

Tracking-based advertising: harms and how to counter them

Tracking-based advertising undermines fundamental rights and furthers the economic interests of Big Tech platforms at the expense of other businesses. The currently proposed amendment to the Digital Services Act on tracking-based advertising - as voted in IMCO - falls far short of addressing these systemic harms.

As such, we strongly urge MEPs to support alternative wording to the current version of Article 24.2 and 24.3 that regulates tracking-based advertising more strictly.

What are tracking-based ads?

Tracking-based ads (also known as targeted behavioural ads) are ads based on monitoring people on- and offline to develop a specific profile on them and serve them advertisements tailored to match their inferred interests or traits. This entails observing an individual's behaviour over time, such as websites visited, apps used, items purchased, interactions with others, likes/shares and people's location.

Fundamental rights harms of tracking-based ads

One of the two explicit key aims of the Digital Services Act¹ (DSA) is to create rules for a **safe, predictable and trusted online environment** where **fundamental rights** enshrined in the Charter are **effectively protected** (Article 1.2.b). The DSA is meant to enhance user agency in the online environment and to include safeguards to exercise fundamental rights such as freedom of expression and information, the right to non-discrimination and the protection of personal data and privacy.²

However, **tracking-based advertising practices undermine the very fundamental rights the DSA is supposed to protect.**

By being microtargeted with content and ads, based on massive intrusions into our private lives, indiscriminate data harvesting and algorithmic inferences, we are [deprived of our rights and freedoms](#), and instead being [manipulated](#) and caught in a system that reinforces biases and fuels discrimination. Numerous studies have shown Facebook's ad delivery algorithms could be having discriminatory impacts on people, for instance [excluding women and older people](#) from seeing job ads. These same algorithms have also been found to exploit mental vulnerabilities, such as [pushing anxiety-fuelling ads](#) at a young mother worrying about her toddler's health.

¹ Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

² See explanatory memorandum to the DSA, section "fundamental rights".

Economic harms of tracking-based ads

In addition to undermining fundamental rights, **tracking-based programmatic advertising can cause economic harms** as well. [Studies](#) show that only half of the advertiser spend goes to publishers and the rest is eaten by the adtech ecosystem. Furthermore, Big Tech companies are charging [elevated transaction fees](#) to small publishers and advertisers and are providing them with [opaque and misleading information](#) about their ad services, such as potential audience reach. Tracking based ads also facilitate [ad fraud](#), which is a billion dollar industry with [figures](#) estimating about twenty-five percent of ad spend is lost to fraud and [others](#) evaluating the global loss to fraud at over \$66bn.

Contextual advertising as a viable alternative

Online advertising can exist, be relevant and more profitable without tracking. Ads that are targeted based on the content people are viewing (“**contextual advertising**”) rather than their personal profile can in fact be [more profitable](#) for publishers, with examples showing revenues increased by 149% for Dutch publisher NPO Group and by 391% for a Norwegian news publishing group. At the same time, contextual ads can [perform better](#) than ads driven by personal data, e.g. increase the intent to purchase the advertised product by 63%, double the number of visits to the advertisers’ website and improve brand perception.

Additionally, the [majority](#) of people do not want their personal data to be used for advertising purposes. [In fact](#), people prefer contextual ads and find them more trustworthy. A [study](#) conducted by the IAB found that 69% of consumers would be more likely to look at an ad if it was relevant to the content they were reading. According to the same study, **contextual advertising** was cited as the **top strategy** for dealing with the upcoming loss of third-party cookies.

Relationship between the DSA and EU data protection rules

It is important to acknowledge that it is neither possible nor necessary for the DSA to change EU data protection rules or principles, including rules setting out the legal basis for processing personal data for delivering targeted behavioural advertising.

The DSA is without prejudice to the General Data Protection Regulation (GDPR)³ and other Union rules on data protection and privacy of communications and **can**

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

therefore not amend the GDPR.⁴ Recital 52 of the DSA specifically clarifies the GDPR's rules on tracking-based advertising and the need to obtain consent for the processing of personal data for such purposes.⁵

However - as demonstrated - the **harms of tracking-based advertising go beyond harms to the protection of personal data**, which is why additional rules are needed, in particular to enable and facilitate a **systemic switch towards more transparent and rights-respecting alternatives**, such as contextual advertising.

Conclusion

The primary beneficiaries of tracking-based advertising are Big Tech companies, to the detriment of small businesses and to the detriment of people's rights. This is why the DSA needs to regulate tracking-based advertising more strictly and favour less intrusive forms of advertising that do not require tracking of user interaction with content (such as contextual advertising), as called for by the European Data Protection Board (EDPB),⁶ the European Data Protection Supervisor (EDPS)⁷ and the European Parliament⁸ itself. As it stands, the currently proposed amendment to the DSA on tracking-based advertising falls far short and will be inadequate to tackle the harms. **We therefore strongly urge you to support stronger alternative wording to the current version of Article 24.2 and 24.3,⁹ i.e. wording that truly counters the economic and fundamental rights harms of tracking-based advertising.**

⁴ See DSA Article 1.5.i, recital 10 and the explanatory memorandum.

⁵ *"The requirements of this Regulation on the provision of information relating to advertisement is without prejudice to the application of the relevant provisions of Regulation (EU) 2016/679, in particular those regarding the right to object, automated individual decision-making, including profiling and specifically the **need to obtain consent of the data subject prior to the processing of personal data for targeted advertising [emphasis added]**. Similarly, it is without prejudice to the provisions laid down in Directive 2002/58/EC in particular those regarding the storage of information in terminal equipment and the access to information stored therein."*

⁶ European Data Protection Board, [Statement](#) on the Digital Services Package and Data Strategy, 18 November 2021.

⁷ European Data Protection Supervisor, [Opinion](#) 1/2021 on the Proposal for a Digital Services Act, 10 February 2021.

⁸ European Parliament, "European Parliament [resolution](#) of 20 October 2020 with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))", and European Parliament, "European Parliament [resolution](#) of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market, (2020/2018(INL))".

⁹ In fact, the current wording of Article 24.2 and 24.3 of the DSA extends beyond its scope as it aims at amending existing EU data protection legislation. It should also be borne in mind that personal data cannot be considered as a tradeable commodity, as reiterated by the European Data Protection Board (EDPB), and that the language on "monetisation" of personal data currently included in Article 24 runs counter the principle of control over one's personal data.