

# The Digital Services Act and the Regulation on the Transparency and Targeting of Political Advertising: Initial Reflections

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## Abstract

This paper analyses the issue of the manipulation of political consensus on social media and the impact of this phenomenon on the resilience of democratic systems. After highlighting characteristics and consequences of political targeting, the Author reflects on the regulations recently approved by the European Union, in particular the Digital Services Act and the Regulation on the transparency and targeting of political advertising. The aim is to point out opportunities and criticalities of the strategy developed by the European Union to meet the challenges of the digital revolution.

## Keywords

Targeting; Political Propaganda; Digital Revolution

## 1. Introduction

At the time of ‘surveillance capitalism’,<sup>1</sup> the use of targeting for the purposes of building and manipulating political consensus plays a key role in influencing public opinion. This is particularly true during election campaigns, where massive profiling can influence the outcome of the elections. Indeed, consensus-building on social media by candidates and political parties is characterized by sending marked oriented messages to selected groups of voters in order to find their preferences.<sup>2</sup>

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1 S Zuboff, *The age of surveillance capitalism: the fight for the future at the new frontier of power* (Faber faber 2019) 1ff.

2 See F Balaguer Callejon, *La Constitució del algoritmo* (Fundació Manuel Gimenez Abad 2023), 1ff.

Targeting, which is one of the most significant differences between online communication and traditional broadcasting, affects the right of citizen-voters-users to be informed and the principle of media pluralism, which, as the Italian Constitutional Court has pointed out, is a prerequisite for the functioning of the democratic system.<sup>3</sup>

Therefore, the use of these practices, which fosters an increasingly disintermediated relationship between voters and representatives, has a rebound effect on the party-political system, encouraging the rise of charismatic leaders, who take their strength and legitimacy from unfiltered communication.

More generally, there are consequences on the democratic system, in terms of the quality of public discourse, of the ability of citizens to form their own ideas and, ultimately, of the outcome of the elections.

After giving a brief overview of the characteristics and consequences of online political communication, this paper analyses the last regulations adopted by the European Union. The reference is to the ‘Digital Services Act’<sup>4</sup>, the regulation on digital services, published on 27 October 2022, which, together with the ‘Digital Markets Act’<sup>5</sup>, constitutes one of the founding pillars of the ‘Digital Services Package’, and to the last ‘Regulation on the transparency and targeting of political advertising’<sup>6</sup>, recently approved on 13 March 2024.

These regulations constitute a first significant response to the issue of limiting the powers of internet platforms as well as guaranteeing users’ rights in the EU internal market.

## 2. The impact of online profiling and targeting

The rise of social media had raised high hopes about the democratic potential of communication tools capable of decentralizing the production and consumption of political messages and fostering dialogue among users. The literature considered that ICTs would have the potential to cure the dysfunctions of modern democracies, reviving citizens’ involvement in political life, fostering the free circulation of ideas, and giving rise to new deliberative spaces. Social media were appreciated for their ability to stimulate communication with no

3 M Monti, ‘Le Internet platforms, il discorso pubblico e la democrazia’ (2019) 4 Quaderni costituzionali 811, 811ff.

4 Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277.

5 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265.

6 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] OJ L, 2024/900.

space-time barriers. The use of the Internet was imagined to be pluralist, open and free, like no other communicative space experienced until then.<sup>7</sup>

However, this scenario was belied by the facts. Interaction on social networks has been developing on the basis of algorithms which produce dynamics completely at odds with the most elementary deliberative principles: there are mechanisms which profile and segment the public on the basis of preferences of users; which encourage the meeting of similar opinions, reinforcing previous convictions (and related prejudices) and penalizing the comparison between different points of view; which allow for the selection of message recipients and, therefore, allow the same subject to address different and incoherent messages to portions of the electorate; which encourage the circulation of fake news; which give rise to the computational propaganda, ie the manipulation of public opinion online through political micro-targeting and bots/trolls in order to distribute automated political messages on social media; which enable disintermediated forms of communication and a hyper-personal relationship between representatives and voters.<sup>8</sup>

In order to understand this phenomenon, it should be considered that profiling, even before the political sphere, has been widely used for commercial purposes to show users products and services that the algorithm considers to be consistent with their profiles, going so far as to guide and condition the choices of the consumer, who is not exposed in this way to alternative products and services, but only to those that are deemed more attractive to him. Profiling is configured as a strategic process directed to influence the public through messages, based on the preferences of each user, to show the final consumer the product that should arouse the greatest interest and appreciation.<sup>9</sup>

As long as this process is limited to the sphere of private interests and the field of commercial advertising, it does not raise concerns. When, however, the same mechanism is placed at the service of the commercialization of the political message, being able to influence the political and even electoral orientation of users, the evaluation changes.

Three effects are interesting for the constitutional law.

Firstly, profiling affects protection of users' personal data, given the fact that the algorithms used for this purpose essentially feed on data, the processing of which is often authorized in the absence of a real awareness that some services,

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7 See P Lévy, *Le tecnologie dell'intelligenza. L'avvenire del pensiero nell'era informatica?* (ES/Synergon 1992), 76 ff; D De Kerckhove, A Tursi (eds), *Dopo la democrazia. Il potere e la sfera pubblica nell'era delle reti* (Apogeo 2006) 13ff.

8 See T Dobber, R Fathaigh and F Zuiderveen Borgesius, 'The regulation of online political micro-targeting in Europe' (2019) 8(4) *Internet Policy Review* 1, 5ff; A Floridaia, 'La rete, la sfera pubblica e i luoghi della deliberazione pubblica' (2014) 2 *Iride* 319.

9 See K Klonic, 'The New Governors: The People, Rules, and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598, 1599ff.

apparently proposed as free by the platforms, conceal a commercialization of personal data.<sup>10</sup>

Secondly, profiling tends to isolate the user within filter bubbles, in which there is a reinforcement of initial positions and related prejudices, instead of a critical confrontation with other ideas, which become invisible on the web, even though they exist. As a result, there is a strong cyber-polarization of public discourse, as users hear nothing but the amplified echo of their own voice.<sup>11</sup>

Political-electoral profiling also affects the role of political parties, both in terms of their relationship with the voters and the ‘new intermediaries’ of the digital society. Firstly, such techniques can be very expensive, favoring parties with greater financial resources. Secondly, such practices allow candidates to shape their image according to the daily expectations of the electorate. Moreover, since some users are not very active online, parties could base their political campaign only on the analysis of data provided by users who make more frequent use of social media.<sup>12</sup>

Third, these activities take place in a context of media disintermediation. The network has allowed anyone to search for information, but also to produce and share it, exponentially increasing the number of information sources.<sup>13</sup> This absence of mediation, however, causes a strong personalization of the political and party system: leaders use targeting to build a direct and unfiltered communication with their voters, which favors the rise of political parties by real ‘outsiders’, who prove to be much more adept than professional politicians at communicating with the electoral base.

Finally, targeting techniques result in the fragmentation of public opinion into closed and polarized groups.<sup>14</sup> The combined effect of fake news, cyber-cascades and confirmation bias tends to alter the perception of the real relevance of issues, affecting freedom of information and, in particular, the right to be informed, which, as the Constitutional Court has recognized, ‘must be determined and qualified with reference to the founding principles of the form of State outlined by the Constitution, which require that our democracy be based on free public opinion and be able to develop through the equal competition of all in the formation of the general will’.<sup>15</sup>

10 See G D’Ippolito, ‘Comunicazione politica online: dal messaggio politico commercializzato alle sponsorizzazioni sui social network’ (2020) 1 *MediaLaws* 159, 167ff.

11 C R Sunstein, *Republic.com. Cittadini informati o consumatori di informazioni?* (Il Mulino 2001) 1ff.

12 See M Calise, ‘Il destino dei partiti’ (2023) 1 *Quaderni costituzionali* 101, 101ff.

13 Florida (n 8) 324.

14 See A Cardone, «Decisione algoritmica» vs *decisione politica?* *A.I. Legge. Democrazia* (Editoriale scientifica 2021), 72ff.

15 Constitutional Court, sent. 112/1993, para 7.

Therefore, the regulation of these processes is necessary, to avoid a pathological distortion of political representation and participation to democratic processes.

### 3. The European Union's change of approach

After a long period in which, despite the absolute relevance of this phenomenon, the self-regulation of the platforms had prevailed and users had the alternative between accepting profiling and the commercialization of their personal data or not accessing the service of online platforms, the European Union has changed its regulatory approach.

Among the most significant measures adopted, we find the Regulation (EU) 2022/2065 on a single market for digital services, well known as the Digital Services Act (DSA), which, after a long legislative process, was finally published on 27 October 2022. The regulation, which came into force the following 16th November, is directly applicable in all EU States from 17 February 2024. Together with the Digital Markets Act, which was approved a few weeks earlier and which aims to ensure competition in the internal market for digital services, it constitutes one of the pillars of the Digital Services Package, the strategy put in place by the European institutions to ensure a predictable and reliable digital space.

With this regulation, the European legislator aims to harmonize the rules applicable to intermediary services in the internal market. From a subjective point of view, the DSA applies to 'intermediary service providers' (whether mere conduit, caching or hosting), ie all those entities which provide 'any service, normally for remuneration, at a distance, by electronic means and at the individual request of a recipient'.

In particular, the regulation provides:

(a) some general provisions, which apply to all service providers irrespective of their respective characteristics (section I, arts 11–15);

(b) additional provisions concerning hosting service providers, including online platforms (section II, arts 16–18);

(c) a set of provisions relating exclusively to online platform providers (section III, arts 19–28);

(d) additional provisions, which apply to those online platform providers that allow consumers to conclude distance contracts with traders (section IV, arts 29–32);

(e) finally, additional obligations for very large platforms and search engines (section V, arts 33–44). Very large platforms and search engines (VLOPs and VLOSEs respectively) are those entities, which have an average monthly number of active users of 45 million or more in the EU. Recognition takes place

following a procedure, governed by Article 33 of the Regulation, which ends with an EU Commission statement.

First of all, the DSA – incorporating the recommendations that had been formulated by the European Data Protection Board (EDPB) in relation to the risks of targeting to which users are subjected and of circumventing the provisions relating to the GDPR – at art 26 establishes that providers of online platforms shall ensure that, for each and every advertisement, the recipients of the service are able to identify clearly, concisely and unequivocally: (a) that the information constitutes an advertisement, including through visible markings; (b) the natural or legal person on whose behalf the advertisement is presented or paid for; (c) the relevant information relating to the parameters used to determine the recipient of the advertisement and, where applicable, how those parameters can be changed by the user.

Furthermore, online platform providers must make available to the recipients of the service a functionality allowing them to declare whether the content they provide contains commercial communications. Concerning the transparency, art 27 provides that online platform providers, who make use of recommender systems, must specify, in their general terms and conditions, in clear and intelligible language, the main parameters used, as well as any option available to the recipients of the service, that allows them to change these parameters. In addition, providers of online platforms must also make available a functionality enabling the recipient to select and modify, at any time, the preferred option relating to the parameters by which advertisements are determined.

With regard, on the other hand, to the data that may or may not be subject to profiling, art 26 establishes an (absolute) ban on presenting advertising to service recipients based on the profiling of the special categories of personal data referred to in Article 9(1), of the GDPR. It follows that platforms will no longer be able to profile users by using data relating, for example, to racial or ethnic origin, to political opinions, to religious or philosophical beliefs, to trade union membership, genetic data, biometric data intended to uniquely identify a natural person, data relating to health or sex life or sexual orientation. This provision should be read in conjunction with art 28 of the DSA, which also prohibits advertising based on personal data of service users who are minors.

Additional obligations are foreseen for very large platforms and search engines (VLOPs and VLOSEs), which are, first and foremost, required to identify, analyze, and assess any systemic risks arising from the design or operation of their service and systems, including algorithmic systems (arts 34–35).

Above all, there are two provisions that are important for the purposes of this analysis. Art. 38 stipulates that, in addition to the requirements of art 27 mentioned above, VLOPs and VLOSEs shall ensure the user at least one option for their recommendation systems that is not based on profiling. Art 39 provides that all very large platforms, which present advertisements on their online

interfaces, shall compile and make available to the public, in a specific section of their online interface, a register containing a series of information for the entire period during which they present the advertisement. This register shall necessarily set out: (a) the content of the advertisement, including the name of the product, service, trademark and the subject matter of the advertisement; (b) the natural or legal person on whose behalf the advertisement is presented or paid for; (c) the period during which the advertisement is presented; (d) an indication of whether the advertisement was intended to be presented to one or more specific groups of addressees of the service and, if so, the main parameters used for that purpose; (e) the commercial communications published; (f) the total number of addressees of the service reached and aggregate data broken down by Member State for the group or groups of addressees to which the advertisement was specifically addressed.

These obligations witness a change of approach of the European Union. Faced with the failure of self-regulation, the European institutions have chosen to intervene, for the first time, with a regulation and not with soft-law.<sup>16</sup> The regulation is wide-ranging and constitutes one of the most significant novelties a few years after the ‘foundation pillar’ of the European protection of users’ digital rights, ie the GDPR.

In particular, the decision to indicate on whose behalf and with what parameters advertisements are presented to users is positive, as well as the provision that prohibits profiling from taking place based on special categories of data pursuant to Article 9 GDPR or on data concerning minors. This novelty mainly follows the recommendations pointed out by the doctrine, which had highlighted how platforms substantially circumvent the GDPR, which merely required explicit consent for the processing of such categories of data. Indeed, this provision, obliging very large platforms to offer at least one recommendation system that is not based on profiling, is significant: as a result, online platforms must provide users with at least one non-profiling-based mode.

However, some doubts and questions arise.

First, the measures discussed above apply only to hosting providers and not to all data controllers, so that some providers may be excluded. Secondly, it is difficult to define exactly the perimeter of the ‘special category of data’ under art 9 GDPR and, therefore, which information cannot be profiled also due to the DSA. This demonstrates that the regulation of these phenomena is not

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16 See C Frisani, ‘Il Digital Services Act: le prospettive di riforma per una maggior tutela online’ (*Ius in itinere*, 2022) 1ff.; O Grandinetti, ‘Le piattaforme digitali come “poteri privati” e la censura online’ (2022) 4(1) *Rivista italiana di informatica e diritto* 175, 175ff; G Tiberi, ‘L’irresistibile ascesa della sovranità digitale europea’ in G Ferri (eds.), *Diritto e nuove tecnologie* (ESI 2022), 175–216.

easy and that the online platforms, even in the presence of stricter rules, could circumvent the prohibitions laid down by the EU legislator with the DSA.<sup>17</sup>

### 3.1. The last step: the Regulation on the transparency and targeting of political advertising

The Digital Services Act is one of the most important innovations in recent years in defining a system of rules governing the digital services market and protecting EU users' rights.

However, the EU legislator, aware that an ad-hoc intervention was necessary to regulate specifically the use of online political and electoral propaganda, has recently approved a further regulation: we refer to the 'Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on transparency and targeting of political advertising'.

Except for a few limited provisions, it will apply from 2025 in all Member States (so that the last European elections of June 2024 were excluded).

The regulation aims, on the one hand, at contributing to the proper functioning of the internal market for political advertising and related services; on the other hand, at protecting natural persons regarding the processing of personal data.

The proposal moves along two main lines. First, it provides for a series of transparency and diligence obligations on 'political advertising service providers', defined as 'a natural or legal person engaged in the provision of political advertising services'. 'Political advertising', on the other hand, is defined as 'the preparation, placement, promotion, publication, delivery or dissemination, by whatever means, of a message normally provided in return for remuneration or through in-house activities or as part of a political advertising campaign: (a) by, for or on behalf of a political actor, unless of a purely private or purely commercial nature; or (b) which can and is intended to influence the outcome of an election or referendum, voting behavior or a legislative or regulatory process, at Union, national, regional or local level' (art 3).

The regulation requires, at art 11, that publishers of political advertising shall ensure that each political advertising message clearly, prominently and unambiguously displays the following information: (a) a statement attesting that it is a political advertising message; (b) the sponsor of the political advertising message and, where possible, the entity that ultimately controls the sponsor; (c) an indication of the election, referendum or legislative or regulatory process to which the political advertising message in question is related; (d) a statement attesting that the political advertising message has been the subject of targeting or message delivery techniques; (e) a transparency notice containing the

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17 G Vigevani, 'Piattaforme digitali private, potere pubblico e libertà di espressione' (2023) 1 Diritto costituzionale 41, 41ff.

information required by the Regulation itself. In addition, publishers of political advertisements must allow natural or legal persons to report that a particular political advertisement published by them does not comply with the regulation and must set up a suitable notification system for this purpose. These requirements follow the warnings of the European Data Protection Supervisor and, precisely, are additional and supplementary to the transparency obligations, laid down in the Digital Services Act, abovementioned.

These obligations should make data controllers more accountable, since the keeping of specific registers and greater transparency on targeting techniques should encourage platforms to process user data in a way that complies with the law, and no longer evade existing obligations. Secondly, transparency rules should protect political actors, who should be more aware of how targeting works. However, the most significant advantage should be for citizens-users, who should be able to check the main parameters used to send them political ads: this should contrast targeting opacity and make users more aware of how electoral communication works in the digital era.

On the other hand, the regulation establishes that the processing of personal data is permitted due to certain conditions. Targeting or message delivery techniques in online political advertising are allowed if: a) the data controller has collected personal data from the data subject; (b) the data subject has given his or her explicit consent due to Regulations (EU) 2016/679 and (EU) 2018/1725 to the separate processing of personal data for political advertising purposes; (c) and such techniques do not involve ‘profiling’ as defined in Article 4(4) of Regulation (EU) 2016/679 and Article 3(5) of Regulation (EU) 2018/1725.

Compared to the prohibition in the first version of the proposal, which provided for several exceptions, the European Parliament and the Council have chosen, in the latest approved version, a stricter line, thus establishing an absolute prohibition of targeting for certain categories of data, considered particularly sensitive.

With reference to data that are not subject to special protection, processing is limited to that which is the result of the explicit consent of the data subject, given solely for the purposes of online political advertising. The regulation has a more restrictive wording than the original proposal, which did not provide for any additional limitation with respect to what was already prescribed by the GDPR. It is an important novelty since online platforms have to obtain express consent for processing from users. However, the European legislator seems to continue to ignore that the consent, given online by the user, is not informed, conscious and free, since the platforms’ policies are not clear and understandable.<sup>18</sup>

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18 M Monti, ‘La disinformazione online, la crisi del rapporto pubblico-esperti e il rischio della privatizzazione della censura nelle azioni dell’Unione Europea (Code of practice on disinformation)’ (2020) 11 *Federalismi* 282.

Finally, special protection is provided for minors, since targeting or advertising message delivery techniques involving the processing of personal data of a minor are prohibited.

In conclusion, the regulation recently approved by the European Parliament on March 2024 constitutes an important response to the critical issues repeatedly highlighted by both the European and national authorities as well as the doctrine: in particular, it is the first regulation specifically dedicated to the regulation of political advertising in pre-election periods.

However, some issues and doubts arise, and, in particular, a long process of implementation is necessary. For instance, the EDPS had suggested introducing a general and absolute ban on targeting for political purposes, since the obligations stated by the EU legislator might be insufficient in the face of the great variety of ways in which users can be profiled online, especially by using data that are not in considered 'sensitive', the so-called 'inferred data'.

In conclusion, the choice of the European legislator seems to be a reasonable compromise, considering the legitimate economic interests of Internet platforms, which base their business precisely on the processing of data for marketing purposes.<sup>19</sup>

#### 4. Concluding remarks

Political targeting concerns several issues: from the need to preserve the individual citizen's right to free and informed information, to the need to protect economic interest of internet platforms, to, finally, the need to guarantee the prerequisites of political representation and participation, allowing genuine public debate inspired by deliberative principles.<sup>20</sup> All these issues are particularly important during electoral campaigns since targeting might influence the outcome of elections.

In a framework in which internet platforms are playing a key role, governing the online space, it was necessary to leave an approach based on self-regulation. This is what the European Union has put in place, recently approving several regulations.

They represent a first, significant, response, but not yet comprehensive and sufficient, as a long process of implementation of these new rules and of evaluation of the impact assessment is required.

More generally, the European strategy is shareable due to the trans-nationality of online political communication, even though some questions arise. On

19 See M Z van Druenen, N Helberger and R O Fathaigh, 'The beginning of EU political advertising law: unifying democratic visions through the internal market' (2022) 30(2) *International Journal of Law and Information Technology* 181.

20 See C Caruso, 'Il tempo delle istituzioni di libertà. Piattaforme digitali, disinformazione e discorso pubblico europeo' (2023) 3 *Quaderni costituzionali* 543.

the one hand, over-regulation could make the internal market safer, but also less competitive: online platforms could devise strategies to bypass the provisions set by the EU or, as a last resort, leave the European market, even though it is very profitable, boasting more than 250 million users; on the other hand, some areas have remained uncovered, exposing to the risk that these obligations could be circumvented by treating inferred data, i.e. data whose processing is not subject to special conditions and which are used to trace back to information for which processing is prohibited.

In conclusion, the new EU regulations have marked a decisive change in the European regulatory framework on profiling and targeting. It is now necessary to verify whether and how this new set of rules will be applied, with the aim of building an 'European digital space', which protects users' rights without threatening the freedom of economic initiative of Internet platforms, as well the freedom of propaganda of political parties, which use targeting for political purposes.