

**THE IMPACT OF THE PROPOSED REGULATION OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL ON THE TRANSPARENCY AND
TARGETING OF POLITICAL ADVERTISING ON THE LIMITATION OF
POLITICAL MICROTARGETING'S EFFECT FROM THE PERSPECTIVE OF
FUNDAMENTAL RIGHTS OF INDIVIDUALS**

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ABSTRACT

The issue of political microtargeting and its detrimental effect on the fundamental rights of individuals has been at the centre of discussion and topical theme among various legal experts and practitioners. This thesis analyses new draft regulation on the transparency and targeting of political advertising in relation to the shortcomings of the current legal framework and assesses whether it would be able to limit political microtargeting and its threats to the fundamental rights of individuals. The main research question that this thesis focuses on is: to what extent would a new regulation on transparency and targeting of political advertising be able to fill the gaps in the existing legal framework by mitigating the threats posed by political microtargeting to the fundamental rights of individuals? Based on the analysis of the present legal framework on the mentioned phenomenon and the new draft regulation, the thesis additionally puts forward suggestions to the European Commission for relevant amendments in the draft regulation in order to eliminate the existing lack of legal clarity and pitfalls within the draft regulation with regard to mitigating risks of mentioned type of advertising against fundamental rights.

Keywords: Political microtargeting, European Union, fundamental rights.

INTRODUCTION

Political microtargeting has been at the centre of many debates in the European Union (EU) and beyond for the last 6–7 years. In order to explore the topic of upcoming regulation of this type of targeting practice against fundamental rights, it is important to define and explain the essence of it. Political microtargeting is a form of political advertising, where people are receiving content that has been adapted to suit them through making use of personal data collected on those people. Political advertising lacks a universal definition and various scholars define it differently. This thesis will refer to political advertising as a means through which parties and candidates present themselves to the electorate, mostly through the mass media.¹ This type of tailored advertising has been used during the campaigns for various national parliaments and presidential elections. Meanwhile, it has been criticised by legal experts for its negative impact on the fundamental rights of individuals. A new draft regulation on the transparency and targeting of political advertising is currently being drafted in the European Parliament.² The regulation will be the frontrunner to limit political microtargeting and thereby reduce the threat to people's fundamental rights. However, there are many legal inconsistencies and shortcomings in the proposed regulation which will clearly affect the real impact of the regulation on the mentioned phenomenon.

Data-driven political marketing has various implications on the fundamental rights of the individuals. Among other things, this phenomenon poses threats on the mentioned rights. In order to address the effects of the political targeted advertising, the European Commission initiated creation of a brand-new regulation, aim of which is going to be mitigate the possible negative impact of political microtargeting.³ Restricting it is a way to avoid individuals from being subject to harmful effects. Well-thought-out regulation ensures that the rights of individuals are protected and at the same time that there is no impermissible encroachment on the rights of other parties.

Any type of regulation in some way affects human rights in certain way. Regulation of political microtargeting is supposed to provide better protection against any kind of infringements with

¹ Kaid, L. L. (2012). Political advertising as political marketing: A retro-forward perspective. *Journal of Political Marketing*, 11(1–2), 29–53.

² Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising on the transparency and targeting of political advertising. Accessed from: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0731> , 5 July 2023.

³ Political advertising – improving transparency. (2021). Retrieved from: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12826-Political-advertising-improving-transparency_en , 5 July 2023.

the fundamental rights of people. It is similarly important to note, that, it is vital to execute the new regulation on political microtargeting wisely, so that it would not have an effect, which would be contrary to the sole purpose of the regulation. From the legal point of view, the EU lacks currently specific legislation, which would directly tackle this type of targeting and deal with its impact on the fundamental rights of individuals. Meanwhile, there is the possibility that the new regulation, which is being debated on, might have a negative effect on the rights of the politicians, who are using political microtargeting. Based on mentioned, there is no comprehensive research with regard to the possibility of the new regulation to fill the gaps in the existing legal framework by mitigating the threats posed by political microtargeting to the fundamental rights of individuals.

The topic at hand is novel due to the fact that no comprehensive and reflective research has been made so far into the new regulation of political microtargeting. There is only one article, which analyses the regulation to certain extent, but it is quite superficial. The thesis is timely and is of practical value to the European Commission as the final version of the regulation has not yet been adopted. Even though after months long stalemate in the process, a provisional agreement has been reached by the Council of Europe and the European Parliament, it still indicates that trilogue negotiations did not bring all necessary changes to the original version of it.⁴ Besides that, there is an ongoing scandal, whereby European Commission itself recently carried out political microtargeting in order to promote one draft law, which is being debated on among European Union member states, which indicates how timely this issue is. The thesis explores the present legal framework governing the political targeted tailored advertising by analysing its impact on it and explores the content and loopholes of the proposed regulation and based on results proposes solutions. This work will serve as a direct guidance to the European Commission for implementing amendments to the new regulation on political microtargeting so that it would actually serve its primary purpose of mitigating the negative effects of political microtargeting on the fundamental rights of individuals.

The aim of the research is to analyze the new draft regulation on the transparency and targeting of political advertising in relation to the shortcomings of the current legal framework and assesses whether it would be able to limit possible impact of this phenomenon and its threats to the fundamental rights of individuals and put forward suggestions for a change in the draft

⁴ (2023). EU Political Advertising Rules: More Clarity Needed for Harmonised Implementation. Retrieved from: <https://ccianet.org/news/2023/11/eu-political-advertising-rules-more-clarity-needed-for-harmonised-implementation/> , 7 November 2023.

regulation in order to eliminate the existing lack of legal clarity and pitfalls within the draft regulation with regard to mitigating risks of political microtargeting against fundamental rights.

In order to achieve the aim, the following research objectives are set:

1. To provide an overview of the history of political microtargeting and examine the concept of political microtargeting.
2. To provide an exploration on implications of political microtargeting on the fundamental rights of individuals.
3. To analyze the new regulation on the transparency and targeting of political advertising against the present legal framework addressing political microtargeting, address the inconsistencies within the new draft regulation. Furthermore, additional objective it to make proposals to the European Commission for amendments.

The thesis research consists mainly of theoretical and qualitative research methods. The work will include qualitative analysis of the political microtargeting related primary and secondary European Union legal framework as well as the threats that the targeting poses to individuals. The reason for the specific choice is that the thesis aims to analyse in more depth the proposed regulation on transparency and targeting of political advertising in comparison to the existing legal framework and its gaps in limiting the mentioned advertising in the protection of individuals' fundamental rights.

To find the answer to the main research question, the thesis is structured in following way. The first part of the paper will address the phenomenon of political microtargeting and its implications on the fundamental rights of individuals. The second part of the thesis explores the present legal framework, which shall fight against political microtargeting. The paper examines whether the new legislation would be able to limit the practice of political microtargeting and thereby mitigate its impact on the fundamental rights of individuals. The thesis analysis entails a legal approach, whereby the present framework is assessed against the current status of political microtargeting to identify the main shortcomings. The third chapter of the thesis explores the proposed new draft regulation on political microtargeting together with its loopholes and weaknesses. On the basis of an examination of the new regulation, the fourth chapter of the thesis draws conclusions and proposals for amendments will be made to the European Commission as appropriate.

1 POLITICAL MICROTARGETING AND FUNDAMENTAL RIGHTS

1.1 Introduction to the concept of political microtargeting and brief legal history

This chapter will provide a brief historical overview of the essence of the political microtargeting. This is a form of political advertising, which entails involves collecting information about people, and using that information to show them targeted political advertisements.⁵ More specifically, it entails various means of communications, such as e-mails, phone, social media advertising and other similar means, which are being used with an aim to communicate and build a relationship with potential voters.⁶ The ads tailored to potential voters vary, but usually they are touching upon topics and issues, which are potentially vital for the persons concerned. Those ads then adapt their format as well as the language with an aim to fit more to the target audience. In principle, based on the writings of scholars like Simon Kruschinski, political microtargeting could be interpreted as a process of making strategic decisions at the individual level about which potential voters to target with specific campaign slogans and messages.⁷

The rapid development of technology has led to the use of digital technology with an aim to launch microtargeting campaigns, which would be targeting specific groups of voter base and political supporters.⁸ Political microtargeting is built upon usage of data and analytics with the purpose of conveying specific tailored message or idea to very specific group of people. The ads tailored to potential voters vary, but usually they are touching upon topics and issues, which are potentially vital for the persons concerned. Those ads then adapt their format as well as the language with an aim to fit more to the target audience. At the same time, earlier described technique is often about increasing voter base, but it is necessary to keep in mind that it is not

⁵ Zuiderveen Borgesius, F., Möller, J., Kruijkemeier, S., Ó Fathaigh, R., Irion, K., Dobber, T., ... & de Vreese, C. H. (2018). Online political microtargeting: Promises and threats for democracy. *Utrecht Law Review*, 14(1), 82–96.

⁶ Bodó, B., Helberger, N., & de Vreese, C. H. (2017). Political micro-targeting: a Man-churian candidate or just a dark horse? *Internet Policy Review*, 6(4), 1–13.

⁷ Kruschinski, S., & Haller, A. (2017). Restrictions on data-driven political micro-targeting in Germany. *Internet Policy Review*, 6(4), 1–23.

⁸ Aagaard, P., & Marthedal, S. (2023). Political microtargeting: Towards a pragmatic approach. *Internet Policy Review*, 12(1), 1–22.

limited to this. Political microtargeting can be also about affecting the political activity of the voters, such as mobilising or dissuading the voters. Thus, targeted political advertising consists of three main steps: firstly, various personal data is being collected, secondly, the collected data is used to find a suitable group of people, who could potentially be targeted with certain information and as a last step, the identified group is being targeted with tailored messages.⁹ Personal data, which is collected in the process, can be of any kind and is usually not constrained to only a specific set of personal data. Thus, political microtargeting is a much wider term that covers a comparatively broader spectrum of issues and comes with a bigger number of risks. Political microtargeting is not a new phenomenon and has existed for almost two decades. It has been used during various elections in the United States of America (US), but also in the European Union member states. Some of the earliest roots of the gathering of voters' information for tailored messaging go back to the 1950s.¹⁰ However, it was only after the 2016 United States of America presidential elections scandal that political microtargeting became known for the wider public audience. Nevertheless, based on existing research, it has longer roots in the than in the European Union. For example, in the US, it was already in 2004, that George W. Bush, the former president of the US, used the Analyst Institute and various other analyst companies in order to target voters in different states. One such microtargeting took place in Michigan, where three separate campaigns were used in order to send tailored messages to chosen groups of people, who were thought to be potential voters of Bush.¹¹ In 2012, Barack Obama, the former president of the US, launched his own political microtargeting campaign, whereby personalised messaging, such as through sending e-mails, was carried out with regard to potential voter segments. The mentioned microtargeting was mostly based on analysing and processing personal data, which was collected via various means.¹² It has also been quite usual that websites have sold personal data about the users' activities to political campaigners. Furthermore, in the US, there are companies, who are selling their microtargeting services to politicians. Entities like Cambridge Analytica, a British consultancy firm and CampaignGrid, a US company engaged in online advertising, have collected certain personal data of millions of

⁹ Dobber, T., Ó Fathaigh, R., & Zuiderveen Borgesius, F. (2019). The regulation of online political micro-targeting in Europe. *Internet Policy Review*, 8(4).

¹⁰ Murray, G. R., & Scime, A. (2010). Microtargeting and electorate segmentation: data mining the American National Election Studies. *Journal of Political Marketing*, 9(3), 143–166.

¹¹ Bennett, C. J., & Gordon, J. (2021). Understanding the “micro” in political micro-targeting: An analysis of Facebook digital advertising in the 2019 Federal Canadian election. *Canadian Journal of Communication*, 46(3), 431–459.

¹² Lavigne, M. (2021). Strengthening ties: The influence of microtargeting on partisan attitudes and the vote. *Party Politics*, 27(5), 965–976.

people, which can be made use of and have been made use of during election campaigns. The services of Cambridge Analytica were used during the 2016 US presidential election campaign, during which Cambridge Analytica with the help of special technological program harvested and later profiled personal data of millions of Facebook users in the US without the consent of the users in order to later target them with election advertisements.¹³ Thus, political microtargeting has been quite a widely used tool there.

Similarly, as in the states, political microtargeting has been used during political campaigns also in the European Union. While political microtargeting might not be that developed in the European Union, the latter is much looking into the US a to execute similar action also in the European Union. Political scientist Colin Bennett has also provided in his research paper, that there are many states in the European Union, which would definitely eagerly see similar political microtargeting practices taking place in the European Union.¹⁴ There are already some real examples. For example, in 2015, Sozialdemokratische Partei Deutschlands German, the German Social Democratic Party, hired US political strategist Jim Messina, who was part of former US president Barack Obama's presidential campaign, to help the mentioned German party successfully carry out their political microtargeting campaign.¹⁵ Furthermore, in 2016, GroenLinks, the Dutch green party, hired a US digital strategy company, which was tasked to help the party build up a framework and strategy to successfully execute political microtargeting during elections. At the same time a few years later in 2018, another Dutch political party Politieke Beweging Denk, the Political Movement Denk carried out political microtargeting by targeting people, who were using a special type of sim card that could be used to call cheaply to non-European Union states.¹⁶ Ironically, in autumn of 2023, the European Commission itself, which is tasked with developing the new regulation against the political advertising, used it on social media when promoting Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse. This was done with the purpose of get more support to the piece of law at the time when it was heavily being criticised by privacy activists. This action is currently being investigated by the

¹³ Heawood, J. (2018). Pseudo-public political speech: Democratic implications of the Cambridge Analytica scandal. *Information polity*, 23(4), 429–434.

¹⁴ Bennett, C. (2014). Voter surveillance, micro-targeting and democratic politics: knowing how people vote before they do. *Micro-Targeting and Democratic Politics: Knowing How People Vote Before They Do (April 11, 2014)*.

¹⁵ Medick, V., V. (2015). Obama Insider To Help Social Democrats Challenge Merkel. Spiegel International Retrieved from: <https://www.spiegel.de/international/germany/obama-insider-jim-messina-wants-to-beat-angela-merkel-a-1051358.html> , 5 July 2023.

¹⁶ van Trigt, M. (2018). Microtargeting moest deze student helpen in de gemeenteraad van de VVD te komen: zo probeerde hij dat [Microtargeting was supposed to help this student get into the VVD city council, so he tried that]. *Volkskrant*.

European Data Protection Supervisor.¹⁷ The aforementioned cases are just a few examples of the usage of political microtargeting in the European Union. Consequently, it can be deduced that political microtargeting is no longer just a US phenomenon and is rapidly expanding throughout the European Union.

There has been a huge shift in the attitude towards political microtargeting among various legal experts as well as decisionmakers in the European Union. While political microtargeting has gained popularity among different political parties throughout the European Union, the use of this technique brings with numerous risks and threats. Since 2021, various voices from the European Union institutions, such as members of the European Parliament have been calling for tougher rules on political microtargeting. At the beginning of 2021, the Socialist and Democrats Group in the European Parliament even launched a campaign AdsZuck, which was aimed at ending the exploitation of the personal data of European Union citizens by big technology firms.¹⁸ In the same year, the European Commission published its proposal on transparency and targeting of political advertising. The purpose of the proposal is to enhance the protection of electoral integrity and contribute to the more open democratic debate in the European Union. Based on the proposal, political advertisements would need to be clearly labelled accordingly. Moreover, political microtargeting must be transparent and targeted individuals need to be informed about it in detail. A year later in 2022, the European Data Protection Supervisor went even further and called for a total ban for political microtargeting.¹⁹

1.2 The effects of political microtargeting on fundamental rights of individuals

1.2.1 Fundamental rights of individuals

In the spring of 2023, the European Parliament voted on the regulation on the transparency and targeting of political advertising proposal and with 433 votes in favour, 61 against and 110 abstentions adopted its position with regard to the proposal. Presently, the proposed regulation

¹⁷ Tar, J. (2023). EU Commission's microtargeting to promote law on child abuse under scrutiny. Retrieved from: <https://www.euractiv.com/section/law-enforcement/news/eu-commissions-microtargeting-to-promote-law-on-child-abuse-under-scrutiny/> , 23 October 2023.

¹⁸ Stolton, S. (2021). Retrieved from: <https://www.euractiv.com/section/digital/news/commission-mulls-tougher-rules-for-microtargeting-of-political-ads/> , 5 July 2023.

¹⁹ EUobserver. (2022). *EU watchdog calls for ban on political microtargeting*. Retrieved from: <https://euobserver.com/tickers/154152https://euobserver.com/tickers/154152> , 5 July 2023.

is in the phase of triologue negotiations, but the negotiations have been halted so far and there is no clear timeline on when the negotiations will continue. In order to provide broader analysis of the effect of the new draft regulation on mitigating the harms of political microtargeting on fundamental rights of the individuals it is important to first understand which exact threats does political microtargeting pose and that is why in this section, the author will explore the present effect that political microtargeting poses on the fundamental rights of individuals.

As a starting point, it is vital to mark that there is a triangular relationship between state and individuals when it comes to fundamental rights. By virtue of article 1 of the European Convention On Human Rights, states are vested with a positive obligation to secure to everyone within their respective jurisdiction the rights and freedoms provided in the Convention.²⁰ This implies to the state's obligation to enact laws, which protect individuals' human rights. This has been highlighted also in *Animal Defenders International v United Kingdom*, one of the most famous human rights judgements related to political advertising according to which it there has to be in place legislation addressing politically targeted advertising.²¹ The adopted laws in turn govern the legal relations between private parties. At the same time, the state's omission to act can lead to a situation, where lack of laws will directly impact the legal relations of private parties. In international law, violations of fundamental rights can be attributed to states. Political microtargeting however, depicts a case, where violations happen due to conduct of political actors and other normal persons, thus the wrongdoing cannot be directly attributed to states. However, the ongoing infringements of fundamental rights of individuals through mentioned wrongdoing have happened due to the states' failure in the face of not enacting needed laws, which would establish specific rules of conduct. This kind of omission has direct effect on the relations between private parties and consequently the fault can be attributed to state.

It was only after the 2018 Cambridge Analytica scandal, that relevant lawmakers and scholars started calling for harsher legislation to fight against political microtargeting.²² It is vital to point out that political microtargeting is not unlawful by default and there are many cases, where it is perfectly in compliance with the relevant laws. At the same time, political campaigns based on the access to a wide range of personal data of prospective voters gives the actors tools to

²⁰ Xenos, D. (2012). *The positive obligations of the state under the European Convention of Human Rights*. Taylor & Francis.

²¹ *Animal Defenders International v. the United Kingdom*, ECtHR (GC) 22 April 2013, 48876/08.

²² Schäwel, J., Frener, R., & Trepte, S. (2021). Political microtargeting and online privacy: A theoretical approach to understanding users' privacy behaviors. *Media and Communication*, 9(4), 158–169.

mislead the voters.²³ As mentioned in the previous paragraph, political microtargeting in certain situations can be absolutely lawful. For example, in social media, it is possible to execute political microtargeting lawfully. It is possible to carry out political microtargeting on big social media platforms whenever the users have consented to it by ticking the relevant box. This is in line with the General Data Protection Regulation (GDPR) article 6 (1), which sets forth that data processing shall be lawful in case the data subject has given consent to the processing of his or her personal data for one or more specific purposes. Furthermore, in case personal data, which is being harvested during political microtargeting has been anonymised, then such activity is also in line with the GDPR requirements. The following sections will provide more in-depth overview of various consequences that political microtargeting can have on the rights that individuals are enjoying.

1.2.1.1 The right to privacy

However, presently, political microtargeting is predominantly happening in situations, where it infringes upon the fundamental rights of the individuals outlined in different parts of European Union law. Most commonly, political microtargeting violates the individual's right to privacy. Based on article 8 of the European Convention on Human Rights, everyone has the right to respect for his private and family life, his home and his correspondence. Moreover, there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. European Convention of Human Rights is a convention, which could be interpreted as a less comprehensive legal instrument of the Charter of Fundamental Rights of the European Union, but at the same time it is a very important piece of legislation. Even though the mentioned convention defines the right as right to private life, according to relevant legal literature, it shall be interpreted as a right to privacy. According to some scholars, right to privacy is crucial as regards human dignity, freedom and democracy and a prerequisite for a democratic society.²⁴ Having said that, the European Court of Human Rights has held in its

²³ Witzleb, N., & Paterson, M. (2020). Micro-targeting in Political Campaigns: Political Promise and Democratic Risk. *Data-Driven Personalisation in Markets, Politics and Law (CUP, 2021 Forthcoming)*, Monash University Faculty of Law Legal Studies Research Paper, (3717561).

²⁴ Çınar, Ö. H. (2021). The current case law of the European Court of Human Rights on privacy: challenges in the digital age. *The International Journal of Human Rights*, 25(1), 26–51.

judgement in the case *Markkinapörssi Oy and Satamedia Oy v. Finland*, that article 8 of the convention provides for the right to a form of informational based self-determination, meaning that individuals shall enjoy their right to privacy as regards personal data which, are collected, processed and disseminated collectively and in a way that their article 8 rights could be engaged.²⁵

Political microtargeting often involves data scrapping on a massive scale with an aim to build up data sets of chosen groups of individuals to later target them with tailored content. The existing cases have showcased that political microtargeting is oftentimes carried out without valid consent from the individuals, in privacy terms data subject. Furthermore, such mentioned data scrapping can involve the collection of sensitive personal data, inter alia that of political opinions. Sensitive personal data, however, is subject to even more strict privacy rules. An example for this is a case from Germany, where during 2021 federal elections a political party Alliance 90/The Greens (Bündnis 90/Die Grünen) processed personal data on political opinion of personal voters to later showcase them relevant advertisements to gain their support.²⁶ This case illustrates a scenario, where earlier described technique may amount to infringement of right to privacy. This brings in another domain of rules listed in the GDPR, which are directly related to the fundamental rights of individuals This violates the GDPR, which prohibits the processing of personal data related to a political opinion unless the data subject has given explicit consent for that or in case some other relevant provisions apply. This type of infringement of the privacy of individuals has taken place in Germany, where different political parties were engaged in political microtargeting on the social media platform Facebook during the 2021 federal elections. The cases were referred to the relevant data protection authority by a famous data privacy advocacy group called None of Your Business (NOYB).²⁷ In those cases, the privacy advocacy group found evidence that the political parties were processing the personal data of the people, they had chosen to microtarget with tailored political advertisements. This was done without obtaining consent from the people concerned, thus it entailed a violation of article 5 (1) GDPR. Based on article 5 (1) GDPR, personal data must be processed lawfully and in a transparent way with regard to the data subject. This entails having a legal basis for data processing, which the political parties lacked. Another threat to privacy

²⁵ McCully, J. (2018). *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (Eur. Ct. HR). *International Legal Materials*, 57(3), 437–489.

²⁶ ZDF Magazin Royale. TargetLeaks How the parties use secret data for their election campaign on Facebook – here are the #TargetLeaks. Retrieved from: <https://targetleaks.de/> , 15 July 2023.

²⁷ NOYB. (2023). Political microtargeting on Facebook: an election promise just for you! Retrieved from: <https://noyb.eu/en/political-microtargeting-facebook-election-promise-just-you> , 15 July 2023.

that political microtargeting poses is the processing of special categories of personal data, inter alia sensitive personal data such as personal data that can reveal an individual's political opinion. This is a violation of the GDPR, which among other things, prohibits the processing of sensitive personal data, which might reveal an individual's political opinion. In the ongoing inspection into the political microtargeting case in Germany, which was mentioned earlier on, it is also alleged that the German political parties had been processing sensitive personal data of the data subjects.

1.2.1.2 Freedom of expression

The mentioned violations of the fundamental rights of individuals are of great importance when talking about the threats of political microtargeting. However, there is an additional human right at stake, which could be described as one of the pillars of any democratic society. Namely, political microtargeting has a detrimental effect on the freedom of expression, which has been a core element in all of the treaties related to human rights. Freedom of expression is one of the fundamental rights included in both the Charter of Fundamental Rights of the European Union as well as the European Convention of Human Rights. There are different legal theories into the freedom of expression. One of the main justifications for the right of freedom of expression is the right to free speech with the purpose of enabling individual's self-fulfilment and to express one's personality. This means being able to form autonomous choices and shape own political preferences.²⁸ The latter has also highlighted in its considerations, that freedom of expression is a twofold right, which from one perspective protects the rights of politicians and political parties, but from other perspective puts high efforts into ensuring that there are no infringements of the rights of other individuals.²⁹ Freedom of expression incorporates a right to communicate ideas, opinions, convictions, beliefs, and information. Freedom of expression is a right, which can be exercised in various ways, such as orally, in writing, and through media.³⁰ This is among other things a right, which is interlinked with political microtargeting by giving various rights to the electorate. In this context, freedom of expression implies the ability of voters to engage in public discourses. Through political microtargeting, part of the people will

²⁸ Scanlon, T. (1972). A theory of freedom of expression. *Philosophy & Public Affairs*, 204–226.

²⁹ Cianci, L., & Zecca, D. (2023). Polluting the Political Discourse: What Remedies to Political Microtargeting and Disinformation in the European Constitutional Framework?. *European Journal of Comparative Law and Governance*, 1(aop), 1–46.

³⁰ Gunatilleke. (2021). Justifying Limitations on the Freedom of Expression. *Human Rights Review* (Piscataway, N.J.), 22(1), 91–108. <https://doi.org/10.1007/s12142-020-00608-8>.

be left out from being recipients of information and this in itself will lead to the dissolution of public discourse. This in turn will mean a violation of freedom of expression. Infringing upon the right of expression presents a real threat to democracy. The importance of this fundamental right has been highlighted also by the European Court of Human Rights in case *Lingens v Austria*, whereby the court held that this right enjoys the highest level of protection.³¹ Presently assessing on the relevant case law of the aforementioned court has taken a position that article 10 of the European Court of Human Rights on the freedom of expression shall be interpreted in a way that it also includes a right to receive information. Political microtargeting may heavily curb the individual's own decision-making.

1.2.1.3 Freedom of information

The aforementioned sections have mentioned several various consequences that political microtargeting can have. The earlier sections have covered how there can be adverse effects on the right to privacy of individuals as well as freedom of expression. Next to those rights, there is possible intrusion with the freedom of information.

Due to the fact that political microtargeting entails a data driven political campaign, it poses a direct threat to the right to information. Right to information is another fundamental right enshrined in the European Convention on Human Rights. Political microtargeting presupposes personalised messages, which then target various political segments and voter bases. This kind of approach could have significantly limit the freedom of information of potential voters. The potential of such a consequence is bigger if such targeting is being executed through various kinds of private communication channels and apps. Targeting leads to fragmentation and consequently leaves certain group out and they will not see the message.³² This exact thing happened during latest scandal, where the European Commission targeted only chosen group of people with tailored content to urge them into voicing supportive stance with regard to a certain law, which was being debated on among lawmakers at the time.³³

The mentioned political microtargeting has a potential to interfere with the article 10 of the European Convention on Human Rights. Based on the charter, everyone has the right to

³¹ Pannick, D. (1993-1994). Article 10 of the European Convention on Human Rights. *King's College Law Journal*, 4, 44–51.

³² Council of Europe: European Court of Human Rights, Guide on Article 10 of the European Convention on Human Rights – Freedom of expression. Retrieved from: https://www.echr.coe.int/documents/d/echr/guide_art_10_eng , 15 September 2023.

³³ Lomas, N. (2023). EU faces privacy complaint over CSAM microtargeting ads it ran on X. Retrieved from: <https://techcrunch.com/2023/11/15/oops-2/> , 16 November 2023.

freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Furthermore, there shall be respect for freedom and media pluralism.³⁴ Political microtargeting can have negative effect on individual through making that person restrain from informing themselves about various political topics due to the well-founded fear that the person's personal data will be collected in the process. The same data would later be used to target him or her with tailored advertisements.³⁵ This is also not hypothetical scenario, but it has already happened in the United States of America and such a tendency may well extend to the European Union.³⁶ There is presently no case law from the Court of Justice of the European Union, which would address this aspect. Nevertheless, the Court of Justice of the European Union has highlighted in few of its judgements, such as *telekabel Wien* that private parties should also uphold the individual's right to information. That case dealt with copyright and internet providers, but it could still be read as an indirect indication that the right to information is an important fundamental right, which must not be interfered with.³⁷ Moreover, the European Court of Human Rights provides useful guidance and has dealt with this topic to certain extent in its earlier cases. For example, in a judgement in a case *Erdoğan and Others v. Turkey*, the court has held that these kinds of limitations, could amount to distortion of electoral process.³⁸ The court has noted in later judgements also that voters must enjoy the right to truthful, balanced and impartial information. In light of the existing case law and practice, the political microtargeting, which separates the voter bases and targets only certain people can infringe upon the individuals' fundamental rights, here the right to information.

Thus, it is safe to say that political microtargeting directly hampers the behaviour and choices that individuals are making. This affects the way those people are voting during elections. These considerations have also been highlighted by the privacy advocacy group Privacy International, which has noted that political microtargeting entails very far-reaching profiling, which in a longer perspective can have permanent effects on the behaviour of individuals during election

³⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Retrieved from: <https://www.refworld.org/docid/3ae6b3b04.html> , 15 September 2023.

³⁵ Matthes, J., Hirsch, M., Stubenvoll, M., Binder, A., Kruikemeier, S., Lecheler, S., & Otto, L. (2022). Understanding the democratic role of perceived online political micro-targeting: longitudinal effects on trust in democracy and political interest. *Journal of Information Technology & Politics*, 19(4), 435–448.

³⁶ Strömbäck, J., & Shehata, A. (2010). Media malaise or a virtuous circle? Exploring the causal relationships between news media exposure, political news attention and political interest. *European journal of political research*, 49(5), 575–597.

³⁷ Case C-314/12 UPC Telekabel Wien, EU:C:2014:192

³⁸ ECtHR, Erdoğan Gökçe v. Turkey, Judgment of 14 October 2014, Application No. 31736/04

periods.³⁹ All the abovementioned aspects indicate that the impact of political microtargeting produces significant negative effect on the fundamental right of individuals.

1.2.1.4 Freedom of elections

Freedom of election can be considered one of the cornerstones of the European elections and democracy. Political microtargeting, which heavily depends on big data and constitutes a political campaign executed by using and harvesting vast amounts of personal data of voters has risks having a considerable impact on the freedom of elections. Violation of this freedom can have very negative outcomes.

Elections are important aspect of democratic processes in any state. Part of the freedom of elections is the individuals' perception of the whole election procedure. Elections entail an opportunity for people to freely choose their leaders, who will represent their interests in political decision making. Elections in normal circumstances shall be conducted in fair and free manner. However, political microtargeting may very well infringe the earlier noted freedom of elections through delegitimizing the elections. Political microtargeting interferes with the integrity of election. Political microtargeting negatively influences the process through practices like deception via personalization and thus manipulating the certain political action making of voters with the purpose of making them vote for a certain candidate, which in normal circumstances would not have been the person's preferred choice.⁴⁰ The whole described aspects can heavily interfere with the right of free elections as currently political microtargeting can also be executed by malicious foreign actors, who have hostile objectives towards the affected states and its citizens.⁴¹

Freedom of elections is a fundamental right listed in the European Convention on Human Rights. The Convention addresses this fundamental right through article 3 of Protocol No 1. More specifically, based on the article 3, the High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. The official commentary to the Convention also note that this particular provision enshrines a characteristic principle of democracy. Moreover, article 3 of Protocol No. 1 shall accordingly be interpreted as having

³⁹ Levano, J. (2023). *Similarly Significant or Largely Irrelevant? Exploring the Adverse Effects of Online (Political) Targeting in Light of Article 22 GDPR*. Retrieved from: <https://alti.amsterdam/similarly-significant-or-largely-irrelevant/> , 15 September 2023.

⁴⁰ Norris, P. (2014). *Why electoral integrity matters*. Cambridge University Press.

⁴¹ Tenove, C., Buffie, J., McKay, S., & Moscrop, D. (2018). Digital threats to democratic elections: how foreign actors use digital techniques to undermine democracy.

prime importance in the Convention system.⁴² It is important to state that this provision shall not be limited to the elections of national parliament. It means that this right is applicable to other elections. One of the most famous political microtargeting took place during the United Kingdom's, which is a former European Union member state, BREXIT campaign, whereby significant political microtargeting took place on significant voter base former block member state.

Political microtargeting poses very significant threats to numerous fundamental rights of individuals, such as right to privacy, freedom of expression, freedom of information, right to free elections. The described effects also undermine the democratic political order, which is common to most countries. It would be necessary for the European Union legislators to carry out further in-depth investigation of the effects of political microtargeting in order to further assess whether today's new proposed regulation sufficiently addresses the threats.

⁴² Council of Europe: European Court of Human Rights, Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life. Retrieved from: https://www.echr.coe.int/documents/d/echr/guide_art_8_eng , 15 September 2023.

2 PRESENT REGULATORY RESPONSE TO THE POLITICAL MICROTARGETING

2.1 The European Convention on Human Rights

The following chapter explores present legal framework, which is directly or indirectly governing political microtargeting in the European Union. In the European Union, there is no specific legislation for political microtargeting. The actions undertaken by the European Union in order to tackle political microtargeting are currently implemented mainly through the privacy and data protection rules stemming from three pieces of legislation: the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, GDPR and e-Privacy Regulation. Thus, the present approach is to prevent political microtargeting by executing best possible protection of the personal data of the individuals. As it has been stated earlier, political microtargeting affects various domains within the fundamental rights of individuals. The European Convention on human provides protection against political microtargeting through three main rights – article 8 on right to private life, article 10 on freedom of expression and information and article 3 of Protocol No. 1 on free elections.⁴³

The European Convention on Human Rights considers the protection of personal data an individual's sovereign fundamental right. The mentioned Convention stipulates under article 8, everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Furthermore, the provision establishes that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. The article also outlines that compliance with these rules shall be subject to control by an independent authority. Personal data is defined as any information, which relates to an identified or identifiable individual. This article must be interpreted strictly meaning that it is highly important for a person to be able to enjoy respect for private and family life.⁴⁴ The existing court case law indicates that the purpose of article 8 of the charter is to ensure a person's full control over its personal data and right to privacy. The abovementioned put against political microtargeting means that article 8 of the European

⁴³ Villiger, M. E. (2022). *Handbook on the European Convention on Human Rights*. Brill.

⁴⁴ Lynskey, O. (2014). Deconstructing data protection: the 'added-value' of a right to data protection in the EU legal order. *International & Comparative Law Quarterly*, 63(3), 569–597.

Convention of Human Rights explicitly implies that data protection is a fundamental right, whereby any interferences by authorities or third parties with this right are limited.

The data-driven political microtargeting is being also curbed through the article 10 of the mentioned Convention. This provision sets forth that everyone has the right to freedom of expression. The right shall among other things include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. The second subsection of the article provides that the freedom and pluralism of the media shall be respected. The relevant commentary to the article 10 stipulates that the right for information is a means through which people are able to form their own opinions and to later express them.⁴⁵ The right to freedom of information is among other things presently used to make sure there would not be any interference with the communications between private parties. There is no explicit case law on the interference of data-driven political campaigns with the right to receive and impart information and ideas without interference by public authority and regardless of frontiers, but at the same time the European Court of Human Rights has highlighted in its judgement in the case *Orlovskaya Iskra v. Russia*, that the voters have a right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election.⁴⁶ This judgement is the most proximate case law, which touches upon the political microtargeting where personal data is being used.

Another right, which forms part of article 10 of the Convention is the right to freedom of expression. The European Convention on Human Rights provides under article 10 that everyone shall have the right for freedom of expression. The case law of the European Court of Human Rights implies that freedom of expression protects the essential foundations of a democratic society. The Convention protects all forms of expression, this means written, oral and all other possible types of it. Freedom of expression also covers that of communicated on the Internet.⁴⁷ The Court has gone even further and highlighted in its judgements that user-generated expression on the Internet provides an unprecedented platform for the individual's exercise of freedom of expression.⁴⁸ Political microtargeting is a phenomenon, which exactly targets potential voter audiences through targeted advertising. Political microtargeting is intrusive practice, which with its targeted content is narrowing down the political discourse. The parties

⁴⁵ Schabas, W. (2015). *The European convention on human rights: a commentary* (First edition.). Oxford University Press.

⁴⁶ European Court of Human Rights. (2017). *Orlovskaya Iskra v. Russia* [online]. Retrieved from: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%22001-171525%22%7D>.

⁴⁷ *Ibid.*

⁴⁸ Harutyunyan, A., & Harutyunyan, A. A. (2019). New dimension of the case-law within the article 10 of the European Convention on Human Rights: freedom of expression (*Delfi AS v. Estonia*).

engaging in political microtargeting are often executing their targeting messages in a way that the voters face challenges when trying to make a decision during election campaigns. Thus, this subsection of article 10 indirectly prohibits the endangering of the democratic processes.⁴⁹

Third important component of the covered charter is article 3 of Protocol No. 1. Based on the article 3, every citizen of the Union shall enjoy the free elections, which shall take place at certain interval through secret ballot. The elections must take place in a way that the free expression of the opinion of the people in the choice of the legislature will be ensured.⁵⁰ Based on the Court's view, this right shall not be confined to only elections of national parliament, but could also be extended to, for example local elections.⁵¹ There is currently lack of definition for elections in the view of court, however, the court has taken a stance that this term shall be interpreted widely. The provision aims to protect the fundamental right to freedom of elections. Moreover, the case law of the European Court of Human Rights goes even further and interprets this article as one of the most fundamental parts when it comes to electoral systems in a democratic society. There is not specific case law yet, which would enable to provide definite statement that this article embodies direct protection against political microtargeting, but taken that political microtargeting entails a phenomenon, which is based on very wide data-driven political campaigns and targeting, it would still be logical to make an assumption that the scope of the article covers it.

The European Convention on Human Rights is just one legal instrument addressing political microtargeting and further chapters will explore other remaining tools. Very similar articles are outlined also in the Charter of Fundamental Rights of the European Union. The mentioned aspects imply that the convention includes various provisions, which are directly or indirectly in one way or another providing protection against political microtargeting. However, when the charter was being drafted political microtargeting was not that widespread and used and thus the articles have been drafted in a way that they do not consider today the possible threats, which come with political microtargeting.

⁴⁹ Brkan, M. (2023). The regulation of data-driven political campaigns in the EU: from data protection to specialized regulation. Yearbook of European Law.

⁵⁰ Council of Europe: European Court of Human Rights, Guide on Article 3 of Protocol No. 1 of the European Convention on Human Rights - Right to free elections. Retrieved from: https://www.echr.coe.int/documents/d/echr/Guide_Art_3_Protocol_1_ENG , 9 October 2023.

⁵¹ *Ibid.*

2.2 The Charter of Fundamental Rights of the European Union

The following chapter explores the Charter of Fundamental Rights of the European Union, which is another tool of many governing political microtargeting in the European Union. As it has been stated earlier, political microtargeting affects various domains within the fundamental rights of individuals. The Charter of Fundamental Rights of the European Union provides protection against political microtargeting through three main rights – article 8 on right to data protection, article 11 on freedom of expression and information and article 39 on free elections. Thus, the present approach is to prevent political microtargeting by executing best possible protection of the personal data of the individuals.

The Charter of Fundamental Rights of the European Union considers the protection of personal data an individual's sovereign fundamental right. The mentioned charter stipulates under article 8, everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Furthermore, the provision establishes that everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.⁵² The article also outlines that compliance with these rules shall be subject to control by an independent authority. Personal data is defined as any information, which relates to an identified or identifiable individual. This article must be interpreted strictly meaning that it is highly important for a person to be able to enjoy respect for private and family life.⁵³ Furthermore, the case law of the Court of Justice of the European Union highlights that the purpose of article 8 of the charter is to ensure that person's personal data shall not be subject to any sort of arbitrary intrusion. The abovementioned put against political microtargeting means that article 8 of the Charter of Fundamental Rights of the European Union explicitly implies that data protection is a fundamental right, whereby any interferences by public authorities or third parties with this right shall be prohibited, although there are also certain exceptions.⁵⁴

The data-driven political microtargeting is being also curbed through the article 11 of the mentioned Charter. This provision sets forth that everyone has the right to freedom of expression. The right shall among other things include freedom to hold opinions and to receive

⁵² European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Retrieved from: https://www.europarl.europa.eu/charter/pdf/text_en.pdf, 15 July 2023.

⁵³ Kellerbauer, M., Klamert, M., & Tomkin, J. (Eds.). (2019). *The EU Treaties and the Charter of Fundamental Rights: a commentary*. Oxford University Press.

⁵⁴ Peers, S. (2021). *The EU Charter of Fundamental Rights: a commentary (Second edition.)*. Hart Publishing.

and impart information and ideas without interference by public authority and regardless of frontiers. The second subsection of the article provides that the freedom and pluralism of the media shall be respected. The relevant commentary to the article 11 stipulates that the right for information is a means through which people are able to form their own opinions and to later express them. The right to freedom of information is among other things presently used to make sure there would not be any interference with the communications between private parties. There is no explicit case law on the interference of data-driven political campaigns with the right to receive and impart information and ideas without interference by public authority and regardless of frontiers.⁵⁵

Another right, which forms part of article 11 of the Charter is the right to freedom of expression. The Charter of Fundamental Rights of the European Union provides under article 11 that everyone shall have the right for freedom of expression. The case law of the Court of Justice of the European Union implies that freedom of expression protects the essential foundations of any democratic society and thus this right encapsules very big importance in the Charter. The charter protects all forms of expression, this means written, oral and all other possible types of it. Freedom of expression also covers that of communicated on the Internet.⁵⁶ Political microtargeting is a phenomenon, which exactly targets potential voter audiences through targeted advertising. Political microtargeting is intrusive practice, which with its targeted content is narrowing down the political discourse. The parties engaging in political microtargeting are often executing their targeting messages in a way that the voters face challenges when trying to make a decision during election campaigns. Thus, this subsection of article 11 indirectly prohibits the endangering of the democratic processes.⁵⁷

Third important component of the covered charter is article 39. Based on the article 39, every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State. Under the second section of the same article, members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.⁵⁸ This provision aims to protect the fundamental right to freedom of elections. Moreover, the case law of the Court of Justice of the European Union goes even further and interprets this article is one of the most fundamental parts when it comes to electoral systems in a democratic society.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Supra nota* 45.

⁵⁸ *Supra nota* 21.

The Charter of Fundamental Rights of the European Union is just one legal instrument addressing political microtargeting and further chapters will explore other remaining tools. The mentioned aspects imply that the Charter of Fundamental Rights of the European Union includes various provisions, which are directly or indirectly in one way or another providing protection against political microtargeting. However, when the charter was being drafted political microtargeting was not that widespread and used and thus the articles have been drafted in a way that they do not consider today the possible threats, which come with political microtargeting.

2.3 The General Data Protection Regulation and political microtargeting

This subchapter explores the GDPR and its provisions, which are supposed to protect individuals, under this regulation the data subjects, against political microtargeting. The GDPR is considered as secondary law on data protection in the European Union. Even though the GDPR is considered secondary law, it is one of the core regulations in data protection, provisions of which have been drafted in light of the Charter of Fundamental Rights of the European Union. The GDPR is also considered the most wide and comprehensive data protection related legal instrument in the European Union.⁵⁹

The past examples of political microtargeting cases have increased the importance of the data protection regulations also in the political campaigning. Under the data protection terminology, voters fall under the category of data subjects and due to the fact that their personal data can be misused within political microtargeting for political purposes. In this realm, the European Data Protection Board has gone even further and highlighted that compliance with the data protection rules is vital for protecting democracy.⁶⁰ The GDPR includes a set of rules, which define how transparent and fair data processing should be carried out. The relevant articles within the GDPR in this context are articles 5, 9, 15 and 17. More specifically, these articles touch upon topics like the main principles of data protection under the GDPR, requirements with regard to the processing of special categories of personal data, the right of access by the data subjects and the right to erasure, also known as the right to be forgotten. Here, personal data shall be understood as any type of information, which is related to an identified as well as identifiable person.

⁵⁹ Wielec, M. (2023). The Right to Privacy in the Digital Age: Perspectives on Analysis of Certain Central European Countries' Legislation and Practice.

⁶⁰ *Supra nota* 45.

Thus, the GDPR sets forth principles, which are considered the core principles of data processing in data protection. Under article 5, these are principles of lawfulness, transparency, fairness, purpose limitation, data minimisation storage limitation, accuracy, confidentiality and accountability. This means that data processing based on the GDPR has to be carried out in a way that these principles are adhered to.

2.3.1 Principle of lawfulness

The GDPR stipulates in article 6 (1) that data processing is lawful only in the case, where data controller applies one of the six legal grounds, which are listed in the mentioned legislation. Thus, data processing can be carried out in case a) the data subject has given consent, b) the processing is necessary for the performance of a contract, c) the processing complies with a legal obligation to which the controller is subject, d) the processing seeks to protect someone's vital interests, e) the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, and f) the purpose is of legitimate interest pursued by the controller or by a third party. For clarity, the controller in data protection is a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.⁶¹ At the same time, when it comes to political microtargeting, then often it is very complicated to fully determine, who even is the controller, but this question will not be dealing with this aspect.

As mentioned earlier, one of the legal bases for data processing could be consent. The other mentioned legal bases are not really applicable for the political microtargeting. However, consent, as underlined in the GDPR, needs to be freely given, specific, informed and unambiguous. This is mentioned also in article 7 of the GDPR. The mentioned regulation has additional requirements on information, which has to be presented to the data subject when the latter is asked consent. The information includes things like purpose of the data processing, legal basis for the processing as well as the recipients of the personal data.⁶² The earlier chapter has provided more in-depth information about the essence of political microtargeting, which has indicated that political microtargeting is nowadays very complex. Furthermore, as past examples from various states have shown, data subjects most of the time do not have any clue

⁶¹Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). Official Journal of the European Union L 119/1. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679> , 9 October 2023.

⁶² *Ibid.*

that their data is being collected to later carry out political microtargeting. Moreover, according to the opinion of the European Data Protection Board, this kind of data processing shall be carried out in a transparent matter, and it cannot be the case that political microtargeting, which is the end goal of such processing, would be a surprise for the data subjects. In addition to the mentioned, the practice in data protection field shows that asking consent from data subjects for data processing is usually done through very vague or complicated forms or questions. The consent is often also hidden within the other terms and conditions. Thus, it is virtually impossible to execute political microtargeting in compliance with the principle of lawfulness. The case law from the Court of Justice of the European Union indicates clearly, that data processing where consent has not been given via clear statement or affirmative action, could lead to the violation of the GDPR.⁶³ The GDPR recitals also mention, that consent shall not be regarded as freely given unless the data subject has actually a free choice, including a choice to refuse as well as a chance to later withdraw consent. Currently, the social media platforms, which are being used for carrying out political microtargeting do not have an option for data subject to provide genuine consent explained above. It is also important to mention, that as political microtargeting is in the end carried out by third party, not by the politicians themselves, there is definitely a requirement to have data subject's consent. The core need for that derives from the fact that political microtargeting involves the processing of special categories of data, such as political opinion. In light of the above, it is quite clear that currently it is almost impossible to execute political microtargeting in compliance with the principle of lawfulness.

2.3.2 Principle of purpose limitation

Principle of purpose limitation is another one from many data protection principles, which currently serves as the protection for the data subjects against political advertising. Principle of purpose limitation derives from the article 5 (1) (b) GDPR, which sets forth that personal data can be collected for specified, explicit and legitimate purposes and there shall not be further processing taking place in a manner, which is incompatible with those purposes.⁶⁴ Under this provision, political microtargeting is often executed by stating that it is an activity supporting democratic engagement. However, the mentioned article is in that regard quite strict and should be interpreted that political microtargeting shall be proportionate in achieving its purpose.

⁶³ C673/17 Planet49 GmbH [2019] ECLI:EU:C:2019:801, para 61.

⁶⁴ *Supra nota* 55.

However, at the same time, further processing, which is taking place for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should not be considered incompatible with the initial purposes as long as such further processing is happening in accordance with the article 89 (1) GDPR.⁶⁵ From one perspective it lays down very clear rules and constraints for political microtargeting. At the same time, the meaning of legitimate purposes is quite vague. Today, there is no consensus on what the exact meaning of legitimate purposes is. It is possible to argue, for example, that increasing political engagement could fall under this provision. If this is the case, then it would enable the possibility to carry out a wide range of political activities that could take place during, for example, election period, but also outside of an election period, such as communicating with electors and interested other third parties; surveying people and gathering opinions. During some infamous political microtargeting scandals, very excessive processing of voter's data was being carried out with the purpose of political microtargeting.⁶⁶ However, the principle of purpose limitation lays down, that, for example, social media platforms are not able to collect the personal data of individuals to later use it for political advertising. This is because those are two different data processing purpose within the meaning of the GDPR and there is a need for there to be lawful basis for each of those purposes.

2.3.3 Data minimization

Data minimization is in addition to other aforementioned principles, example of core data privacy principles, which among other things is also relevant for the context of political microtargeting. Similarly, as with any data processing, it is important to consider the extent of it and keep it as minimal as possible. Described targeting practice usually involves very extensive amounts of personal data and thus data minimization principle is vital to limit too wide processing.

Based on the article 5 (1) (c) GDPR, personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.⁶⁷ In essence, this clause entails that data processing shall be relevant, adequate as well as limited to what is absolutely necessary when serving its purpose. This kind of rule shall prohibit also actors engaged in political microtargeting from harvesting endless amounts of personal data and

⁶⁵ *Supra nota 55.*

⁶⁶ *Supra nota 12.*

⁶⁷ *Supra nota 55.*

storing it just in case for some unidentified future use. This should also oblige the political actors to arrange every now and then review to have a clear continuous overview of which types of personal data has been collected and being processed and whether it is still necessary.⁶⁸ In case it is not, they are obliged to get rid of such data. Moreover, the aforementioned principle provides a stark protection for the data subject from the perspective, that it is not possible to make use of social media for political microtargeting as using personal data collected by social media platforms is a case, where personal data is being collected for one purpose and later further processed for a different purpose than the original one. Such a practice would violate the principle of data minimization.

Data minimization lays down obligations, that are almost impossible to be complied with for political microtargeting. Political microtargeting presupposes collection of very big amount of personal data by using social media. However, the thing is that often the used platforms do not disclose the exact amount of personal data, which has been collected. Data minimization also puts limits on the categories of personal data, which can be collected in the process of political microtargeting by political actors. Moreover, this GDPR provision significantly curtails the possible channels and sources for collecting personal data for later political microtargeting.

2.3.4 Data accuracy

Data accuracy refers to the correctness of personal data. The principle of data accuracy is another one of the seven core data protection principles. The GDPR provides in article 5 (1) (d), that personal data must be accurate and, where necessary, kept up to date. Moreover, every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay.⁶⁹ The mentioned principle vests the data subjects with the right to carry out at whatever moment a check on exactly which personal data has been collected about him or her to build up a user profile for targeting and in respect of collected data make use of right of rectification whenever necessary. The principle of data accuracy is related also with the data subject's right to have personal data about him to be rectified if it happens to be wrong as stated in article 16 GDPR. Data accuracy principle covers both the data derived directly from the data subject as well as personal data collected from other sources.⁷⁰ Consequently, data accuracy currently vests data

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Hallinan, D., & Zuiderveen Borgesius, F. (2020). Opinions can be incorrect (in our opinion)! On data protection law's accuracy principle. *International Data Privacy Law*, 10(1), 1–10.

subject with significant powers in terms of having control over the use of their personal data. Data accuracy protects individuals from their personal data being inaccurate during data processing.

2.4 The e-Privacy Directive

The e-Privacy Directive is another legal instrument considered a secondary data protection law in the European Union. The e-Privacy Directive entails a directive, which complements the GDPR. The e-Privacy Directive sets forth provisions governing the usage of cookies for the purpose of tracking or tracing behaviour of the users, in this context understood also as data subjects. Cookies in the meaning of data protection are defined as user identifiers. It means that they are a piece of information, which particular server and client exchange between each other.⁷¹ The cookies are able to provide exact information about the preferences and content engagement of the user. The e-Privacy Directive entails a directive, which forms part of the European Union regulatory framework for the purposes of electronic communications. The e-Privacy Directive applies to the provision of electronic communications services to the end-users in the European Union, to the use of this kind of electronic communication services and to the protection of information related to the terminal equipment of end-users located in the European Union.⁷²

The e-Privacy Directive is related to the protection of the content of electronic communications and metadata related to electronic communications, including content exchanged via electronic communications services, such as text messages, voice messages, video recordings, images and sounds. This piece of legislation requires transparency as well as there to be consent for the use of tracking via cookies and some other similar tracking tools.⁷³ This means that if actors engaged in political microtargeting aim to carry out their targeting activities through the use of cookies, for example, then the data subjects must be informed prior about the purposes of the tracking cookies. Furthermore, based on the mentioned directive, the listed types of tracking technologies presuppose there to be data subject's consent.⁷⁴ This transparency requirement

⁷¹ Kristol, D. M. (2001). HTTP Cookies: Standards, privacy, and politics. *ACM Transactions on Internet Technology (TOIT)*, 1(2), 151–198.

⁷² (2021). Proposal for a Regulation on the transparency and targeting of political advertising | Legislative Train Schedule. European Parliament. Retrieved from: <https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-greater-transparency-in-paid-political-advertising> , 9 October 2023.

⁷³ Ó Fathaigh, R., Dobber, T., Zuiderveen Borgesius, F., & Shires, J. (2021). Microtargeted propaganda by foreign actors: An interdisciplinary exploration. *Maastricht Journal of European and Comparative Law*, 28(6), 856–877.

⁷⁴ Hiltunen, M. (2021). Online Political Advertising and Disinformation during Elections: Regulatory Framework in the EU and Member States. *Helsinki Legal Studies Research Paper*, (68).

from the e-Privacy Directive among other things has an important role to play in regulating the political microtargeting and setting forth certain obligations.

3 PROPOSED REGULATION ON THE TRANSPARENCY AND TARGETING OF POLITICAL ADVERTISING

3.1 Analysis of the new Regulation on the transparency and targeting of political advertising

The following chapter will look into and analyse the new proposed regulation on political microtargeting, which is being negotiated on the EU level. The first calls for a regulation, which would address political advertising started in 2018. However, it was not until 2020 that the European Commission launched a new draft regulation on the transparency and targeting of political advertising. The regulation was drafted as part of the European Commission's Democracy Action Plan.⁷⁵ The aim of the new regulation is supposed to serve as a complementing piece of legislation with regard to political advertising and complement Digital Services Act, which another piece of legislation, which at the time of this particular thesis has just entered into force. One of the main objectives of the new regulation is supposed to put in place a legislation, which would put a constraint on tailored messaging, which so far has exploited political debate and violated many fundamental rights. The draft regulation was officially presented in November 2021 and since then it has been on the agenda. According to the European Parliament, the proposed Regulation on the Transparency and Targeting of Political Advertising shall establish a common regulatory framework that would enhance the transparency of sponsored political advertising, both online and offline. Moreover, according to the scope of the legislation, the regulation aims to protect natural persons with regard to the processing of personal data by laying down rules on the use of targeting and amplification techniques in the context of political advertising. These rules will apply to all controllers i.e., beyond providers of political advertising services, making use of such targeting and amplification techniques.⁷⁶ Presently the mentioned regulation in the phase of trialogues, but the discussions have been put on pause since spring due to political disagreements and there is no precise information when the trialogues will continue.

⁷⁵ Online political advertising: everything you need to know. Retrieved from: <https://epd.eu/what-we-do/policy/online-political-advertising-everything-you-need-to-know/> , 9 October 2023.

⁷⁶ *Supra nota* 1.

3.2 Gaps and loopholes in the new regulation

The European Commission has presented the new Regulation on the Transparency and Targeting of Political Advertising as a very novel and ambitious legal act, which shall put in place very precise and strict rules for political microtargeting as well as political amplification. Furthermore, a bigger attention will be paid to transparency, as paid political will need to be labelled based on concrete guidelines.⁷⁷ Current aims of the new regulation in principle entail an important step forward in regulating the scene of political microtargeting, which presently could be described as a real wild west due to lack of strict laws and enforcement. The Regulation on the Transparency and Targeting of Political Advertising has a lot of loopholes and weaknesses, which pose a threat to the end goal of mitigating political microtargeting and instead leave the actors a chance to continue causing harm to the fundamental rights of individuals.

3.2.1 Political microtargeting based on profiling

Political microtargeting is as the wording also says literally targeting person based on extensive profile, which consist of information gathered about person. Profiling is to be understood as any types of automated data processing, which comprises the use of personal data with a purpose to evaluate certain personal aspects and traits relating to a natural person. The aim of such processing is to analyse and predict specific aspects with regard to the person's, for example, economic situation, personal interests, behaviour, location, health. The Council of Europe has defined this term as set of characteristics, which are specific to a certain group and thus can also be extended to the members of that group.⁷⁸ In the context of political advertising, profiling entails that political actors will create a profile based on collected information about a certain person for ad delivery.

Based on the GDPR, profiling is a form of automated data processing during which, certain characteristics and aspects related to a person are being evaluated. The objective of such processing of personal data is to analyse and predict such aspects related to the person as monetary situation of the person, health, interests, movement patterns, which have significant

⁷⁷ (2021). European Democracy: Commission sets out new laws on political advertising, electoral rights and party funding. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_6118 , 9 October 2023.

⁷⁸ Gil González, E., & De Hert, P. (2019, April). Understanding the legal provisions that allow processing and profiling of personal data—an analysis of GDPR provisions and principles. In *Era Forum* (Vol. 19, No. 4, pp. 597–621). Berlin/Heidelberg: Springer Berlin Heidelberg.

impact to the person or have legal effects to the person. According to the mentioned law, this kind of profiling must be done in transparent manner and profiling practices need to be easily accessible for the data subject.⁷⁹ The data subject must also have an option to object to described profiling. In political advertising, profiling allows actors to gain information through different online and offline sources to create psychographic profiles about potential voters. This is usually done through information harvested on person by using social networks with the help, for example, data brokers or according to information already available in the information systems of those political actors. Profiling in this way usually is carried out both to a group as well as individually. As mentioned earlier, such profiling must be carried out in transparent and open manner, whereby the data subjects, here the voter base, would be informed about all the activities. However, in reality it has been not achieved. One of the most famous examples is Brexit campaign, where people were asked to fulfil a personality test, which was said to be used purely for academic use. However, it later came out that the data was processed for other purposes than the one initially stated. Thus, data subjects were not appropriately informed and the profiling was not done in compliance with the data protection requirements.⁸⁰

The newly adopted provisional agreement did not ban profiling within political microtargeting, but provides requirement for there to be consent. This clause is very questionable, because receiving consent for something like this is already today very hardly achievable. The proposed regulation does not have even specification what requirements must the consent follow. According to the GDPR, consent must be freely given, unambiguous, specific and informed.⁸¹ The case law in data protection field is a good proof that it is very easy to receive consent from the data subject by making use of deceptive design patterns and bundling together various terms and conditions. Deceptive design pattern is among those the biggest issue. This derives from the use of dark patterns. Dark patterns entail manipulative and deceptive interface designs, which alter and affect the user behaviour and usually towards the actions, which the users in normal circumstances would not take. Thus, there will be very big concern that described profiling activities would run counter to the GDPR.

⁷⁹ *Supra nota 55.*

⁸⁰ ur Rehman, I. (2019). Facebook-Cambridge Analytica data harvesting: What you need to know. *Library Philosophy and Practice*, 1–11.

⁸¹ *Supra nota 55.*

3.2.2 Exceptions for political microtargeting

Another massive loophole, which the regulation includes, relates to the exceptions for political advertising. The regulation has a clause 48 under which political microtargeting and amplifications can be carried out when it is done by a controller or someone acting on behalf of the controller on the basis of explicit consent of the data subject or in course of the legitimate activities by a foundation, association or any other type of non-profit organisation, which has political, religious or philosophical aim. The clause stipulates that such targeting shall be limited to members of such organisation.⁸² However, this is very superficial and ambiguous clause, which enables a lot of leeway for going around the regulation. It is very easy to set up a new some sort of association or a foundation by various political actors and then continue political microtargeting. Thus, it leaves a massive loophole for political microtargeting through other tools and ways, which could also be things like disinformation. In principle, the actors will just be able to change their name and continue their activities without much change. This, however, would continue to pose a threat to freedom of information, which is a fundamental right mentioned in the European Convention on Human Rights as well as in the Charter of Fundamental Rights of the European Union. This kind of loophole provides an opportunity to distort the elections and affect the political decision-making of individuals. According to the existing case law, voters must enjoy the right to truthful, balanced and impartial information. This is what the new regulation must protect, but in reality, the new law will not bring any meaningful changes and present status quo will remain.

3.2.3 Regulation of political microtargeting and freedom of expression

When it comes to curtailing political activities, especially the types of political communication, it is necessary to comply with the Article 10 of the European Court of Human Rights. This is the article about freedom of expression. This right explicitly mentions that “*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.*”⁸³ Moreover, the European Court of Human Rights has held in one of its earlier judgements, that “*freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of*

⁸² *Supra nota 1.*

⁸³ *Supra nota 26.*

every man".⁸⁴ It highlights how important this right is. This right can be subject to limitations in only very specific and limited cases and it is up to the European Court of Human Rights to decide, whether the limitation posed on the right are compatible with the human rights.

The proposed regulation on political microtargeting is on a clash course with the freedom of expression, i.e it might interfere with the article 10 of the mentioned convention. More specifically, the regulation has article 2.2, which defines political advertising. The definition is however very wide. The definition covers preparation, placement, promotion, publication, dissemination of a message for or on behalf of political actor, unless it is only for private or commercial nature.⁸⁵ The proposed wording lacks clarity and it covers all types of political messages. This definition lacks coherent limitation and there is a danger that the clause captures also content, which does not entail political microtargeting. In addition, current wording catches both paid as well as unpaid political advertising. This is a big threat for the honest politicians, civil society organisations, which could also be caught under the provisions, because present proposal does not limit itself to only to political advertising that involve economic activities.

The limitations put on any fundamental right must be among other things prescribed by law and should pursue the legitimate aims.⁸⁶ Based on the article 10, the norm must be formulated in a way that there is sufficient precision, which would enable the individual to actually understand what the law prescribes and accordingly regulate his or her conducts.⁸⁷ The wording of the regulation lacks legal clarity and the relevant authorities are being left with a wide margin for addressing the political microtargeting. Another potential threat of the new regulation relates to the requirements of proportionality and necessity requirements, which any sort of limitations on freedom of expression must follow. From one perspective, the voters have a right to impartial, truthful and balanced information. The proposed regulation sets forth in article 19 that the regulation is pursuing a legitimate aim.⁸⁸ At the same time, the new legislation requires to follow transparency obligations, which means an obligation to follow whether each advertisement does follow the requirements and if the advertisement might affect the individual's voting behaviour. The proposal also puts a lot of attention on the information regarding the source of funds, which are used for political microtargeting as well as its origin. This altogether puts a lot of extra burden and possibly overly so to civil society, who are anyway

⁸⁴ *Handyside v. the United Kingdom*, §49.

⁸⁵ *Supra nota 1*.

⁸⁶ Zdraveva, N. (2021). Freedom of expression vs. Right to privacy: The Role of ECHR in modelling civil liability for damage.

⁸⁷ Ó Fathaigh, R., & Voorhoof, D. (2019). Article 10 ECHR and expressive conduct. *Communications Law*, 24(2), 62–73.

⁸⁸ *Supra nota 1*.

on a weaker position. Following such requirements can be very costly and civil society organisations do not have big amounts of money. Moreover, research has outlined that this might lead to situations, where civil society organisations lose their partners in the face of political actors. The European Court of Human Rights has held that political advertising is one form of freedom of expression and thus is subject to protection. The limitation of fundamental rights must also be backed up by a pressing social need. The overly heavy burden, which the civil society organisations however based on current proposal of the regulation does not seem to follow this need.

Another challenging aspect is about the removal of content, if it unlawful. Namely, article 7 (2) (f) obliges to put in place mechanisms for reporting of political advertisements, which might not follow the regulation, i.e do not have needed labelling and information. According to the legislation, all publishers of political advertisements must label their advertisements accordingly and include a transparency notice next to the advertisement.⁸⁹ The article 7 is exactly aimed at reporting of advertisements, which do not follow this requirement. The removal will apply to any content, which is contrary to the regulation. Various organisations have highlighted those mechanisms, which allow take down procedures, are dangerous in light of the freedom of expression. This thesis how described in its earlier part, how much there is a lack of legal clarity in the regulation and how wide is the scope of it. Currently, there is no specific information, which could also, for example, determine whether the content is actually able to alter the behaviour of an individual during political decision making. Moreover, the removal procedures have been linked with the Digital Services Act. This means that the removal procedure will be done through the article 16 of the Digital Services Act. Article 16 of the mentioned legal act however is aimed at removing illegal content.⁹⁰

Thus, the proposed regulation might have very dangerous implications on the freedom of expression. Political expression as highlighted earlier is part of freedom of expression and it must be protected. However, proposed regulation might lead to scenario, where political expression will get arbitrarily removed due to absolute lack of legal clarity and noncompliance with the requirements, which must be followed when a certain fundamental right is being curtailed.

⁸⁹ *Supra nota 2.*

⁹⁰ 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). Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065> , 9 October 2023.

3.2.4 Data protection authorities as enforcers of the regulation on personal data matters

The Regulation article 15 (1) on competent authorities notes that the supervisory authorities referred to in article 51 of the GDPR or article 52 of regulation 2018/1725 shall be responsible for the enforcement of article 12 of the regulation.⁹¹ The provision implies that it will be the responsibility of the data protection authorities to monitor the compliance with the regulation on targeting or amplification techniques that involve the processing of special categories of personal data as described in the GDPR. In accordance with the article 15 (3), each competent authority designated under this particular paragraph must enjoy full independence both from the sector and from any external intervention or any kind of political pressure. It shall be able in full independence effectively monitor and impose respective measures, which are considered necessary and proportionate to ensure compliance with the law.⁹² These are another pitfalls, which do not lead to higher protection of fundamental rights of individuals.

The pitfall of this can be best examined through the enforcement of the GDPR. It is not a secret in data protection field that the enforcement of data protection requirements, i.e those of the GDPR, has been very lengthy and hard process that has taken years to reach an active phase. The GDPR came into force in 2018, however, it took almost two to three years until it finally started to be enforced and only now finally some results can be seen. The GDPR was supposed to bring with very strict enforcement and bring a solution to very all over the place data protection framework, which was there in the European Union before the applicability of the GDPR. The mentioned legislation has even a specific article 51 (2), which very clearly stipulates that each European Union member state shall have an independent regulatory body established, whose task it is to contribute and execute an oversight over the consistent application and compliance with the GDPR.⁹³ Despite this actual enforcement of it is hugely lacking. Certain data protection authorities are doing very active enforcement and are also imposing significant fines whenever necessary. At the same time, some authorities are rather reluctant to carry out meaningful enforcement and have limited in their activities to reprimands. Furthermore, the research indicates that there is significant number of data protection authorities, who show a low tendency to investigate and fine for the data protection violations. According to some research papers, the extent of investigations and enforcement is lacking heavily. For instance, according to the report of Irish Council of Civil Liberties, by the end of

⁹¹ *Supra nota 1.*

⁹² *Supra nota 2.*

⁹³ Sivan-Sevilla, I. (2022). Varieties of Enforcement Strategies post-GDPR: A fuzzy-set qualitative comparative analysis (fsQCA) across data protection authorities. *Journal of European Public Policy*, 1–34.

2022, most of the European Union–level enforcement cases have ended with a reprimand.⁹⁴ Furthermore, a research was conducted into the work of data protection authorities and based on given results, the analysed authorities had investigated less than third of the cases and about the same amount of cases ended with fines. Moreover, the authorities have also an ability to choose a strategy, whereby the actors, which are being investigated, are given multiple further chances to bring their actions into compliance with the data protection regulation. This is a very alarming finding, which has unfortunately led to very weak enforcement of the data protection law in the European Union.

There is also already existing examples, where data protection authorities have dealt with the topic of political microtargeting. One of them is the United Kingdom's data protection authority Information Commissioner's Office. After the infamous Cambridge Analytica scandal, which involved various different actors, who harvested data, the authority carried out ex-officio investigation (investigation initiated by the authority's own initiative) into the handling of personal data by the United Kingdom's political parties.⁹⁵ The investigation revealed numerous mishandlings of voters' personal data, but the outcome was in the face of recommendations. Information Commissioner's Office did not impose any fine or reprimand. Similarly, in spring 2023, several complaints were filed against German political parties for political microtargeting, which took place in 2021.⁹⁶ However, there has not been any result for those complaints and things have not moved forward since the filing of the complaints. As referenced earlier, the effectiveness of data protection authorities depends significantly on the autonomy and impartiality. Thus, there cannot be any influencing from the states or any external actors to the enforcement activities of the authorities. Unfortunately, there are already examples, where this has not been achieved. This is precisely the case, for an instance, in Poland, where for past 8 years, the data protection authority has been politically influenced. In Poland, the members of the authority, whose task is to protect the right to privacy of its nationals, have been impacted in their decision making by their political affiliations.⁹⁷ The authorities have failed to take action even in the cases, which have concerned sensitive personal data, which is usually subject to

⁹⁴ Ryan, J. (2023). 5 years: GDPR's crisis point - Irish council for civil liberties. Retrieved from: <https://www.iccl.ie/wp-content/uploads/2023/05/5-years-GDPR-crisis.pdf> , 9 October 2023.

⁹⁵ (2018). Investigation into the use of data analytics in political campaigns. Retrieved from: <https://ico.org.uk/media/action-weve-taken/2260271/investigation-into-the-use-of-data-analytics-in-political-campaigns-final-20181105.pdf> , 9 October 2023.

⁹⁶ *Supra nota* 27.

⁹⁷ Kozak, M. (2023). Regulating Political Advertising. Retrieved from: <https://verfassungsblog.de/regulating-political-advertising/> , 31 October 2023.

even stricter rules. The European Commission has not so far taken any action to pressure Poland to improve the situation.

All these examples indicate, that today the data protection authorities have been and still seem to be unable to adequately handle the cases related to political microtargeting. Thus, trusting the oversight of the enforcement of the new regulation on political microtargeting partly with the data protection authorities would be a hugely risky move from the viewpoint of the fundamental rights of the individuals. The aforementioned description of the current practice of the authorities indicates that there is a significant chance that the possible violations of the rules set forth in the new regulation will not be investigated with sufficient detail, the enforcement proceedings will be very time-consuming and the outcome of the whole process might be meaningless for the affected individuals, because reprimand or recommendations will not be viable change or solution. Under the article 8 of the European Convention on Human Rights, everyone has the right to respect for his private and family life, his home and his correspondence.⁹⁸ It is also clear that the European Court of Human Rights considers right to privacy a fundamental human right and right to data protection forms an important part in person's ability to enjoy his or her private life.⁹⁹ Leaving the enforcement of the new regulation on political microtargeting risks to have very detrimental effect on the fundamental rights of individuals. Political microtargeting among other things violates the right to respect for private and family life through having an intrusive effect on person's privacy. Today, data protection authorities, which in principle are already vested with the power to have an oversight over the enforcement of compliance with the data protection obligations have failed in their works and have been doing their work in very fragmented manner. This means that the new regulation based on its today's wording will lead to a failure to mitigate the negative effects of political microtargeting from the perspective of fundamental rights of individuals. The lawmakers should find new supervisory authorities, who would monitor the enforcement of the new regulation.

The proposed regulation is in principle a good initiative, but it comes with various flaws and risks to the fundamental rights of individuals. The flaws of the regulation in principle derive

⁹⁸ *Supra nota 25.*

⁹⁹ Kovalenko, Y. (2022). The Right to Privacy and Protection of Personal Data: Emerging Trends and Implications for Development in Jurisprudence of European Court of Human Rights. *Masaryk University Journal of Law and Technology*, 16(1), 37–57.

from the very vague scope of the upcoming regulation and unthought-through regulation. As long as the flaws in this regulation are not removed, it will not have the anticipated effect.

4 FURTHER STEPS WITH THE REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE TRANSPARENCY AND TARGETING OF POLITICAL ADVERTISING

In chapters 1 and 2, the thesis has examined the legal history of political microtargeting and the legal framework governing it. The thesis has also brought the attention to the effects of political microtargeting on the fundamental right of individuals and the impact of the Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising in mitigating the effects of political microtargeting from the perspective of fundamental rights of individuals. In the present chapter, the author puts forward possible suggestions for the European Parliament, implementing of which would increase the effectiveness of the new regulation in mitigating the detrimental negative effect of political microtargeting and would find a solution to eliminate the intrusive effect of the regulation on individuals' fundamental rights.

Examination of the political microtargeting against the human rights and analysis of the planned new legislation has indicated that the European Union has tackled very serious issue that is political microtargeting. Political microtargeting has negative impact on the fundamental rights of individuals, such as the right to privacy, freedom elections, freedom of expression and freedom of information. The current legal framework already addresses it, however only to some extent. The political microtargeting is being regulated by a number of legal acts in combination and rather indirectly by various provisions, which put in place limitations and certain prerequisites when carrying out political microtargeting. The European Union has now put forward a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising. However, it comes with many flaws and loopholes, and it seems that lawmakers have not really given enough consideration on fundamental rights. More specifically, it has some provisions, which instead of the initial purpose of protecting fundamental rights instead pose a direct threat to the fundamental rights. European Parliament should make a number of amendments to the wording and provisions of the new regulation.

The author puts forward following proposals for amendments to the European Commission, which latter should implement before adopting final text of the regulation:

Amendments to the Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising:

Amend § 12 Section 2 in the following way:

- The prohibition laid down in the first sentence shall not apply to the situations referred to in article 9 (2) (d) of Regulation (EU) 2016/679 and Article 10 (2) (a) and (d) of Regulation (EU) 2018/1725.

Remove from clause 48 second and third sentence and the clause shall look the following:

- Targeting and amplification techniques in the context of political advertising involving the processing of data referred to in Article 9 (1) of Regulation (EU) 2016/679 and Article 10 (1) of Regulation (EU) 2018/1725 should therefore be prohibited.

Amend § 2 Section 2 in the following way:

- Political advertising' means the placement, promotion or dissemination, by any means, of a paid message:
 - (a) by, for or on behalf of a political actor, unless it is of a purely private or a purely commercial nature; or
 - (b) which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.

It is important to further assess this provision against the freedom of expression and strike a needed balance as well as limitation. It is highly necessary for the provision to not limit the activity of necessary civil organisations, thus limiting the scope of definition to paid political advertising could be one of the solutions.

Amend § 15 Section 1 in the following way:

- The European Union must set up a new competent authority, which would have an oversight duty over the enforcement of the Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising.

When the competent authority has been found the wording of article 15 section 1 of the regulation must be amended in a way that the referral to the data protection authorities and European Data Protection Supervisors would be removed.

Remove § 7 (2) (f) as long as there is no coherent approach and legal clarity on the scope of the provision. The current wording makes the scope very wide, which captures also poses a risk of covering the activities of civil organisations.

The proposed amendments would solve the present legislative loopholes and weaknesses that the new regulation includes. The mentioned amendments would definitely also increase the effect of the Regulation of the European Parliament and of the Council on the transparency and

targeting of political advertising in mitigating the negative effects of political advertising from the perspective of fundamental rights of individuals and solve the legal uncertainty over the vague or too wide scope of some articles of the regulation. The prompt implementation of the mentioned changes put forward by the author would enable effective enforcement of the regulation would harmful intrusion of the fundamental rights of individuals.

5 CONCLUSION

The aim of this thesis has been to provide suggestions to the European Commission for change of current proposed Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising with a goal to get rid of the existing loopholes and weaknesses, which undermine the purpose of the regulation. Furthermore, the effects of the shortcomings of the draft regulation on the fundamental rights of individuals have been examined.

The thesis has examined the legal history, the effect of political microtargeting on a number of fundamental rights and existing legal regulation of political microtargeting in the European Union. More specifically, the thesis has explained the threats that the political microtargeting poses on a number of human rights and the present legal framework addressing the political microtargeting has been explored. Likewise, the work has explored the new regulation on the political microtargeting, its proposed content and the impact of the provisions on the fundamental rights of individuals in light of mitigating political microtargeting. On the basis of qualitative analysis of the existing laws and new legal act, the thesis concludes that the proposed Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising will not produce the expected result. In fact, with its very wide scoped provisions, it will create even more legal uncertainty and poses virtually same risks to the indispensable rights of individuals.

Political microtargeting is a tool, which for a long time has been used for to affect people's decision making or make them take a certain decision they might not otherwise have taken themselves. At the same time, such practice has been subject to extensive scrutiny by legal experts and practitioners due to political microtargeting's harmful impact on the basic human rights. Political microtargeting poses detrimental effect on rights like, right to privacy, freedom of elections, freedom of information, freedom of expression. Until now political microtargeting has been regulated through the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights, GDPR and to certain extent also the e-Privacy Directive. Despite this, the enforcement has not brought visible protection to the individuals.

Based on the qualitative analysis of the thesis qualitative analysis, the proposed regulation would not fill the gaps in the existing legal framework by mitigating the threats posed by political microtargeting to the fundamental rights of individuals. The lawmakers, who drafted the new regulation had an objective to put in place specific constraints against the use of political microtargeting and thus protect the rights of people. However, the new regulation

countering political microtargeting has been shaped in a way, that the result is almost on the contrary, whereby the regulation is not proportional and limits the freedom of speech of those, who are not even engaged in political microtargeting. Moreover, the law will put the legitimate activities of civil society legitimate organisations in big danger. Equally, the enforcement and oversight of provisions related to personal data handling in the new regulation has been delegated mainly to the data protection authorities. This is another major mistake that has been made during the drafting process. As the thesis has mentioned, these authorities are today facing big challenges in even enforcing obligations stemming from the GDPR, thus it is very doubtful that they will manage any better with this new piece of legislation. The author has suggested that the European Commission should amend § 2, 7, 12 and 15 as well as clause 48 of the regulation on political microtargeting through changing their wording. Furthermore, a new section should be added under §3, which would have a list of specific countries with which Estonia would allow holding a dual citizenship.

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