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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising - Comments from delegations

Further to the meetings of the Working Party on General Affairs on 9 June 2023, please find in Annex comments received from delegations.

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CZECH REPUBLIC

- We are very optimistic about the Commission's compromise proposals and ready to support them. We would like to mention just one comment, namely whether it would not be beneficial to further clarify the relationship between the definition of political advertising and the EP text regarding commercial advertising.

EP compromise proposals

- We appreciate the concessions from the EP side. Yet, we still have severe reservations about some provisions the EP has retained in the presented package.

Time-limited targeting and ad delivery ban

- As for the time-bound complete ban on targeting based on sensitive data, we continue to disagree in principle with a total ban. However, we are fully aware of the completely different positions of the Council and the EP in this matter and, therefore, of the need to find a landing zone for both institutions. Hence, we are willing to consider such a concession to the EP on the assumption that there is an overall willingness of the Member States to accept this trajectory.
- Even so, we do not agree with the proposed period of 120/90 days before the elections. With regard to the legal framework of elections in the CZ, this period would potentially cover the entire period (or the absolute majority) of the election campaign. Not to mention that in the case of snap elections, the election campaign in CZ may not even reach two months. Applying this compromise proposal of the EP would inevitably mean that large and established political actors would be disproportionately favoured.
- Therefore, any considerations in this direction should not exceed the logic of the Council's mandate, which implicitly assumes the pivotal part of the pre-election campaign to be one month before the elections.

Explicitly provided data

- Regarding the retention of the requirement for explicitly provided data, first of all, we do not consider it necessary to limit the processing of regular personal data only to the explicitly provided ones. At the same time, we see inherent risks in this provision, which may have unintended consequences and lead, for example, service providers to collect even more personal data in order to fulfil their contractual commitments to the sponsor.
- Furthermore, there may also be situations where a particular segment of data subjects practically could not be targeted just because, for example, they did not provide complete data or where the set language of the platform does not correspond to the country of residence.
- Last but not least, taking into account that there is no effective age control across platforms, we also believe that data based on the use of services or devices can help to assess whether the data subject in question is really minor, which can ultimately contribute to the prevention of situations we are trying to regulate here.

Ad delivery without further processing of personal data

- We still have doubts about the practical feasibility of ad delivery without further processing of personal data.

Rows 228–228e

- We do not believe that establishing a specific permanent network of national contact points is necessary, but we do not oppose the proposal.

European Public Repository

- We continue to believe that small and micro-enterprises should be exempted from the obligation to publish the required information in the repository to avoid disproportionate administrative burden.
- We also understand the concerns of the Commission and think these should be taken into account.
- In the case of proceeding with the establishment of the repository, we would favour an extension for publishers who are not Very Large Online Platforms (VLOPs) or Very Large Online Search Engines (VLOSEs) to publish the requested information to at least 48 hours.

GERMANY

- Whilst maintaining its scrutiny reservation DEU wants to make the following comments today:

a. Commision proposals (document WK 7458/23)

- **DEU thanks the COM for its text proposals.**
- **DEU shares the aim that** purely personal messages should be clearly excluded from the scope of this Regulation with legal certainty in order to respect the freedom of expression.
- **Further, DEU shares the aim to clarify** that public communications from official sources are excluded from the scope of this Regulation provided they are not designed to influence the outcome of a democratic process. This in line with the general approach of the Council. We also welcome the additional safeguards against circumvention.
- **Therefore DEU is open and supportive for the COM proposals.**
- DEU has one remark concerning **line 27a (recital 17a)** and the topic of internal communications. This recital is based on the EP Text and limits the exemption to political parties only. However, the corresponding EP article (see line 195i, Art. 12 (1e)) extends this exemption also to foundations, associations or any other non-profit bodies. Therefore, recital 17a needs to be coherent to the EP text in line 195i with regards the addresses of that exemption.
- Additionally, DEU proposes two minor clarifying amendments in recital 17 and 19 in order to increase the legal certainty further:
 - Rec. 17: „ The promotion, publication, delivery or dissemination by other actors of a message that is liable and designed to influence, the outcome of an election or referendum, legislative or regulatory process or voting behaviour or the public opinion on societal or controversial issues at Union, national, regional, local or at a political party level should also constitute political advertising, **unless it is an expression of personal political opinion or part of editorial freedom. ...**“
 - Rec. 19: „...political opinion should not be covered by this Regulation. Such political opinions which are additionally promoted, published or disseminated by service providers **against remuneration** should in any case be considered to be political advertising.“

b. EP proposals Art. 12 (Document WK 7487/23)

- Regarding the EP compromise text on Art. 12 DEU wants to reiterate initially its position from the joint protocol statement:
- This regulation can only be **effective** if it does **not fall behind the prohibition of the DSA on advertising** using special categories of personal data. DEU supports a complete ban of processing special categories of personal data pursuant to Art. 9(1) GDPR for the purpose of personalising political advertisement.
- Therefore, DEU favours a solution in the regulation that respects this position.
- Taking this into account, DEU wants to share that in general the EP text proposals **are going into the right direction** in order to find a compromise with the Council.
- This is **in particular true for Art -12**. In this regard, the time period where the processing of special categories of personal data shall be banned should be as long as possible and in the best case not below 120 days before an election or referendum.
- With regards the proposal of the EP to allow only the combination of four categories of personal data for targeting and ad delivery techniques DEU wants to ask the PCY the **following questions**:
 - Did the EP explain the reasons why it has chosen exactly this figure and if yes, what are its arguments to defend this proposal?
 - Did the EP explain how categories are to be differentiated from each other and what categories the EP has in mind that would qualify as distinct categories?

c. National Contact points (row 228-228a)

- According to DEU, the PCY **should defend the General Approach** with regards lines 228-228a.

d. Ad Libraires (row 163t-163ah)

- With regard the EP proposals in lines 163t-163ah, DEU reiterates that the request of the EP **for a European public repository for all political ads** online is reasonable.
- A **neutral and independent body** should ensure the management of a **public repository for all online political ads**.
- If the Commission is willing to manage the public repository **DEU would welcome this whilst being flexible for the date of entry into force of this task**.

ESTONIA

The problem for Estonia from the outset has been the overly broad definition of political advertising. We see a risk that too broad of a definition could have a negative impact on freedom of expression and inhibit political dialogue in society. We therefore welcome proposals that help to concretise and narrow the definition of political advertising.

IRELAND

General Comments:

- Ireland wishes to reiterate its concerns regarding the additional restrictions proposed by the Parliament on the processing of personal data (other than special categories of personal data) for the purposes of political advertising which are moving the proposal further away from its original intention which was to provide for enhanced transparency around political advertising during electoral periods while maintaining freedom of expression on the one hand and the right to be informed on the other notwithstanding supporting a plurality of political opinion in and around elections. It is considered that the proposals to prohibit targeting and amplification techniques using special categories of personal data combined with restrictions on the processing of (non-special categories of) personal data may give rise to adverse effects in respect of political advertising across all forms of media.
- For example, under Ireland's Electoral Acts, all candidates at an election, who have been validly nominated, are entitled to send one election letter free of postage charge to each household in the constituency. The cost of this facility is met by the Exchequer. Would this long-established facility be affected by the additional restrictions proposed by the Parliament on the processing of personal data?
- The processing of personal data is already well-established in the General Data Protection Regulation. Additional restrictions, over and above what is set out in the General Data Protection Regulation, could give rise to unintended consequences, such as the withdrawal of political advertising services from the marketplace, in particular, in the absence of an analysis of the impact of such additional restrictions in both the offline and the online spheres.
- Accordingly, Ireland suggest that a careful consideration of these proposals be undertaken and calls for a detailed examination of, and consultation on, the proposed restrictions on the processing of personal data and the impacts these may have on the provision of political advertising services in the internal market. A full and proper impact assessment is needed to support an informed decision on these key issues.

European Commission Compromise Text (Document wk07458.en23.pdf refers)

- Ireland appreciates the compromise proposals from the Commission which aim to bring greater clarity on the exclusion of personal messages from the scope of the proposal.
- The amendments proposed to Recitals 15, 16, 17, 18, 19 and in Articles 2(2) and 2a aim to provide an appropriate balance in protecting the fundamental principles to freedom of

speech, the right to political opinion and the right to information while ensuring there is full transparency in political advertising received by the electorate during electoral and referendum campaigns.

- Accordingly, Ireland broadly supports the compromise proposals put forward by the Commission.

European Parliament Compromise Text (Document wk07487.en23.pdf refers)

- Ireland welcomes the compromise proposals from the European Parliament on Article 12 which concerns the targeting of political advertising having regard to the use of personal data and/or special categories of personal data within the meaning of the General Data Protection Regulation.
- However, Ireland has concerns with regard to the additional prohibitions proposed (rows 193a and 193b refer) on the use of special categories of personal data. In general terms, while a referendum campaign in Ireland can take place up to a maximum period of 90 days from the making of a polling day order, elections are typically completed within a period of 60 days (and no later than 30 days in the case of a Dáil election) from the making of a polling day order. Accordingly, to insert a ban on processing of special categories of personal data for a limited period of 120/90 days before an election / referendum would, in practical terms from an Irish perspective, constitute a *de facto* prohibition on the use of special categories of personal data even when explicit consent is provided given our elections would all be completed within that limited period. Clarification is sought on how these proposals would apply in a scenario in which an election or referendum campaign is less than the limited period and political advertising might have been sponsored prior to the commencement of the election or referendum (when it was unknown that an election or referendum was about to be called, e.g. Ireland does not have fixed term parliaments with the result that general elections may be called at any time and at short notice) but within the 120/90 day period.
- Furthermore, Ireland has strong concerns with regard to extending the restrictions proposed (row 195 refers, including rows 195c-195g) in Article 12 to the use of personal data. The processing of personal data is already well-established in the General Data Protection Regulation. Additional restrictions, over and above what is set out in the General Data Protection Regulation, could give rise to unintended consequences, such as the withdrawal of political advertising services from the marketplace, in particular, in the absence of an analysis of the impact of such additional restrictions.
- Ireland supports the proposed prohibition of targeting and ad delivery techniques involving the processing of personal data of minors (row 195b refers) and notes the consistency of language with the Digital Services Act.

- In conclusion, Ireland reiterates that it does not favour additional restrictions on the use of targeting or amplification techniques, in particular, as such additional restrictions might relate to the use of personal data. Ireland has strong concerns that further restrictions may ultimately give rise to a prohibition in practical terms which may result in a withdrawal of political advertising services from the marketplace.

AUSTRIA

[Row 107b (Art 2 No. 2 (ba) (i)) + rows 26-27 (Recital 16 and 19a)]

- Assuming that AT's criticism of the indefinite term „purely private“ is already well documented we welcome every effort to improve this extremely important definition (exemption). Nevertheless, we highly doubt that inserting the phrase „in a personal capacity“ would foster legal clarity and legal safety.
- The corresponding amendments in recitals 16 and 19a just repeat the legal phrase or reformulate them in other words („under personal responsibility“) without any added explanatory value. This is also valid for the unclear phrases „would normally be considered“ in recital 16 or „should normally result“. The only clear and concrete element in recital 16 for the determination is the requirement „and without remuneration“.
- Also the new recital 19a gives rise to more questions than it solves:
 1. What is meant by the term „personal political speech“?
 2. Given the scope and the definitions, it is not clear why it might be necessary to include „interpersonal communication“.
 3. How could the phrase „should normally result from individual self-determination“ be useful to determine „political opinions expressed in personal capacity“?
 4. None of the different „relevant factors“ in the fourth sentence seems to be of any help for the assessment, whether a message is political advertising or not.

[Row 28 (recital 18)]

- We do not see how the insertion of the phrase „in a neutral manner and with due regard to voters' freedom to form an opinion“ would be of any help for the assessment, whether an official information would constitute political advertising or not. How would the voter's freedom have to be duly regarded in this assessment?
- Is it really intended that e.g. also an official campaign to motivate people to exercise the right to vote (or to visit the national parliament to see how democratic processes work) must not be promotional but strictly neutral in design and wording?

[Article 12]

- From a data protection stand point we thank the Presidency and the Commission for their efforts in reaching a balanced compromise that respects the fundamental rights of all involved and safeguards the integrity of democratic elections.
- For the sake of completeness, we need to refer to our previous question whether, in light of the ECJ's ruling in C-184-20, all personal data that is processed in the context of political advertising has to be deemed to be personal data according to Art. 9 GDPR. If such a legal distinction is possible, we fully support the compromise text.

FINLAND

From the perspective of citizens' perceived trust, it is risky to define official communication as political advertising in any situation. Labeling official communication as political advertising could significantly weaken the credibility of the authorities, increase citizens' mistrust, and provide opportunities for the spread of disinformation. This kind of legislation could also be used, to undermine the credibility of the authorities in politically sensitive matters, such as human and fundamental rights issues. There is also a danger that the authorities will refrain from communicating on certain sensitive issues, which would be completely against open government policies and democratic values.

These risks must be identified and minimized. The definition tends to be open-ended, which is understandable in itself, but at the moment it is too open to interpretation when it comes to official communication. For example, authorities can aim to provide information about the effects of planned bill in such a way that the messages aims to influence both public opinion and regulatory process. Authorities also take part in public discussion and may before elections raise issues they consider important and which the future government should address. Ministries' communication could also be easily interpreted as political advertising, because ministries are politically controlled and official communication (press releases etc.) often goes through ministers' cabinets and may contain direct quotes from the responsible minister. It is not entirely clear whether such situations are entirely excluded from the scope.

In any case, this kind of official communication should be clearly distinguished from political advertising. It could be argued, that it already is, but at least it seems that in the case of legislative process there might be need to specify the provision (row 107 d), as “influencing legislative or regulatory process” can be seen as a rather low threshold compared to influencing voting behavior or the outcome of elections or referendums. Because it is somewhat the task of the authorities to try to influence the regulation of their own administrative sector. So this kind of communication will always have “a clear and substantial link between the message and its potential to influence a legislative or regulatory process” (row 126 h).