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Defining Online Political Advertising

How Difficulties in Delineating Paid Political Communication Can Be Addressed

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Executive Summary

Finding guidelines to ensure fair online political campaigning will be one of the key issues for European policymakers to tackle when devising regulation for digital platforms. In traditional media, paid political communication is typically regulated, recognizing the potential impact that political ads can have on individuals and on societal debates. Paid political communication as a form of political speech seeks to shape opinions on candidates, policies, ideas and issues of public concern that can impact not only individuals, but communities and their legislative agendas. This is fundamentally different from ads seeking to shape buying habits or attitudes towards commercial brands, products and goods.

It has become commonplace for political parties, candidates and movements to use online advertising on social media, video apps, search engine result pages and other digital platforms. Just like in other parts of the world, Europe has witnessed growing expenditures and a growing number of political online advertisers and ads over the past years. While such political ads on large platforms can be helpful to reach niche audiences and mobilize voters, they have also been used in negative campaigning, to demobilize voters, especially minorities, to skew public debates in favor of wealthy advertisers, and to spread disinformation.

So far, political ad rules made for the offline media and information environment have not widely been adapted to deal with the online ad space and its potential dangers related to data-driven, targeted and algorithmically delivered ads. Under public pressure and in the absence of up-to-date regulation, corporate actors have therefore created their own definitions and rules for dealing with paid political communication. These definitions and measures vary considerably across platforms. Some platforms have banned political ads, with some exceptions, while others apply special restrictions. How well and consistently platforms enforce their definitions and rules is crucial, but there are few openings for independent auditing and oversight. This undermines public interest scrutiny of paid political communication online.

The European Union (EU) has the opportunity to address this gap by devising guidelines for paid political communication online. Apart from legislative initiatives in several member states, the European Commission is expected to tackle this issue in two of its flagship tech regulation proposals, the Digital Services Act (DSA) and the European Democracy Action Plan (EDAP). These proposals can be used to establish transparency and accountability standards for paid political communication online. At the core of developing such

standards lies the question of how to delineate paid political communication from personal opinions and purely commercial, transactional advertising for goods and services. The lines for this distinction were already blurry in the traditional, offline ad space, but have become even blurrier in the past years as online advertising grew. For example, there are now more and different types of advertisers that can be political, such as non-party groups and social media influencers. Advertising is not restricted to elections anymore but happens throughout the entire legislative cycle and covers many issues not related to candidates and elections at all.

In light of the difficulties to determine who qualifies as a "political" advertiser or where the line between ads on social issues and those deemed "political" is, it is more useful to set a mandatory baseline for ad transparency for all online advertising. Online ads rely on personal behavioral data that is used for targeting by advertisers and for algorithmic ad delivery by platforms. To allow public interest scrutiny of this type of advertising, it is necessary and justified to require advertisers and advertising platforms to provide meaningful transparency on their ads. This includes mandatory ad databases, ad disclaimers for citizens and advertiser verification mechanisms.

Further measures to ensure accountability and public interest scrutiny might necessitate a clarification as to what political advertising is. To that end, certain core political advertisers should be defined that are always considered political, for instance, political parties, candidates, parliamentary groups and lobby associations. They could face heightened scrutiny for their paid communication, such as financial reporting requirements or spending caps. Actors that are financially or otherwise connected to these core advertisers could be deemed political advertisers on the periphery and in such cases be subject to such additional scrutiny as well. This might apply to social media influencers and non-party campaigns. These definitions would cover a wide range of political advertising online. Issue-based advertising, however, might fall out of the scope of this approach, even though it is an important facet of online political advertising. This could be addressed by mandating meaningful labeling and self-reporting options at platforms, so that advertisers can flag their paid messages as political. While leaving some uncertainty, this is preferrable to companies or governments deciding on their own what content is "political" and thus subject to political ad rules.

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1. Introduction:
Why Defining Political Advertising
Is an Important Policy Question

Online advertising has become part of the standard repertoire of political campaigning. Long gone are the days when paid political communications only meant printing posters to put up on the street and producing TV commercials. Instead, in Germany alone, the major political parties are estimated to have spent more than three million euros on Facebook ads in 2019.[1] During the 2019 elections in the United Kingdom (UK), targeted online ads were used by all parties as well as outside political groups.[2] In the Netherlands, one party apparently used a social media ad campaign to help boost its membership and thus secure state subsidies.[3] In the United States (US), social media influencers were paid to support specific political candidates[4], not to mention the record amount of money spent on platform ads.

This ongoing shift to online political advertising is marked by several expansions, which present a new set of challenges for policymakers and regulators compared to the traditional journalistic media space.

- **More advertisers.** Apart from political parties, other groups such as non-party organizations, lobby associations and cause-based political movements have relatively easy and cheap access to online marketing tools.
- **Continuous advertising periods.** Political advertising occurs throughout the entire legislative cycle and not just during election campaigns anymore.
- **More topics.** The number and types of issues covered by paid political content are not only relegated to messages in support or opposition of a specific party or candidate, but might advocate for a law or cause, solicit donations or promote political protests.

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1 Julian Jaursch, "Rules for Fair Digital Campaigning: What Risks Are Associated with Online Political Advertising and What Reforms Are Necessary in Germany" (Berlin: Stiftung Neue Verantwortung, June 8, 2020), 50, https://www.stiftung-nv.de/en/publication/rules-fair-digital-campaigning.
2 Mark Scott, "Six Charts That Explain the UK's Digital Election Campaign," *POLITICO*, November 29, 2019, https://www.politico.eu/article/uk-general-election-facebook-digital-advertising-labour-conservatives-liberal-democrats-brexit-party-nyu/; Tristan Hotham, "The Digital Campaign: Targeted Advertising in the 2019 General Election," *The Political Studies Association (PSA)*, December 6, 2019, https://www.psa.ac.uk/psa/news/digital-campaign-targeted-advertising-2019-general-election.
3 Eric van den Berg and Tijmen Snelderwaard, "Zo werd FvD de grootste partij van Nederland," *NPO3.nl*, April 8, 2020, https://www.npo3.nl/brandpuntplus/fvd-ledenwerving-facebook.
4 Kate Knibbs, "The Influencer Election Is Here," *Wired*, February 13, 2020, https://www.wired.com/story/election-2020-influencers/; Shelly Banjo, "TikTok's First U.S. Presidential Election," *Bloomberg*, November 2, 2020, https://www.bloomberg.com/news/newsletters/2020-11-02/tiktok-s-first-u-s-presidential-election.

- **More platforms.** Beyond just posters, print ads and TV spots, now, search engine results pages, video apps, social media sites and streaming services can be and have all been used for paid political communication.
- **More data.** Lastly and most crucially, there is an expansion of the data-driven surveillance of citizens and potential voters inherent in online platform advertising. Platform advertising functions under different parameters than offline advertising. It is driven by gathering and analyzing vast swaths of personal behavioral data, which allows advertisers to target their ads and platform algorithms to deliver ads to rather homogeneous, small groups of people. More so than for traditional media, advertising is the primary source of income for online digital platforms.[5]

These changes and expansions are important for lawmakers and the public to consider for several interconnected reasons.

Selling ideas is not the same as selling goods
For one, paid political speech – in contrast to paid product placement, for instance – does not merely affect buying behavior, but can affect individuals' political opinions and public debates. Paying to reach people to convince them of certain political ideas and candidates, reinforce or sway their voting behavior, establish support for a policy proposal, disparage opponents, solicit donations and ask for volunteer support affects the priorities of societal and parliamentary agendas, the makeup of elected bodies, and the content and tone of political discourse. Thus, paid political messages have much higher individual and societal implications than purely transactional, commercial advertising for products and services. This entails the need for transparency and accountability on behalf of advertisers and ad platforms in the public interest.

Moreover, because such advertising can be considered a form of political speech, platforms and regulators must balance the right to freedom of expression for people and organizations with the need to avert discrimination as well as harms to democratic processes.[6] It is clear that online advertising can serve laudable purposes in support of democratic processes and inclu-

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5 Cf. K. Sabeel Rahman and Zephyr Teachout, "From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure," *Knight First Amendment Institute*, February 4, 2020, https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure; Nathalie Maréchal, Rebecca MacKinnon, and Jessica Dheere, "Getting to the Source of Infodemics: It's the Business Model" (New America: Ranking Digital Rights, May 27, 2020), https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/.
6 Cf. Damian Tambini, "Internet and Electoral Campaigns: Study on the Use of Internet in Electoral Campaigns" (Strasbourg: Council of Europe, 2017), https://rm.coe.int/use-of-internet-in-electoral-campaigns-/16807c0e24.

sion: activating voters to cast their ballots; drawing attention to issues not covered by major campaigns or the media; reaching specific audiences with policy topics affecting vulnerable niche populations. Yet, advertising can also be used to dissuade people from voting[7], to engage in negative campaigning and personal attacks[8], to cause public confusion[9], to hide wealthy donors[10], and generally to reinforce people's fears and anger. Online, these risks are exacerbated by business models almost entirely reliant on targeted, algorithmic advertising, which in turn relies on the massive and invasive collection of personal behavioral data.[11]

Existing regulation has not caught up to the online ad space
Connected to the previous normative point, many EU member states and other countries around the world have long-established rules for paid political speech in broadcasting media.[12] Specific rules for online political advertising are often missing, however.[13] In Germany, for example, political TV and radio ads are prohibited, except for those by political parties in a short pre-election period. Parties are not charged for TV ads and there is a quota system to ensure somewhat fair exposure for parties of different sizes. While this system has worked reasonably well for TV and radio, it leaves open questions regarding its applicability online.

Policymakers across Europe are therefore looking to adapt existing legislation regarding political ad rules for the digital space and find new rules to ensure fair digital campaigning. Most prominently, the European Commission

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7 April Glaser, "A New Strain of Voter Depression Is Underway, with Black People as the Target," *NBC News*, October 16, 2020, https://www.nbcnews.com/tech/social-media/days-left-black-voters-face-orchestrated-efforts-discourage-voting-n1243780.
8 Tristan Hotham, "We Need to Talk about A/B Testing: Brexit, Attack Ads and the Election Campaign," *LSE BREXIT*, November 13, 2019, https://blogs.lse.ac.uk/brexit/2019/11/13/we-need-to-talk-about-a-b-testing-brexit-attack-ads-and-the-election-campaign/.
9 Megan Graham, "Trump Campaign Ran a Facebook Ad Implying He Won the Election, Which Is Supposed to Be against the Company's Rules," *CNBC*, October 27, 2020, https://www.cnbc.com/2020/10/27/trump-campaign-ads-are-working-around-facebooks-election-rules.html.
10 Christian Fuchs, Paul Middelhoff, and Fritz Zimmermann, "AfD: Millionen aus der Grauzone," *DIE ZEIT*, May 18, 2017, https://www.zeit.de/politik/deutschland/2017-05/afd-partei-foerderung-verein-geld/komplettansicht.
11 A SNV paper published in June sheds light on these characteristics and issues, and provides in-depth analyses of the risks and potential policy remedies to minimize them. See Jaursch, "Rules for Fair Digital Campaigning: What Risks Are Associated with Online Political Advertising and What Reforms Are Necessary in Germany."
12 Joris van Hoboken et al., "The Legal Framework on the Dissemination of Disinformation through Internet Services and the Regulation of Political Advertising" (Amsterdam: University of Amsterdam, December 2019), 107–12, https://www.ivir.nl/publicaties/download/Report_Disinformation_Dec2019-1.pdf; Tom Dobber, Ronan Ó Fathaigh, and Frederik J. Zuiderveen Borgesius, "The Regulation of Online Political Micro-Targeting in Europe," *Internet Policy Review* 8, no. 4 (December 31, 2019): 11–13, https://policyreview.info/articles/analysis/regulation-online-political-micro-targeting-europe.
13 Ernesto Apa et al., "Media coverage of elections: the legal framework in Europe" (Strasbourg: European Audiovisual Observatory (Council of Europe), 2017), 115, https://rm.coe.int/16807834b2.

is set to introduce legislation and guidelines on online advertising, including specifically political advertising, via the proposed Digital Services Act (DSA) and the European Democracy Action Plan (EDAP). German regulators are in the process of refining their statutes on political advertising. Legislators in Ireland have sought to update their electoral law to encompass online advertising and Dutch lawmakers are working on a law on political parties as well[14], which could touch upon advertising. In Czechia, a new regulatory body, set up in 2017, focuses specifically on digital campaigning, but still needs some more experience and resources.[15] A Lithuanian government agency has started tracking paid political messages offline and online.[16]

Such legislative moves are a sign that lawmakers acknowledge the urgent need to address the lack of fitting rules for political ads in the online space. In the meantime, however, platforms have made their own rules, which has serious weaknesses.

Corporate rule-making and self-regulation is not sufficient
In lieu of updated regulatory guidelines, corporate decisionmakers have developed definitions for political advertising, which vary widely across platforms.[17] Some platforms prohibit most political advertising (for instance, Twitter and TikTok), others define sets of issues and advertisers subject to enhanced transparency rules (Facebook, Reddit), while still others limit the targeting options for political advertising (Google). While it is laudable that many large platforms acknowledge the need for specific rules for paid political speech, self-regulatory measures have so far failed to fully address the risks associated with political advertising. The examples above highlight some of the shortcomings. In addition, voluntary transparency measures in-

14 Minister van Binnenlandse Zaken en Koninkrijksrelaties, "Voortgang voorbereiding Wet op de politieke partijen," 2020, https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail/2020Z10803/2020D23378.

15 Pavel Havlícek and Jirí Rajtr, "Digital Political Advertising in the Czech Republic" (Prague: Association for International Affairs, February 18, 2020), http://www.amo.cz/wp-content/uploads/2020/02/AMO_Digital-political-advertising-in-the-Czech-Republic_final.pdf.

16 Lietuvos Respublikos vyriausioji rinkimu komisija, "Reklamos gaudykle," 2020, https://vrk.maps.arcgis.com/apps/opsdashboard/index.html#/59686db215b24a7eb9ad854e04ab4fef.

17 Election Integrity Partnership, "Evaluating Platform Election-Related Speech Policies," Election Integrity Partnership, September 4, 2020, https://static1.squarespace.com/static/5f19d72fae0908591b9feccb/t/5f5bd9a5a637a55d9b999226/1599855014237/EIP_Platform_Policy_Comparison.docx+%283%29.pdf; CITAP Digital Politics, "Platform Advertising," CITAP Digital Politics, 2020, https://citapdigitalpolitics.com/?page_id=33.

stituted by some big platforms are insufficient.[18]

Furthermore, the wide variety of platform definitions makes independent monitoring from academics, regulators and civil society experts difficult. This, however, is crucial to allow for public interest scrutiny of paid political speech. While TV advertising used to be mostly relegated to a defined national market, typically overseen by an independent regulator, online political ads can transcend borders and thus political, cultural and language differences. Existing oversight mechanisms do not hold in this case, and other oversight by external observers is hampered by the gamut of platform definitions.

On a more fundamental level, it is problematic that private, profit-driven corporations reliant on behavioral advertising to make money decide on the limits to (paid) political speech. This contrasts with broadcasting rules set by elected officials or their democratically instituted regulatory bodies, for example, or to industry-wide self-regulation in print media. In light of the previously mentioned normative and political concerns surrounding political ads as a form of protected speech that have both positive and negative consequences not only for individuals, but also society as a whole, the primacy of corporate rule-making is questionable.

As the EU, member states and platforms grapple with finding rules for fair digital campaigning, the basis for such rules is still missing: A definition for paid political communication remains elusive. There is a wide variety of corporate and national definitions, while the European Commission only vaguely and ambiguously defines different types of paid political speech.[19] So, what is political advertising? For example, it is fairly simple to call a message on

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18 European Regulators Group for Audiovisual Media Services, "ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice," May 4, 2020, 17–23, http://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf; French Ambassador for Digital Affairs, "Twitter Ads Transparency Center Assessment" (Paris: French Ambassador for Digital Affairs, 2019), https://disinfo.quaidorsay.fr/en/twitter-ads-transparency-center-assessment; French Ambassador for Digital Affairs, "Facebook Ads Library Assessment" (Paris: French Ambassador for Digital Affairs, 2019), https://disinfo.quaidorsay.fr/en/facebook-ads-library-assessment; Mozilla Foundation, "Facebook and Google: This Is What an Effective Ad Archive API Looks Like," *The Mozilla Blog*, March 27, 2019, https://blog.mozilla.org/blog/2019/03/27/facebook-and-google-this-is-what-an-effective-ad-archive-api-looks-like; Laura Edelson, Tobias Lauinger, and Damon McCoy, "A Security Analysis of the Facebook Ad Library" (2020 IEEE Symposium on Security and Privacy (SP), San Francisco, CA, 2020), 661–78, https://doi.org/10.1109/SP40000.2020.00084; Athanasios Andreou et al., "Investigating Ad Transparency Mechanisms in Social Media: A Case Study of Facebook's Explanations" (Network and Distributed Systems Security Symposium, San Diego, CA, 2018), http://www.eurecom.fr/en/publication/5414/download/data-publi-5414_1.pdf; Paddy Leerssen et al., "Platform Ad Archives: Promises and Pitfalls," *Internet Policy Review* 8, no. 4 (October 9, 2019), https://policyreview.info/articles/analysis/platform-ad-archives-promises-and-pitfalls.
19 Hoboken et al., "The Legal Framework on the Dissemination of Disinformation through Internet Services and the Regulation of Political Advertising," 26–29.

Facebook paid for by a candidate running for public, national office "political advertising". But what about paid online communication that is not an ad on Facebook, but, say, a post by an influencer that they were paid for by a political organization? Or gadgets, skins or posters in an online game? What about ads from non-governmental organizations (NGOs) or corporate lobbyists advocating for a cause, outside of an electoral campaign? Are these political ads and thus subject to certain legal and/or platform rules? These questions are crucial to answer, because they are the basis for decisions on how political ads are treated by platforms and regulators.

To aid discussions on these questions, which will likely not be relegated solely to the development of the DSA and the EDAP, this paper presents some of the existing approaches to defining political ads, highlights their shortcomings, and makes recommendations on how lawmakers could improve the approaches.

2. Existing Regulatory Approaches: Different Definitions and their Trade-Offs

Defining what qualifies as political advertising is an important task for lawmakers, because this form of paid political speech seeks to shape people's opinions and behaviors on candidates as well as legislative and societal issues that can affect all of society. When trying to define political ads, several questions emerge (see figure 1), such as what is a "political" advertiser and what is a "political" topic? When is advertising "political", only during elections or at other times as well?

There are various approaches to answering these questions, some of which have made it into countries' laws or into platforms' terms of services. In the following, I provide an analysis of four approaches, based on the questions in the columns from left to right. Each comes with important caveats and trade-offs. As will be seen, one of the key challenges is the struggle to capture as much political advertising as possible, while maintaining an enforceable definition.
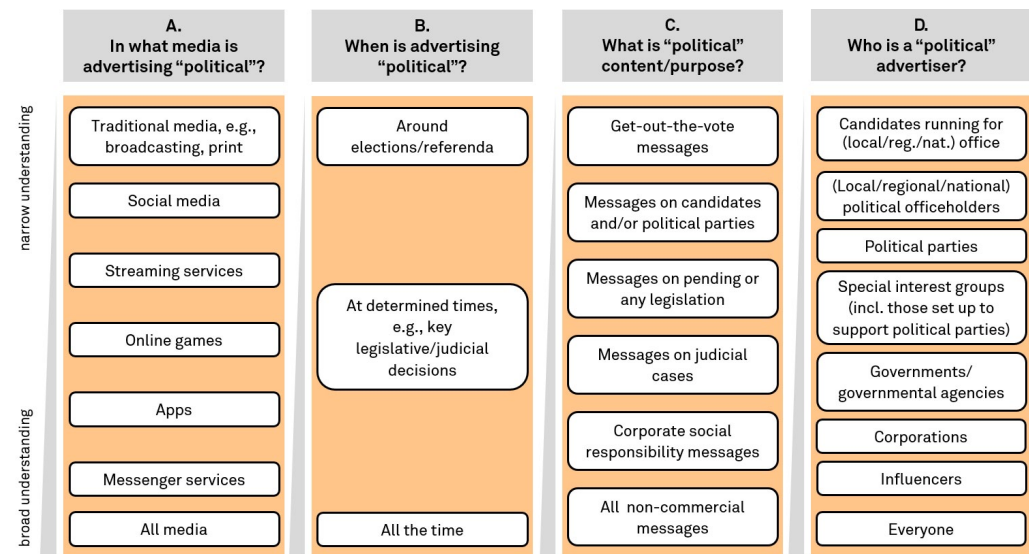
A. In what media is advertising "political"?	B. When is advertising "political"?	C. What is "political" content/purpose?	D. Who is a "political" advertiser?
Traditional media, e.g., broadcasting, print	Around elections/referenda	Get-out-the-vote messages	Candidates running for (local/reg./nat.) office
Social media		Messages on candidates and/or political parties	(Local/regional/national) political officeholders
Streaming services		Messages on pending or any legislation	Political parties
Online games	At determined times, e.g., key legislative/judicial decisions	Messages on judicial cases	Special interest groups (incl. those set up to support political parties)
Apps		Corporate social responsibility messages	Governments/ governmental agencies
Messenger services			Corporations
			Influencers
All media	All the time	All non-commercial messages	Everyone

narrow understanding → broad understanding

Figure 1. Questions to be addressed when defining political advertising[20]

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20 This breakdown of political advertising was discussed in working groups convened by the European Partnership for Democracy, based on suggestions from Paige Morrow from Article 19.

A. The media-centered approach:
Insufficiencies of the regulatory status quo for broadcasting

The predominant current regulatory approach for political ads mostly covers just traditional, journalistic, broadcasting media. Much of this broadcast regulation was first developed decades ago and has not been updated everywhere, explaining the continued narrow focus on TV and radio. For instance, German regulation was designed for broadcasting and only recently was expanded to cover social media and search engines. It remains open, as of yet, how the rules for political ads in broadcasting can and will be enforced with a view to the characteristics of the online ad space. The way advertising works online is so different from offline advertising that specific rules for the online ad space are necessary. It used to be that "moving images" were considered to be more persuasiveness and invasiveness than print media. Online ads, however, are not persuasive and invasive depending on whether they are texts, images, sounds, videos or a combination of those, but because they rely on data-driven targeting and algorithmic delivery, which is unavailable to traditional offline media. This is not addressed in regulation for traditional broadcast media.

Additionally, while TV ads remain crucial for political campaigns throughout the world, it would be shortsighted to keep regulation narrowly focused on broadcasting. Expenditures for online ads have risen over the past years and especially younger people use online platforms more and more, highlighting the likely continued and growing significance of digital marketing.

B. The timing-centered approach:
Covering elections, but little else

In existing regulation, political advertising has often been equated with electoral advertising, meaning ads supporting a candidate or party during campaign season. For instance, the EU's Code of Practice on Disinformation takes political advertising to be "advertisements advocating for or against the election of a candidate or passage of referenda in national and European elections".[21]

The downside of an election-centered approach is that none of the paid political communication outside of an electoral context is covered. For ex-

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21 European Commission, "EU Code of Practice on Disinformation" (Brussels: European Commission, September 26, 2018), 5, https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454.

ample, paid messages to support or oppose a certain bill would fall outside of any political ad regulation, if they are not delivered within a certain time frame. This does not reflect the current reality of digital campaigning: Political advertising, especially online, is not confined to elections anymore. Political campaigns pay for posts to push their agenda and gain supporters all year round. While there could still be additional rules for electoral campaigns (such as blackout periods or a freeze in ad volume), any political ad definition needs to cover more than just electoral ads.

C. The content-centered approach: The issues with defining issue ads

Instead of defining media in which or times when ads are political, another way to go about defining political advertising is determining a set of issues or purposes to be considered "political". The idea behind this is that if a paid message covers a certain topic or serves a certain purpose, it is part of public political discourse or campaigning. The European Court of Human Rights has taken such a broad view of political advertising[22] and some national governments take this stance as well. In Ireland, for example, a set of "political purposes" is defined, including "to promote or oppose, directly or indirectly, the interests of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament".[23] German media regulation prohibits advertising for political topics and "world views".[24] On the platform side, Facebook has a content-based definition in place: The company applies certain rules to "ads about social issues, elections or politics". Under the heading "social issues", it defines a broad set of eight topics, including "crime", "immigration" and "health".[25] Google and Pinterest go about their political ad guidelines in a similar fashion.[26]

22 Hoboken et al., "The Legal Framework on the Dissemination of Disinformation through Internet Services and the Regulation of Political Advertising," 44–47.
23 Oireachtas, "Electoral Amendment Act" (2001), 48, http://www.irishstatutebook.ie/eli/2001/act/38/enacted/en/pdf.
24 Staatskanzlei Rheinland-Pfalz, "Staatsvertrag zur Modernisierung der Medienordnung in Deutschland," December 5, 2019, 16, https://www.rlp.de/fileadmin/rlp-stk/pdf-Dateien/Medienpolitik/Medienstaatsvertrag.pdf.
25 Facebook, "About Ads about Social Issues, Elections or Politics – About Social Issues," *Facebook*, 2020, https://en-gb.facebook.com/business/help/214754279118974?id=288762101909005.
26 Scott Spencer, "An Update on Our Political Ads Policy," *Google*, November 20, 2019, https://blog.google/technology/ads/update-our-political-ads-policy/; Pinterest, "Advertising Guidelines," *Pinterest*, 2020, https://policy.pinterest.com/en/advertising-guidelines.

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The challenge with these "issue ads" is that the line between political and non-political content is blurry if it exists at all.[27] Using a negative definition is tempting, but still has pitfalls. This would mean that political advertising is defined as all advertising that is not commercial and transactional. The promising aspect is that there is an EU-wide definition of commercial communication, at least for audiovisual media.[28] The pitfall is that even then, the lines to non-commercial ads remain blurry. For instance, the Women's National Basketball Association (WNBA) in the US publicly dedicated their 2020 season to social justice issues, including the decidedly political topic of systemic racism.[29] Would all (commercial) advertisements for individual WNBA games be considered political ads then? This applies to many other companies, too, which engage in corporate social responsibility (CSR) or reputation management communication.[30] Where should the line be drawn between paid advocacy communication and paid messages that are ultimately aimed at increasing corporate revenues? Another example are topics that are not or should not be political, such as human rights, but that can be politicized in different countries and contexts. Who would decide when a topic of debate is a question of fundamental human rights or one of policy preferences? Answering this question can be politicized in and of itself, if partisan actors with their own agendas get to decide what is political.

Furthermore, public debates are dynamic and shift over time, making the creation of a list of political topics difficult. This is true within a given country, but it is of special importance for Europe. Across the EU, different culture, language, history and legal systems lead to different topics being considered political at any given time. An attempt to define EU-wide "political issues" seems futile for policymakers. In a recent Canadian electoral law reform, legislators and regulators did consider "issue advertising", but refrained from defining a set list of topics for this. They say that it is political parties, groups and the public who dynamically determine what is a political issue.[31] It might seem that this avoids the problem a potentially charged

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27 Leerssen et al., "Platform Ad Archives," 8–9.

28 European Union, "Consolidated Version of the Audiovisual Media Services Directive" (2018), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02010L0013-20181218.

29 Women's National Basketball Association, "WNBA Announces A 2020 Season Dedicated To Social Justice," *WNBA*, July 6, 2020, https://www.wnba.com/news/wnba-announces-a-2020-season-dedicated-to-social-justice/.

30 Cf. Kofi Annan Commission on Elections and Democracy in the Digital Age, "Protecting Electoral Integrity in the Digital Age: The Report of the Kofi Annan Commission on Elections and Democracy in the Digital Age" (Geneva: Kofi Annan Commission on Elections and Democracy in the Digital Age, January 2020), 74, https://www.kofiannanfoundation.org/app/uploads/2020/01/f035dd8e-kaf_kacedda_report_2019_web.pdf.

31 Elections Canada, "New Requirements for Third Parties: Corporations, Unions, Groups and Individuals," 2019, https://www.elections.ca/content.aspx?section=pol&dir=thi&document=backgrounder&lang=e.

list of "political issues", either drawn up by tech companies or governments. In practice, however, advertisers and journalists responded to the law by developing a database, which tracks campaign issues. Corporate advertisers and NGOs can subscribe to this database, so they know when their paid messages are being regulated.[32] This system could not prevent controversies erupting over what topics are political, though. For example, there was a debate over whether advertising based on scientific facts regarding climate change are partisan, because this topic was also a campaign issue for some parties.[33]

For platforms, the difficulty to distinguish between political and non-political paid content might lead to disadvantages for civil society organizations compared to corporations. If most topics are considered political and only purely commercial, transactional ads ("Buy this toy!") do not face regulatory scrutiny, this could put issue-based organizations at a loss to promote their causes. In addition, the wide variety of potentially political issues might incentivize corporate decisionmakers to develop automated tools to label which content is political and which is not. Relying on algorithms to make distinctions regarding political speech is, as of now, a flawed approach, as experiences with content moderation and advertising have shown.[34]

32 IAB Canada, "IAB Canada Launches 'Issues Tracker' Ahead of Federal Election to Help Members Comply with New Rules," *IAB Canada*, September 5, 2019, https://iabcanada.com/iab-canada-launches-issues-tracker-ahead-of-federal-election-to-help-members-comply-with-new-rules/.
33 Muriel Draaisma, "Elections Canada 'wrong' to Say Climate Change Ads Could Be Partisan, Expert Says," *CBC News*, August 20, 2019, https://www.cbc.ca/news/canada/toronto/diane-saxe-elections-canada-warning-climate-change-advertising-partisan-activity-1.5253116; *IAB Canada*, "The 'Issue' of Political Issue Advertising – A Rude Awakening for Canadian NGOs," IAB Canada, September 27, 2019, https://iabcanada.com/the-issue-of-political-issue-advertising-a-rude-awakening-for-canadian-ngos/.
34 Spandana Singh, "Everything in Moderation: An Analysis of How Internet Platforms Are Using Artificial Intelligence to Moderate User-Generated Content," *New America*, July 22, 2019, https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/; Ranking Digital Rights, "Human Rights Risk Scenarios: Algorithms, Machine Learning and Automated Decision-Making" (Washington, DC: Ranking Digital Rights, July 2019), https://rankingdigitalrights.org/wp-content/uploads/2019/07/Human-Rights-Risk-Scenarios_-algorithms-machine-learning-automated-decision-making.pdf; Ranking Digital Rights, "Human Rights Risk Scenarios: Targeted Advertising" (Washington, DC: Ranking Digital Rights, February 20, 2019), https://rankingdigitalrights.org/wp-content/uploads/2019/02/Human-Rights-Risk-Scenarios-targeted-advertising.pdf.

D. The advertiser-centered approach: The danger of just focusing on political parties

One point of departure to define political ads is looking at who is advertising. The premise is that certain actors are, by default, political, and therefore, their paid messages should be considered political, too. This advertiser-centered approach is aided by the fact that legal definitions for certain political actors exist that could be used. For example, most countries at least define what a "political party" is. The delineation between political advertisers and non-political advertisers is clearer than the distinction between commercial and non-commercial messages (see discussion above). Yet, it is also rather narrowly focused on parties, who are not the only political advertisers online. Against this backdrop, some countries as well as tech companies attempt to cover more advertisers in their definitions.

In the UK, for instance, there is a definition for "non-party campaigns", meaning political campaigns that do not stand candidates themselves.[35] Lithuanian law defines "political campaigns", "candidates" and "potential candidates".[36] Political advertising is then not only considered advertising *by* these actors, but also *on behalf* of these actors. Similarly, Facebook applies special rules for ads "[m]ade by, on behalf of or about a candidate for public office, a political figure, a political party or advocates for the outcome of an election to public office".[37] Twitter employs a comparable definition when explaining its political ad prohibition.[38]

Still, even these more inclusive advertiser-based definitions mostly address only election-related advertising (hence Facebook's additional rules for issue ads, as discussed above). Paid messages touching on political issues that are not connected to candidates, parties or elections remain outside of the definition's scope. This is a shortcoming, because advertising online happens independently of elections and speaks to a variety of social issues unrelated to individual candidates.

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35 Electoral Commission, "Non-Party Campaigners: Where to Start," February 24, 2020, https://www.electoralcommission.org.uk/non-party-campaigners-where-start.
36 Republic of Lithuania, "Law on Funding of and Control over Funding of Political Campaigns (2004, Amended 2014)" (2014), https://www.legislationline.org/download/id/7721/file/Lithuania_Law_funding_control_over_funding_political_campaigns_2004_am2014_en.pdf.
37 Facebook, "About Ads about Social Issues, Elections or Politics," *Facebook*, 2020, https://en-gb.facebook.com/business/help/167836590566506.
38 Twitter, "Political Content," *Twitter*, November 2019, https://business.twitter.com/en/help/ads-policies/prohibited-content-policies/political-content.html.

3. Policy Recommendations: Transparency for All Online Ads and Additional Public Interest Scrutiny for Core Political Advertisers

In the digital news and information space provided by large tech companies, the way political ads can be targeted and algorithmically delivered to rather homogeneous, small groups necessitates new rules ensuring transparency and accountability for fair digital campaigning. The different rules discussed in this paper, which were put in place by companies or adapted from the broadcasting space by regulators, have advantages and disadvantages. Any approach entails considerable trade-offs and struggles to capture all paid political communication. Still, there are ways to establish working definitions and mechanisms to address some of the basic issues connected to online political advertising. At the core of any measures should be requirements for meaningful transparency, applying to all online advertising. Other measures include defining certain advertisers as political and establishing oversight and enforcement mechanisms.

Mandate and implement transparency rules for all online ads

As referenced throughout the paper, political advertising carries different weight than advertisement purely meant to sell people the latest gadget or an everyday service. That is why there is a need to create rules that enable public interest scrutiny in the first place. Meaningful transparency is a necessary, but not sufficient, condition to allow for public interest scrutiny of online political ads (somewhat similar to how public interest scrutiny is possible for broadcasting or offline ads) and hold advertisers and ad platforms accountable for paid political speech.[39]

For meaningful transparency to be achieved, it is not essential to make a distinction between different types of ads – be they for candidates or products, for causes or services, be they on one online platform or the other. Instead of trying to find the spot where advertising becomes political and maybe leaving this decision solely to governments or companies, it would be more prudent to institute rules to ensure meaningful transparency for all online

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39 The call for transparency comes with its own pitfalls, though, when trying to determine what exactly is meant by transparency and whom it is for. See Jaursch, "Rules for Fair Digital Campaigning: What Risks Are Associated with Online Political Advertising and What Reforms Are Necessary in Germany," 17–18.

advertising. This should include mandatory, functional ad databases (with more detailed data on ad targeting and ad delivery available than in currently existing voluntary databases), real-time ad disclosure for individual citizens and verification mechanisms for advertisers.[40] Such measures would allow paid communication online, often targeted and delivered using personal behavioral data, to be publicly scrutinized by individuals and external experts, whether this concerns a party or brand paying an influencer, a government agency or a company paying for ads on social media, or a non-party campaign or a lobby group paying to push their videos.

It might seem like a big ask for any advertiser to be included in an ad library, for example, or to be subject to ad disclaimer rules in the name of transparency on paid political communication. Yet, most advertisers and topics can be and are politicized, from ice cream to furniture to soft drinks to cars. Also, considering the data-driven targeting and algorithmic ad delivery available to advertisers online, it is reasonable to require higher transparency standards than offline. There are practical benefits to mandating transparency for all ads, too: Currently, categorizing and removing political ads is largely done by platforms' artificial intelligence systems based on corporate political ad definitions. Inherent flaws and dangers in this set-up could be circumvented if no distinction between political and commercial ads was made for basic transparency rules. With a powerful, searchable ad database, public interest scrutiny of paid political speech would still be possible.

There is wide-ranging consensus on the need for universal online ad transparency. 32 civil society organizations have laid out why this is necessary, what it could look like and what carve-outs might allow for anonymity for political advertisers in high-risk contexts.[41] EU[42] and US[43] researchers have been calling for all-encompassing ad archives as well. At most big platforms, rudimentary, voluntary databases for political ads already exist, which could be broadened. In addition, Google, for example, plans to expand its advertiser verification program from political advertisers to all advertisers over the next years.[44]

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40 European Partnership for Democracy, "Universal Advertising Transparency by Default" (Brussels: European Partnership for Democracy, September 2020), https://epd.eu/wp-content/uploads/2020/09/joint-call-for-universal-ads-transparency.pdf.
41 European Partnership for Democracy.
42 Leerssen et al., "Platform Ad Archives," 9–10.
43 Laura Edelson, Erika Franklin Fowler, and Jason Chuang, "We Need Universal Digital Ad Transparency Now," *TechCrunch*, October 16, 2020, https://social.techcrunch.com/2020/10/16/we-need-universal-digital-ad-transparency-now/.
44 John Canfield, "Increasing Transparency through Advertiser Identity Verification," *Google Ads Blog*, April 23, 2020, https://blog.google/products/ads/advertiser-identity-verification-for-transparency/.

Define certain actors as core political advertisers

Certain actors are already or should be legally defined as political. When these actors become advertisers, they and their paid messages should be considered "political". Typically, such actors are political parties, elected officials, candidates, parliamentary factions, political foundations and political lobby groups/special interest groups. They exist for the sole purpose of gaining and exercising political representation, for example, in parliaments or in public political debates.

European governments and national regulatory authorities should jointly define an EU-wide list of such groups of core political advertisers. Finding consensus on this should be easier than finding consensus on issues that are deemed political across countries.[45] To be sure, some thorny issues will remain (among them the question of whether governments, unions and churches should be considered "political" advertisers), but there are already fora in place to enable a dialogue on these issues, define core advertisers and maybe draw up specific exemptions for certain actors as well. One option is the "European cooperation network on elections".[46] This relatively young network of EU election regulatory bodies could be institutionalized, substantially expanded and tasked with drawing up and regularly revisiting the definition of core political advertisers. It could also incorporate outside expertise from a pluralistic group of stakeholders from civil society, academia and business. Another option is the European Regulators Group for Audiovisual Media Services, a similar network for media regulators, which has already worked on political advertising, and could serve as a coordination body, too.[47]

Once a circle has been around these core political advertisers, they should face heightened scrutiny when paying to reach citizens with their messages. For instance, in addition to all their paid messages appearing in ad databases, these advertisers could be subject to financial transparency obligations and/or campaign spending caps. In many countries, similar rules are already in place for political parties and other political groups, which must report on their income, especially donations, and their expenditures.

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45 A list of groups of "politically exposed persons" already exists within the EU, which could serve as inspiration and be adapted. This has been defined in anti-money laundering law, see Article 3(9) in EU Directive 2015/849, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015L0849.
46 European Commission, "European Cooperation Network on Elections," *European Commission*, 2020, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/eu-citizenship/electoral-rights/european-cooperation-network-elections_en.
47 Cf. European Regulators Group for Audiovisual Media Services, "ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice."

Define certain actors as peripheral political advertisers

In addition to defining a set of core advertisers, there should be consideration for political advertisers on the periphery. These advertisers are not "political" by default like a core political advertiser. Yet, they can become political advertisers if they (1) either receive money or other favors from core political advertisers to spread core advertisers' messages and/or (2) speak on behalf of core advertisers and their interests. An example for the former case would be a social media influencer who is paid by a political candidate to promote the candidate's name and message. An example for the latter would be an association independent of any political party that runs online ads in favor of the candidates and/or policies of a certain party. This should be considered political advertising. In addition to being included in the ad databases, such paid political communication should face the same heightened regulatory scrutiny as core advertisers face, even though the respective advertisers are not themselves core political advertisers. It would shed light both on core advertisers' financial entanglements and external groups' support for core advertisers. There is already legal precedent for such an approach by defining non-party campaigns.

With this view of political advertising on the periphery in place, a large proportion of political advertising on online platforms could likely be covered. For instance, it would include corporations who run online ads advocating for certain political proposals, no matter where and when they do that and disregarding the fact that they are not in the group of core advertisers. While it can be tricky to figure out what periphery political advertising is[48], with increased oversight capabilities and resources, it should be possible for independent national regulators to oversee peripheral political advertising.

What is not fully covered with this definition of political advertising on the periphery, however, are groups that are *not* paid by core advertisers and do *not* speak out on core advertisers' behalf. This gets to the question of issue-based advertising as discussed in the previous section. What about, for instance, an independent (not "core" or "peripheral") NGO paying for platforms ads that encourage young people to vote? For such cases, it is necessary to establish self-regulatory and regulatory reporting and enforcement mechanisms.

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48 For discussions in Germany and the UK, see, respectively, Alexandra Bäcker and Heike Merten, "Transparenz für Wahlwerbung durch Dritte," *Zeitschrift für Parteienwissenschaften* 25, no. 2 (November 27, 2019): 235–46, https://mip.pruf.hhu.de/article/view/140/142; Jacob Rowbottom, "The Regulation of Third Party Campaigning in UK Elections," *The Political Quarterly*, August 17, 2020, https://doi.org/10.1111/1467-923X.12897.

Define enforcement mechanisms

With rules in place as to what qualifies as core and peripheral political advertising, it is vital that a definition also includes clear guidelines for enforcing these rules.

To establish rules for issue-based ads, a self-reporting regime aided by mandatory labeling and transparency functions at advertising platforms could be envisioned.[49] As an example, this means that an NGO paying for messages to encourage young voter turnout should have the option to flag its ads as political, even if it is not considered a core or peripheral political advertiser. A company speaking out on social or racial inequality in an ad on a search engine results page, an app or a video portal, should also have this option. More granular designations than "political" could be envisioned as well, for example, "NGO" or "corporate campaign".[50] Some large online platforms already offer similar options, but there should be a legal requirement that applies to all ad-based platforms of a certain size providing a digital news and information space. This enhanced self-reporting mechanism relies on advertising platforms' and advertisers' cooperation, and thus still has loopholes. It is nonetheless preferrable to a law or corporate terms of service determining supposedly political issues, as this determination cannot be reliably made across time and locales without the drawbacks described in the previous section.

In combination with legal requirements for self-reporting labels, there should be clear guidelines mandating platforms to establish and maintain powerful and meaningful ad databases. This is necessary to enforce the universal online ad transparency rules and other transparency measures mentioned earlier.

Targeted online advertising, whether done by politicians or companies, relies on the collection and analysis of personal behavioral data to infer preferences and group people into profiling categories. With the EU's General Data Protection Regulation, there are already rules in place granting citizens transparency, access and correction rights regarding the use of their data and limiting its use for profiling, among other things. Strengthening enforcement of these rights and clarifying some of the vague provisions on profiling is essential in addressing privacy issues related to online advertising. Data

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49 Who Targets Me, "How to Get to 'Gold Standard' Political Ad Transparency," *Who Targets Me*, October 28, 2020, https://whotargets.me/how-to-take-a-gold-standard-approach-to-political-advertising-transparency-and-policy/.
50 Who Targets Me.

protection authorities need enhanced resources and expertise to do this.

Other oversight agencies are necessary as well. Defining certain actors as political requires an independent oversight authority that maintains a list of core political advertisers. Most EU countries have such agencies already for political parties and, to varying degrees, for other advertisers. These agencies need to have strong expertise and resources at their disposal, and they should be free of political and corporate capture. As mentioned before, streamlining European approaches among national regulators is desirable. An oversight agency should only deal with *paid* political communication. This should be stated clearly in any political ad definition, which could also include financial thresholds for when any rules for paid political communication kick in.

4. Conclusion:
Avoiding Pitfalls of Existing Regulation

For the traditional, offline, journalistic media and information space, physical limitations and legal guidance ensure a basic level of transparency and accountability for paid political speech. There are finite printing or airtime spaces, definitions, quotas, imprint requirements and prohibitions in place, for instance. However, lawmakers have been struggling to establish a similar level of transparency and accountability for paid political speech online, which often happens in an ad space provided by large companies and driven by personal behavior data used for targeting and algorithmic ad delivery. Any definitions and measures need to take these specific characteristics of the online ad space into account.

To achieve a basic level of transparency to allow for public interest scrutiny of paid political speech online, it is more useful to establish legal requirements for meaningful transparency for all online ads than to try and draw a line between political and non-political advertising. This is necessary and justified because online advertising typically relies on lots of personal behavioral data, which can be used for narrow targeting by advertisers and algorithmic delivery by platforms. A transparency mandate for all online ads would include enhanced ad databases and strong advertiser verification mechanisms.

Further measures to ensure accountability and fair digital campaign-

ing might go beyond these basic transparency requirements. If lawmakers contemplate, for instance, financial and targeting reporting obligations or spending caps for paid political communication, it would be most useful to designate certain advertisers as political and apply such rules to them. This could be, at the core, actors such as political parties, candidates and lobby groups, and, on the periphery, those actors paid for by or speaking on behalf of these core political advertisers. For issue-based ads, there could be requirements for meaningful and enhanced self-reporting in place that would circumvent the problems attached to governments or corporations deciding what is a political issue.

Any definitions and measures should avoid making distinctions by media, like the traditional divide between print and broadcast regulation, and between election and non-election times. These distinctions do not hold in the online ad space. Lastly, due to its potential to shape individual opinion formation processes on political issues as well as societal debates, paid political speech and the rules that govern it should not be defined solely by corporate actors, who tend to view this issue in profit-making terms. There should also be caution when letting governments and/or elected officials decide the limits of political speech on their own, as they have vested interests in cementing their own power as well. Independent bodies, which are democratically legitimized and seek inclusion of diverse, pluralistic perspectives, should be involved in any attempt to define and regulate political ads.

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About the Stiftung Neue Verantwortung

The Stiftung Neue Verantwortung (SNV) is an independent, non-profit think tank working at the intersection of technology and society. SNV's core method is collaborative policy development, involving experts from government, tech companies, civil society and academia to test and develop analyses with the aim of generating ideas on how governments can positively shape the technological transformation. To guarantee the independence of its work, the organization has adopted a concept of mixed funding sources that include foundations, public funds and corporate donations.

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