB), Guidelines 8/2020 on the targeting of social media users, Version 2.0, 13 April 2021, paragraphs 27-29.
[39] See EDPS Opinion 1/2021 on the Proposal for a Digital Services Act, 10 February 2021, paragraphs 86 and following; EDPS Opinion 2/2021 on the Proposal for a Digital Markets Act, 10 February 2021, paragraphs 39-41, as well as EDPS Opinion 3/2018 Opinion on online manipulation and personal data, 19 March 2018, https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf