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Political advertising, targeting and minors. The Belgian case.

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Abstract:

The Regulation on the transparency and targeting of political advertising constitutes a response to contemporary challenges in political campaigning, aiming to augment transparency and accountability in the realm of online political advertising. However, persistent concerns involve sponsor's declaration, the distinction between targeting and ad delivery techniques, and the complexities surrounding consent requirements. Of particular concern is the potential vulnerability of minors to political advertising. Emphasis must be placed on refining the regulatory framework to enhance transparency, accountability, and informed consent, thereby safeguarding democratic discourse from manipulation and disinformation.

1 The Regulation on the transparency and targeting of political advertising

On 25 November 2021, the European Commission adopted a Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising¹ as part of the European Democracy Action Plan². The Regulation aims to address various concerns related to disinformation, foreign interference, ads' source and involved parties transparency as well as targeting techniques such as profiling or behavioural advertising. On 6 November 2023, the trilogue negotiations ended up with a political agreement on the final text of the proposed Regulation³. On 20 March 2024, the final text was published in the Official Journal of the EU⁴.

¹ European Commission. (2021). *Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising COM/2021/731 final*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0731>

² European Commission. (2020). *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action plan COM/2020/790 final*. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&%3Bqid=1607079662423>

³ Council of the European Union. (2023). *Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising 17037/23*. <https://www.consilium.europa.eu/media/69097/st17037-en23.pdf>

⁴ Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the Transparency and Targeting of Political Advertising (2024). <https://eur-lex.europa.eu/eli/reg/2024/900/oj>

The objective of the Regulation is to establish a common regulatory framework to ensure the transparency of online and offline paid political advertising as well as to outline the obligations of the involved parties (Art 1). Therefore, the document is divided in two parts. The first one, is dedicated to the general obligations for political advertising services, online or offline, while the following one, lays down the specific requirements for political advertising related to targeting and ad delivery techniques online. The Regulation applies to providers of political advertising services, and sponsors thereof, i.e. the legal or natural persons on whose behalf the advert is prepared, placed, published or disseminated. When it comes to the territorial scope of the Regulation, the place of establishment of the provider and sponsor does not matter; neither does the place of the advertisement, online or offline (Art. 2 (1))⁵. The public authorities' communications on the organisation of the vote or the personal use or opinions expressed using this content by private parties is not covered (Art. 1, 2 and 3 (2)).

Although Art. 8 provides a list of features to be taken account of in order to identify a political advertisement, the Regulation foresees that sponsors of political ads declare whether their content is of political nature (Art. 7). Political advertising publishers are obliged, pursuant to Art 11 to attach an easy-to-spot label (Art. 11 (3)) that an advertisement has a political content, the identity of the sponsor thereof, the elections it relates to, a statement that the ad. has been "subject to targeting or ad-delivery techniques", in case it is necessary, and a transparency notice, whose content requirements are listed in Art. 12. Furthermore, the Regulation establishes a European repository for online political advertisements (Art. 13), in relation to which providers of political advertising services should set up a record-keeping system of the ads they disseminate (Art. 9). In addition, a periodic reporting mechanism (Art. 14) as well as a signalling system, available to legal or natural persons, of potentially infringing content (Art. 15-17) is established in order to ensure public scrutiny, publishers' accountability, illegal content's signalling as well as its investigation.

The next couple of provisions concern online political targeting. Art. 18 lays down the conditions under which targeting or ad delivery techniques for political advertisements are

⁵ Art. 2 (1): This Regulation applies to political advertising where the political advertisement is disseminated in the Union, is brought into the public domain in one or several Member States or is directed to Union citizens, irrespective of the place of establishment of the provider of political advertising services or of the place of residence or establishment of the sponsor, and irrespective of the means used.

allowed. This is possible only when the controller collected the personal data from the data subject, who has provided explicit consent, separately for the purposes of political advertising, and do not involve profiling or special categories of data.

Controllers⁶ are required to take additional transparency measures. Besides the label indicating the political content of an ad., they should provide users with information on the “logic involved and the main parameters of the techniques used, including whether an artificial intelligence system has been used to target or deliver the political advertisement and any additional analytical techniques.” (Art. 19). In addition, controllers should make public their internal policy related to targeting and ad delivery techniques publicly available for seven years. Further, the Regulation sets out the administrative attribution of responsibilities among institutions (Arts. 21-29) as well as a sanctions mechanism in the form of fines (Art. 25). During the last month of preceding an election, infringement would be considered particularly serious.

Although the initial intention of the EU government was to have the Regulation applicable before the June 2024 EU elections, given the electoral calendar as well as the entry into force and 18-months deferral of application requirements, this is not possible. This is why this year’s elections will be carried out under the existing rules.

2 Concerns

Despite the progress achieved with the adoption of the Political advertising regulation, concerns remain⁷. Here I point out some of them, namely, sponsor’s self-declaration, targeting and ad delivery techniques definition and consent.

First, the most obvious issue is the compliance with Arts. 7 and 8. “A provider of advertising services shall request sponsors, and providers of advertising services acting on behalf of sponsors, to declare whether the advertising service that they have requested the provider of advertising services to perform constitutes a political advertising service (...)” pursuant to

⁶ Art. 3 (14), Regulation (2024/900) refers to the definitions of controller as in Regulation (EU) 2016/679 (GDPR) and, where applicable, Regulation (EU) 2018/1725

⁷ *Political agreement on the Regulation on the transparency and targeting of political advertising*. (2024). European Partnership for Democracy. <https://epd.eu/content/uploads/2024/01/Political-Advertising-Reaction-Paper-1.pdf> EU: *Political Advertising Proposal is well-intentioned yet concerning*. (2023). Article 19. <https://www.article19.org/resources/eu-political-advertising-proposal-is-well-intentioned-yet-concerning/>

Art. 7 (1). The current wording of the provision leaves large margins for appreciation for the advertisement's sponsor, who may easily avoid the obligations under this Regulation by not indicating the political nature of their ad. Despite the infringement notification mechanism in Art. 15 or Art. 34 (1) from the Digital Services Act⁸, doubts on the effectiveness of the norm remain. Therefore, an enhanced mechanism ensuring the sponsor's declaration authenticity are needed.

Second, although the definitions of "targeting techniques" (Art. 3 (11)) and "ad delivery techniques" (Art. 3 (12)) are now separated⁹, this is insufficient to strike a meaningful difference between the two advertising tools. Despite the text of Recital 6, both terms are used together throughout the text, and there is no practical differentiation between the two. Furthermore, there is a potential tension between the intention of the text and the reality of automated advertising. This is so because of the prohibition of profiling based on special categories of data, the definition of profiling in the GDPR, and the capacities of the automated tools used by the providers of ads services. While targeting allows choosing the audience of an ad, for example, through segmentation, i.e., the targeting of a particular age group, "ad delivery techniques" involve the selection of the particular person or group that would see the ad within the preselected segment, thus ensuring that the ad fits users inferred interests best¹⁰. The latter has to be done on some parameters based on the data a user feeds in the system. Art. 18 (c) prohibits techniques that involve profiling (as defined in Art. 4 (4) GDPR), based on special categories of data. However, eventually everything a user does in a social media could lead to profiling¹¹. There is no need to process special categories of data (Art. 9,

⁸ More on obligations and challenges under the DSA, see: Nikiforov, L. (2024). The Digital Services Act, content moderation and elections. *January 2024*. <https://brusselsprivacyhub.com/wp-content/uploads/2024/01/The-Digital-Services-Act-content-moderation-and-elections-January-2024-Liubomir-Nikiforov.pdf>

⁹ In the Commission initial proposal, they were together under Art. 2 (8) "targeting and amplification techniques".

¹⁰ Interpretation of Recital 6 and *Targeting and amplification in online political advertising*. (2022). European Partnership for Democracy. <https://epd.eu/content/uploads/2023/08/Targeting-and-amplification-in-online-political-advertising.pdf>

¹¹ 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements. Art. 4 (4) GDPR.

GDPR) in order to draw relevant information on someone's political preferences. Consumer preferences are sufficient¹².

Therefore, the intention to reduce or prevent potential abuse of citizens' vulnerabilities by including Art. 9 GDPR in the Regulation is an important amendment. However, this is not sufficient due to the enhanced capacities of automated ads tools, which enable publishers to identify users' preferences by the means of observed or inferred data.

Third, targeting and ad delivery techniques are allowed if the data subject consent explicitly and prior to the ad delivery. The Regulation refers to the GDPR when it comes to consent (Recital 80). According to the GDPR, consent should be obtained at the time of the collection of the data relevant for the processing. In the context of the Political advertising regulation, consent for this specific profiling should be separately and explicitly provided. Therefore, when exactly citizens would be asked to consent? When signing up for a services or when elections are approaching? Although the most plausible option would be before the electoral campaign, in any case users would be required to consent twice. In this contribution, I cannot analyse further the potential challenges concerning the provision of consent in the context of this Regulation and during elections. However, it would not be a surprise if the evaluation and review of the new Regulation points out that citizens' *consent fatigue* undermines the objectives of the norm.

3 The Belgian case

The upcoming EU elections would be historical because teenagers who turned 16 before the date of the elections will be called¹³ to cast their ballot for the first time¹⁴. In 2023, an Internet connection is present in almost all Belgian households (94%)¹⁵. 98% of those aged 16 to 24 years old use Internet, if not every day, then regularly¹⁶. The majority of those use social

¹² Jung, J., & Mittal, V. (2020). Political Identity and the Consumer Journey: A Research Review. *Journal of Retailing*, 96(1), 55–73. <https://doi.org/10.1016/j.jretai.2019.09.003>

¹³ Voting is compulsory in Belgium

¹⁴ <https://www.dekamer.be/kvvcr/showpage.cfm?section=flwb&language=fr&cfm=flwbn.cfm?lang=N&dossierID=3700&legislat=55>, accessed 20 February 2024

¹⁵ *Utilisation des TIC auprès des ménages. Graphique 1: Disponibilité d'Internet dans le ménage*. (2023). Statbel. <https://statbel.fgov.be/fr/themes/menages/utilisation-des-tic-aupres-des-menages#panel-11>

¹⁶ *Utilisation des TIC auprès des ménages. Tableau 3: Disponibilité d'Internet dans le ménage par région*. (2023). Statbel. <https://statbel.fgov.be/fr/themes/menages/utilisation-des-tic-aupres-des-menages#panel-15>

media (up to 86.6% in 2023 for the most used platform¹⁷). Belgian political parties know that and they take advantage of social media and invest in promoting their political activities and views¹⁸.

Belgians can consent on the Internet at the age of 13 without parental control¹⁹. This means that 10.043.865 citizens are potential targets of marketing and ads. delivery techniques. From those, the 16 y.o. and older, i.e. 9.629.371 citizens are also political marketing targets in the upcoming European elections²⁰.

Thus, how the distinction between different audiences would be made? Under the present conditions, minors (13 y.o.) will be potentially targeted by political ads. Political ads sponsors could target 16 y.o. voters but this practically does not prevent minors from being subjected to algorithm-based targeting or any other more data intensive ad delivery system. Several factors contribute to this concern:

- **Digital Consent Age in Belgium:** The current legal framework allows 13-year-olds to independently consent to online data collection and processing.
- **Voting Age for EU Elections:** The voting age for the EU elections is 16, creating a potential overlap between targeted audiences.
- **The "Lock-In" Effect of Social Media:** Teenagers often congregate on the same social media platforms, creating a situation where targeting efforts aimed at 16-year-olds might unintentionally reach younger users.

¹⁷Degraux, X. (2023, May 21). Belgique: Comment les 16-39 ans utilisent-ils les réseaux sociaux? (Étude 2023). *XavierDegraux*. <https://www.xavierdegraux.be/belgique-comment-les-16-39-ans-utilisent-ils-les-reseaux-sociaux-etude-2023/>

¹⁸Degraux, X. (2024, January 5). Le Vlaams Belang et le PVDA amplifient encore leurs publicités sur Facebook et Instagram (étude exclusive). *XavierDegraux*. <https://www.xavierdegraux.be/le-vlaams-belang-et-le-pvda-amplifient-encore-leurs-publicites-sur-facebook-et-instagram-etude-exclusive/>
Dupont, K. (2024, February 6). *Chez Nous: Comment l'extrême-droite utilise les réseaux sociaux pour séduire les jeunes*. Moustique.Lalibre.Be. <https://moustique.lalibre.be/actu/belgique/2024/02/06/comment-lextrême-droite-utilise-les-reseaux-sociaux-pour-seduire-les-jeunes-277700>
Schaal, B. (2024, February 6). *L'extrême droite wallonne, en campagne sur les réseaux des jeunes*. RTBF.Be. <https://www.rtbf.be/article/lextrême-droite-wallonne-en-campagne-sur-les-reseaux-des-jeunes-11321832>

¹⁹RGPD: "la limite d'âge de 13 ans correspond à la pratique numérique." (2018, February 13). Autoritéprotectiondonnees.Be. <https://www.autoriteprotectiondonnees.be/citoyen/rgpd-la-limite-d-age-de-13-ans-correspond-a-la-pratique-numerique>

²⁰Population par lieu de résidence, nationalité (Belge/non-Belge), état civil, âge et sexe. (2023, June 8). Statbel. <https://bestat.statbel.fgov.be/bestat/crosstable.xhtml?view=8f6e0000-37a9-435a-aa0d-ad5c8b76c09d>

Here is a hypothetical scenario to illustrate the challenge: Imagine a political party targeting 16 y.o. voters based on their municipality. These teenagers might use the same social media platforms, attend the same school, or share similar online and offline environments. It is likely that some of these 16 y.o. will be connected with younger users (aged 13 to 15) on these platforms. Therefore, even if the ad tool targets a specific age group, there is a risk of a *spillover* potentially exposing 549.967²¹ vulnerable minor citizens to political advertising. While the exact impact of this *spillover* effect is difficult to quantify due to the lack of transparency in automated targeting tools, the potential for unintended exposure is significant.

There is no reliable study, which could determine the success of governmental efforts to inform and educate young citizens over their rights, their consent notice's understanding, their use of redress mechanism in the Belgian data protection authority, their resilience to disinformation or ability to ponder political messages. It is also highly unlikely that children have paid for a premium service, which prevents the use of their behavioural data.

This is why, measures to ensure minors' safety on the Internet are more than ever necessary. The current lack of particular remedies to disinformation and manipulation of youngsters on the Internet as well as specific safeguards focusing on their protection is key for their active, informed and safe civil participation.

4 Conclusion

The Regulation on the transparency and targeting of political advertising represents a crucial stride toward addressing contemporary challenges in political campaigning, aiming to enhance transparency and accountability in online political advertising. Despite its objectives, concerns persist regarding sponsor declaration, the distinction between targeting and ad delivery techniques, and the complexities surrounding consent requirements. Particularly concerning is the potential exposure of minors to political advertising due to the overlap between digital consent age and voting eligibility, highlighting the need for tailored safeguards and educational initiatives. Moving forward, policymakers must prioritize the refinement of the regulatory framework, bolstering transparency, accountability, and

²¹ Number of citizens aged 13 to 16 y.o.

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informed consent to foster resilient democratic discourse and protect vulnerable demographics from manipulation and disinformation.