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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 meeting of the Working Party on General Affairs on 26 June 2023, please find in Annex comments received from delegations.

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CZECH REPUBLIC

Article 2

Row 107

We do not agree with the EP's approach towards the definition of political advertising, as virtually anything could be regarded as liable to influence voting behaviour, electoral processes etc.

Such wording would make the assessment even more subjective, for instance, where a sponsor, in good faith, believes that a particular advertisement is not liable to influence electoral processes, and can have severe implications on the applicability of the Regulation, or provision of services where the publishers might fear not to be able to comply with the Regulation.

Row 107d

We can agree with the additions aiming to clarify the provision as well as with the extension to the public authority of the Union. However, we do not agree with substituting “liable” for “designed” with the same rationale as in row 107.

Article 7a

We would prefer not to have all the elements listed directly in the enacting terms but can accept it. Overall, we have just some particular comments on the draft compromise proposals.

Row 163m

We do not find this element to be essential in terms of transparency and believe that such provision should be rather optional, though potentially recommended. On the other hand, it could help inform research activities. Even so, given the current technological realities, we do not think making this element mandatory for providers who are not VLOPs and VLOSEs is necessary.

Row 163p

We welcome the inclusion of “where technically feasible”. However, we maintain reservations regarding having the reference to the directive on accessibility requirements directly in the enacting terms. We believe the requirements for clear visibility, user friendliness and usage of plain language are enough.

Row 163q

We would like to reiterate that we do not agree with the ten-year retention period.

Article 9

We are generally positive regarding the proposed compromise solutions.

We do not favour the EP's original proposal in row 171a, but it is unclear from the table whether the EP still intends to consider this row further.

Article 15a

We welcome that the compromise proposals build on the Council's mandate and are optimistic about the overall compromise suggestions.

Scope of Chapter III

We generally favour sticking to the Council's mandate in Article 12, including the scope. Rather than limiting the scope to services, we would prefer additional safeguards to address the concerns with personal and organic content. We believe that the text could include an even more detailed focus on how to approach messages when service is not involved.

In the provided document, the EP indicates a willingness to accept Council's approach on scope, however, two other suggestions are proposed. In this vein, and especially in case the EP agrees to delete the reference to services in Chapter III, we strongly oppose the suggestion to keep the EP mandate on the definition of political advertising.

When it comes to definitions of targeting and ad delivery techniques, more clarifications are needed on the EP's intentions. We have reservations towards the EP mandate, including the draft compromise proposal, as, to our understanding, it implies different and more limited scope, where various cases, foreseen by the Council, would not be covered by the Regulation. To proceed, we would highly welcome a comparative examination of the practical implications/differences of both mandates in this regard and further discussions on this issue.

DENMARK

General comments

Denmark appreciates the opportunity to make further comments on EP's compromise proposal.

We support the wish for a general status of the negotiations, including an overview of which parts of the regulation that have been preliminarily agreed upon.

Article 2

Row 88a

The meaning behind "Political opinions and other editorial content" is unclear and a clarification on this would be appreciated.

Furthermore, Denmark has reservations about moving the negative delimitation of the definition of political advertising to article 1 regarding the scope of the regulation instead of keeping the delimitation in article 2 (row 107b). We would like journalistic and editorial content to fall outside the scope of the Regulation, which supports keeping the delimitation of political advertising in article 2.

Row 107

It is important to make sure that not all political behavior (i.e. political opinions) fall under the scope of the regulation but rather voting behavior in regards to a specific election or referendum. This could be clarified in row 107 or under the negative delimitation in art. 2(1), point (2)(ba).

Denmark support maintaining the wording "liable and designed to influence the outcome of an election..."

Row 107c

The text in Council's mandate is preferred as it is uncertain why EP chooses to exclude election candidacies from the scope of this row in their draft proposal. Denmark does not believe that it should be considered a political advertisement to inform the public who is running for an election or referendum.

Row 107d

Denmark can show flexibility and support EP's proposed draft if the following wording from Council's mandate is maintained: "(...) provided they are not designed to influence the outcome of an election (...)".

Article 7a

Rows 163a – 163p

It is generally difficult to understand how EP's compromise proposal on articles 7 and 7a differ from the Council's mandate. It would be helpful with guidelines on this matter as EP's compromise proposals at this point seem to elaborate unnecessarily on the text of the Council's mandate on transparency communications and notifications.

Row 163q

Denmark continues to support the Council mandate, which foresees that political advertising publishers must keep their transparency notices together with any modifications for five years. The Regulation should not lead to unnecessary administrative burdens for companies.

Article 9

Rows 169a-169e

It is difficult to see the value of a specification of the obligation of political advertising publishers to facilitate the possibility of communicating information on possible illegal political advertisements to the provider of political advertising services.

Row 170, point 3a

It is considered disproportionately burdensome for political advertising publishers that are not VLOP's to comply with the obligations within point 3a.

Furthermore, it does not seem beneficial to distinguish in point 3a(b) between undertakings that are not VLOPs and those falling under Article 3, para. 1 of Directive 2013/34/EU (micro-undertakings).

Row 170, point 3b

Denmark continues to support Council mandate so the 48-hour rule in point 3b only applies to VLOPs. Other undertakings should not be subject to such a time limit in the month preceding an election or referendum.

Article 15a

Row 223b

The reasoning behind including sponsors in the scope of row 223a is unclear and a clarification on this would be appreciated.

Row 227c, point b

The implications of using the word “circumstances” instead of “facts” are unclear.

Scope of Chapter III

Reference to services

EP’s reasoning behind the deletion of the reference to services in Chapter 3 is unclear. In general, we can support that the rules on targeting of political advertisements should only apply in the case of services, i.e. if the online platform has received payment for targeting.

If the rules on targeting would apply to unpaid content, it could raise issues regarding freedom of expression. The definition of political advertisement is broad in both the Council’s approach and in the position of EP. If there is no requirement of a service, it would mean, for example, that the rules on targeting can apply to a Facebook post from a politician, even if the politician has not paid for targeting and amplification of the message.

Then online platforms could potentially be prevented from recommending content that can be defined as political advertising to specific individuals or groups, even if no payment was made to spread the message.

Definitions

Denmark can show flexibility and support keeping the EP mandate on the definition of “political advertising” and “political advertising service”. Denmark prefers the Council mandate on the definition of “ad delivery techniques”.

EP’s draft proposal of the definition of “targeting techniques” with DK counter proposal:

“targeting ~~or amplification~~ techniques’ means techniques that are *made available by political advertising publishers or providers of political advertising services*, used ~~either to address a tailored~~ *by sponsors, political advertising publishers or providers of advertising services to address a* political advertisement, usually with tailored content, only to a specific person or group of persons or to ~~increase the circulation, reach or visibility of a political advertisement~~ *exclude them by processing personal data, in particular through the collection of their data;*”

GERMANY

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

b. SE proposal Art. -12 (193a-193b; Document WK 8328/2023)

- Regarding the compromise text proposal of the PCY in lines 193a-193b for Art. -12 DEU **supports** as stated in the joint protocol statement **a complete ban** of processing special categories of personal data pursuant to Art. 9(1) GDPR for the purpose of personalising political advertisement.
- 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.
- As the DSA will be applicable without prejudice to this regulation the Council should position itself for a **coherent framework** between this regulation and the DSA like NLD and other MS argued in the last Working Party meeting.
- Otherwise we would have diverging rules in the internal market, on the one hand for online platforms provided for in the DSA and on the other hand for all other addressees like websites provided for in this Regulation. This arises in particular with regard to the limited scope and timeframe of Art. 12 (only preceding an election or a referendum) in comparison to the general scope of the complete ban in the DSA.
- Against this background, DEU favours a solution in the regulation that respects this position.

b. SE proposal Art. 12 (194-196b, Document WK 8328/2023)

- After an initial assessment DEU is in general open for the compromise text proposals of the PCY in Art. 12 (lines 194-196b).
- However, DEU wonders how the wording “personal data has been provided” has to be interpreted and if this wording is clear enough in comparison to the text proposed by the EP. Given this lack of clarity DEU is in general open to the text proposed by the EP.

c. Comments and proposals received from the European Parliament (WK 8362/2023)

aa. Article 2 on definitions

- DEU is in general open for the text proposals and comments concerning Art. 2.
- **In particular, DEU welcomes that the EP supports the clarification** 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 (line 107d). However, DEU would suggest one amendment in line with the wording of the general approach of the Council and the COM proposal: instead of “they are not liable to influence”, we would prefer: “they are not designed to influence”. The criteria “is liable and designed to influence” should be part of the general definition of political advertising in line with the wording of the general approach of the Council and the COM proposal.
- Further, DEU welcomes the aim to **clarify the scope of political advertising** in Art. 1 (2a) line 88a. In this regard, DEU likes to point out, that there should be no inappropriate limitation of expression of opinion by individuals. A deletion of “of a media service provider”, that is in line with the wording of the general approach of the Council and the COM proposal, could be an appropriate approach.

bb. Article 7a on transparency notices

- DEU is in general flexible for the suggestions concerning Article 7a on transparency notices.

cc. Article 9 on unlawful political advertising

- DEU is in general flexible for the suggestions in Art. 9.
- However, concerning the proposal of the EP in line **170** DEU has following remarks:
 - **Firstly**, DEU is against different obligations for VLOPs/VLOSEs in the one hand and other political advertising publishers on the other hand.
 - **Secondly**, DEU highlights that the proposed text would impose for the period beyond the last month preceding an election or a referendum less stricter rules to providers of hosting services that are not VLOPs/VLOSEs in comparison to the notice and action mechanism foreseen in the DSA.

- Against this background, DEU wants to point out that the notice and action mechanism under this regulation **should be coherent** with the notice and action mechanism under the DSA.

dd. Article 15a on cross border cooperation

- With regards Art. 15a DEU is in general open for the draft agreement and comments.
- However, DEU is against the comment in line 227f of the EP. The establishment of a new network would have serious consequences on our current national oversight structure.

ee. Proposal on limiting the scope to services in the definitions (instead of in Article 12)

- Regarding the suggestion to modify the definition of targeting techniques we would ask the PCY and the Commission for their assessment.

PORTUGAL

Article 2

Regarding Article 2 (Definitions), namely the content in line 107e, Portugal would like to reiterate the following suggestion which is not incorporated in the version currently under consideration:

The last exception (b-iv) does not cover legally provided situations where equal treatment is guaranteed, even if in private spaces or against payment. A wording that could accommodate the broadcasting of airtime on private radio and television and the use of public or private performance halls by candidates under equal conditions would be:

"(...) presentation of candidates in specified spaces or in the media which is explicitly provided by law or in public and private spaces as long as equal treatment is ensured."

Article 12

Under Portuguese law, "from the publication of the decree setting the date of the election or referendum, political propaganda carried out directly or indirectly through the means of commercial advertising is prohibited".

This prohibition is based on the principle of equal treatment of candidates, which is enshrined in our Constitution.

The draft Regulation currently under negotiation, in particular its article 12, appears to accept the carrying out of political propaganda from the publication of the decree marking the date of the election or referendum.

Considering the importance for Portugal of the aforementioned prohibition, which derives from a fundamental right in electoral matters, we suggest that a rule with the following content be provided for:

"This Regulation shall not prevent Member States from establishing rules derogating from the rules provided for herein, with a view to ensuring equality of candidacies, and may establish a ban on political propaganda carried out through means of commercial advertising in the period between the marking of an election or referendum and the respective day of the holding of the election or referendum, as well as the competence to apply sanctions in the event of violation of said ban."

FINLAND

Article 12

- Generally we find that the text proposal is moving in the right direction and we thank the Presidency for taking into account our previous comments (for example with regard to consent and removing texts that overlap with the GDPR as well as the shorter time window for banning the processing of special categories of personal data).
- It is vital to find a balanced compromise that promotes a high level of protection for personal data but also takes into account the freedom of speech, the right to political opinion and the right to information.
- Similar to DE (ST 10579/23) have noted in their written comments, we would like some clarifications regarding the combination of four/five categories of personal data and what type of personal data would this entail.
 - We are flexible in finding a balanced compromise, but would like to make sure that this proposal would be fully in line with the principles relating to processing of personal data, especially with the purpose limitation, data minimisation and accuracy principles.
 - It is important to make sure that this regulation would not lead to a situation where the service providers collect and process even more personal data than before.
- In addition, it is important that the data processed for targeted political advertising purposes is accurate and does not lead to unintended consequences. In this regard we would like to reference to the CZ written comments (ST 10579/23), however in general we find it appropriate (similar to the EP) that only personal data the data subject has explicitly provided for targeted political advertising purposes can be processed.
 - Some of the points CZ has made in their written comments, might be valid and should be taken into consideration (e.g. concerning how the platforms can identify minors appropriately and that targeted political advertising is based on accurate and relevant data).
 - In this regard we are evaluating how and whether the personal data that is collected by virtue of using a service or device, could be utilised (could we propose a somewhat similar solution that has been made in Article 5(2)(b) of the Digital Markets Act (EU) 2022/1925).

Other

- We would welcome any updates on the Articles concerning the supervision and sanctions pursuant to this Regulation.
- We would like to emphasise that, with regard to the protection of personal data, we would prefer the supervisory authorities to be the data protection authorities of the Member States. Similarly, we would like to point out that the role proposed by EP for the EDPB is incompatible with the EDPB's current powers and tasks.
- With regard to sanctions, we consider it important that the proposed regulation is compatible with data protection regulation.

EP proposals

Public communication by officials

- As already mentioned previously, normal official communication should be clearly distinguished from political advertising. The reasons have been discussed in more detail in Finland's previous written comment. It is important to discuss the matter in the recitals, at least in terms of what it means when officials are trying “to influence voting behavior or legislative or regulatory process” as it is a bit more abstract than the other part of the same sentence “influence the outcome of an election or referendum “. It might be reasonable to emphasize that it is about political influence.
- In the proposal (row 107d), term “designed” has been replaced by the term “liable” which seems to further open up interpretation. A “designed” attempt to influence is definitionally narrower and binds influencing to a more concrete and planned effort and action. Whereas the wording "is liable to influence" is more abstract and opens the possible to a wider and more comprehensive evaluation, even if the message is not intended to have this kind of effect etc. Taking into account the concerns expressed earlier and now, the use of the term “design” could be more appropriate and emphasizes that political advertising, when it comes to the communication of authorities, must be clearly designed and have a political influence. This would clarify the border between official communication and political communication, making it easier for the authorities to apply the regulation.