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COVER NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	11578/22, 8647/3/22
Subject:	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising - Member States' replies to the Presidency questionnaire on the provisions of Chapters III to V

Delegations will find attached replies to the Presidency questionnaire (ST 11578/22) and Member States' views on the provisions of Chapters III to V of the Presidency compromise text (ST 8647 2022 REV 3) as well as on other elements of the proposal from Austria*, France* and Italy.

Kindly note that the two changes made to the original document 12000/1/2022 ADD 1 include the footnote below and an editorial change on page 22 concerning the heading 'Italy' (it was previously on page 21). No changes to the replies in the annex to this not have been made.

** N.B. Contribution was submitted before the original deadline of 26/08/2022.*

ANNEX I

Contents

AUSTRIA

CHAPTER III

1. Article 12 – Specific requirements to targeting and amplification

Please indicate your positions on the possibilities/provisions outlined below:

1.1 Distinguishing various types of data (provided data vs observed or inferred data)

General remark

The enforcement of the correct application of Art 12 of the proposed regulation ('hereinafter the Proposal') means additional workload for the supervisory authorities under Regulation (EU) 2016/679 (GDPR). Therefore, it is suggested to add in the Proposal a similar provision to Art 52 para 4 of the GDPR.

1.1a Do you thing that Article 12 should differentiate profiling techniques or differentiate observed or inferred sensitive personal data from other personal data?

Answer to question 1.1a

Yes. The differentiation between special categories of personal data and other personal data originates in Art 9 and Art 10 GDPR. According to Art 12 para 1 and 2 of the Proposal targeting or amplification techniques that involve the processing of data within the meaning of Art 9 para 1 of the GDPR are prohibited, except where Art 9 para 2 lit a or d GDPR applies.

Art 9 GDPR lists certain categories of personal data that are particularly sensitive because data subjects typically have a particular interest to keep them secret.

In order to be in line with the GDPR the Proposal must also differentiate between these types of personal data.

In this context, we would further like to point out that in a recent Preliminary Ruling the ECJ clarified that the processing of personal data that are liable indirectly to reveal sensitive information concerning a natural person is included into the strengthened protection regime prescribed by Art 9 GDPR (see ECJ Judgement of 1 August 2022, *Lithuanian Regional Administrative Court*, C-184/20, paras 117-128 (127). This means that the stricter regime of Art 9 para 1 GDPR must also be applied to personal data that are prima facie not considered as sensitive data (e.g. data regarding sex, age, addresses, etc.) **if and when they are processed for the purpose of targeting or amplification** in the context of political advertising, since those data will then indirectly reveal the data subjects' political opinions.

We would therefore like to pose the question – considering the fact that the process of targeting and amplification inherently leads to assumptions about a natural persons political opinion, which (in line with the ECJ's case-law) are sensitive data according to Art 9 – **whether there are any practical cases in which non-sensitive personal data could be processed for the purposes of targeting and amplification according to Art 12**?

1.2 Complete prohibition of targeting and amplification techniques using sensitive data

1.2a If you support completely prohibiting the use of targeting and amplification techniques involving the processing of sensitive data, would you agree to keep the exception referred to in Article 9.2(d) of Regulation 2016/679 and Article 10.2 (d) of Regulation 2018/1725 or to additionally incorporate an exception when it comes to intraparty communication (messages to current and former members)?

Answer to question 1.2a

In this context, we would like to restate, that AT supports the removal of the reference to Art 9 para 2 **lit a** GDPR in Art 12 para 2 of the Proposal.

Regarding the question, whether the reference to Art 9 para 2 **lit d** GDPR should be kept or a **specific exception for intraparty communication** should be introduced, we would first point out that Art 9 para 2 lit d GDPR includes a variety of associations, some of which are of a political nature, such as political parties and trade unions, but also non-political associations like religious communities and philosophical associations.

We would like to raise the concern that including religious and philosophical associations into the exception in Art 12 while limiting targeted political advertising in general might have the unwanted consequence that these associations would increasingly be approached by political actors to target their members for political campaigns.

At the same time, apart from political parties there are also political associations, which pursue the official purpose of representing, exchanging and informing about political views and interests and whose members joined precisely for that reason.

We would therefore propose that the exception in Art 12 para 2 should be **limited to political associations**, i.e. political parties and other political organisations, whose official purpose is the information, exchange and representation of political interests.

1.2b If you do not support such a complete prohibition, do you think that targeting and amplification techniques using sensitive data should be specifically prohibited during electoral periods?

Answer to question 1.2b

We support a (almost) complete prohibition of targeting and amplification based on the processing of special categories of personal data except personal data as referred to in Art 9 para 2 lit d GDPR.

The restriction should **apply regardless of electoral periods**, as a limitation of the applicability of the prohibition would invite political actors and advertising companies to find ways to circumvent the prohibition. For instance political actors could commission political advertising that uses targeting and amplification techniques based on the analysis of sensitive data just before the start of an electoral period and simply reuse the analysis during the electoral period based on the same markers. Once information on such an analysis exists, it seems unrealistic to expect that advertising agencies would not reuse it for follow-up campaigns, regardless of an election coming up or not.

1.2c Are there other categories of technique involving the processing of personal data that should be addressed specifically?

Answer to question 1.2c

We are open to the EC's and Member States' suggestions.

1.3 Obligations for data controllers and political advertising publishers

1.3a Do you think the provisions laid out in paragraphs 3 to 6, as proposed by the French Presidency, need to be further revised (e.g. clarification of obligations; scope of information to be included in the transparency notice etc.)?

Answer to question 1.3a

Para 4:

It is recommended to add an obligation of controllers to provide information on the competent supervisory authority referred to in Art 15 of the Proposal.

Para 4a et al.:

Art 12 (and the Proposal as a whole) addresses different stakeholders, such as advertising publishers, service providers as wells as controllers within the meaning of Art 4 para 7 of the GDPR.

As supervisory authorities pursuant to Art 51 of the GDPR can enforce provisions only vis-à-vis a controller and or a processor and not vis-à-vis an advertising publisher or a service provider, it is recommended to bring Art 12 of the Proposal in line with the terminology of the GDPR.

This is also of utmost importance with regard to Art 15 and Art 16.

Para 5: With regard to para 5 it is recommended to bring it in line with Art 21 of the GDPR, as Art 21 para 2 of the GDPR gives data subjects a broad right to object if data are processed for the purpose of direct marketing (which is comparable to the data processing according to the proposed regulation).

Additionally, Art 21 GDPR – unlike the Proposal – does not contain a reference to Art 9 GDPR.

Additional general comment

Paras 3 to 6 should be revised once negotiations on the scope of the Regulation and the scope of the exceptions in para 1 and 2 have been successfully concluded.

CHAPTER IV

2. Article 14 – Legal representative

General remark

While Art 14 of the Proposal is similar to Art 27 of the GDPR, it is doubtful whether a representative can be made fully responsible for ensuring compliance with the Proposal as envisaged in para 2.

For this reason, Art 27 para 4 and 5 of the GDPR provide an additional responsibility for controllers and processors which prevents a full transfer of responsibility (coupled with less incentive to respect the provisions of the GDPR) to the representative.

However, Art 27 of the GDPR has a severe shortcoming: If no representative is appointed, supervisory authorities have no means to enforce Union law. For the Proposal, this means that if a service provider does not appoint such a representative there are no legal means to force them to do so.

Given the Austrian experiences with provisions for platform-providers not having an establishment in the Union we propose to add a provision for the consequences in the case that the service provider ignores the obligation to designate a legal representative. It also remains to be clarified how sanctions (according to Art 16) might be imposed when there no legal representative has been designated.

It is therefore recommended to provide in the Proposal the possibility for the competent authority to designate an *ex officio representative in absentia* (Kurator) if the relevant service provider fails to do so.

2.1 Should the Member States establish a publicly available register of all legal representatives referred to in Article 14.1?

Answer to question 2.1

We cannot identify the added value of an obligation of the Member States (which MS? all MS, where the provider offices its services?) to establish a register of all representatives. It should be an obligation of the service providers to render this information (and any changes to it) easily, directly and permanently accessible to the recipients of the service.

3. Article 15 – Competent authorities and contact points

Please indicate your positions on the possibilities/provisions outlined below:

3.1 Clarification of competencies – Article 15.1-15.5

3.1a Do you think Article 15 should further specify the roles and powers of respective competent national authorities?

Answer to question 3.1a

The provisions of Art 15 of the draft are unnecessarily complicated and their effective substance can only be identified in several steps by numerous combinations of different legal rules (different paras in different Regulations). Art 15 (especially para 8) is lacking sufficient legal clarity, which Member State has the jurisdiction and under which concrete conditions which authority would be the competent authority and would have to do what („*assist*“, „*cooperate*“, „*take the supervision where it is better placed*“??) and how and what would have to be done in case of a conflict of competence.

It would be highly recommended to provide a dispute settlement mechanism for cases with conflicting views on competence (see for example Art 65 para 1 lit b of the GDPR).

3.1b Should the power to require information from the political advertising service providers be explicitly included in Article 15.5?

Answer to question 3.1b

Why would the power to require information have to be included in Art 15 para 5 if this power – according to our understanding – is already included in Art 15 para 4? The draft (unnecessarily) makes a difference between the „supervisory tasks“ (in para 4) and the „enforcement tasks“ (in para 5).

3.2 Clarification cooperation at the national or EU level – Article 15.6-15.9

3.2a Is the proposed framework for cooperation within and between Member States, and at EU level (national elections networks, European Cooperation Network on Elections) suitable?

Answer to question 3.2a

No. We cannot identify a convincing reason, why according to para 5 and 9 the cooperation would have to be ensured via „election networks“, if the regulatory purpose mainly covers periods where there are no elections. The whole regulatory aim is not a legal matter being part of the field of „elections laws“.

3.2b Do the provisions on cooperation between the Member States laid out in Article 15.8 need further clarification, for instance as regards deadlines?

Answer to question 3.2b

Yes, they definitely need further clarifications and not only as regards deadlines, see also answer to 3.1a.

Additional comments

In line with our previous comments and proposals for amendments, we consider it to be indispensable and justified that the Regulation and its obligations (and therefore also the supervisory and enforcement powers of the competent authority) also include the primarily responsible „sponsor".

In para 5 letter b it is not clear which purpose the „statement" about the identification of the „*person responsible for an infringement … and the nature of that infringement*" would serve. The recitals do not explain the reasoning behind and why such a (power to issue a) statement would be necessary. It is also not clear, what the legal quality of such a statement would be (as with Art 16 there is an own provision about the sanctions for the responsible person).

In para 5 letter c it is not clear, what the difference between „*fines*" and „*financial penalties*" might be and when the one or the other would have to be imposed.

4. Article 16 – Sanctions

Please indicate your positions on the possibilities/provisions outlined below:

4.1 Consideration of responsibilities that apply to sponsors in the provisions of Article 16 (e.g. by the explicit exclusion of the applicability of sanctions to service providers if the sponsor provided false information that was not manifestly erroneous)

Answer to question 4.1

In line with our previous comments and proposals for amendments, we consider it to be indispensable and justified that the Regulation and its obligations (and therefore also the sanctions) are not only addressed to providers of political advertising services but include more obligations for the primarily responsible „sponsor".

An explicit exclusion of the applicability of sanctions to a service provider, if the primarily responsible sponsor provided false information but also in cases where the sponsor has not provided information, should be added to the provisions.

4.2 Harmonizing the level of sanctions (e.g. by introducing minimum and/or maximum amount) – **Article 16.3**

Answer to question 4.2

We consider a specific threshold not to be necessary and we cannot see a convincing argument for a harmonization of the level of sanctions. This provides a margin of appreciation, which secures an equal treatment by taking into account other comparable provisions of national law (dealing with identification and information obligations).

With regard to the list of criteria in para 2, we propose to add another important point for the assessment of the individual sanction:

„f) the financial strength of the person held liable."

4.3. Reinforcing/changing scope of infringements to be considered particularly serious during an electoral period (e.g. by also referring to other Articles of the Regulation) **– Article 16.4**

Answer to question 4.3

In the light of the objectives of the Regulation (especially the goal to guarantee „transparency"), we cannot identify a convincing argument that would justify making a difference between electoral and other periods (to reinforce sanctions to be considered „particularly serious").

4.4. Introduction of an obligation for the Member States to annually report on the type and amount of sanctions imposed

Answer to question 4.4

Also in the light of Art 18, we cannot see the added value of such an additional reporting obligation.

Additional comment

Art 16 para 3 lit d and 16 para 5 in the last sentence seem to be partly redundant. In para 5 it is not clear what the consequences of the first sentence would be for the and what has to be understood by the condition „*for the same or linked political advertising*".

Article 17 – Publication of electoral periods

It is still not clear, which concrete purpose the two obligations (publication + reference to this Regulation) would fulfill. Recital 65 does not provide any reasoning for the necessity of this formalistic requirement but repeats the text of Art 17 in a different wording by using additional undetermined terms („electoral traditions"? „sufficiently in advance"?). We have already noted several times that the definition of the term „electoral period" in Art 2 number 9 is not precise enough: What exactly is the period „*preceding*" an election and which time frame is meant by „*immediately after an election*"? As the wording applies to different elections and referenda on different levels it remains questionable whether the publication would have to be „in" one central place and what the condition about an „*easily accessible*" place might require.

CHAPTER V

5. Article 18 – Evaluation and review

5.1 Do you think the content of the report should be specified?

Answer to question 5.1

There is no need to specify the content as there is

a) already an existing common understanding of the term „*evaluation*“ (being the basic examination whether and in how far the provisions seem appropriate to fulfill the objective being pursued) and

b) a clear task for the Commission, namely to „*assess the need for amendment*“.

6. Article 19 – Exercise of the delegation

6.1 Do you think the power to adopt delegated acts should be supported by other criteria (e.g. obligation to consult the Member States in advance)?

Answer to question 6.1

It would be preferable if the Commission – as an additional condition for adopting delegated acts – had to consult the Member States in advance.

Additional comment

The provision of Art 7 para 8 (as one of the two legal bases for a delegation of power) needs a more precise predetermination:

The condition under which the Commission is empowered to adapt delegated acts is far too vague („*where such an amendment is necessary for the wider context of political advertisement and its aims to be understood*“?). The recitals do not provide any explanations in this respect.

6.2 What is your position on the period for which the Commission is empowered to adopt delegated acts?

Answer to question 6.2

If there existed clear and precise criteria under which the Commission is empowered to adapt delegated acts (see the answer above), it would not be a question of principle for us how long the period in Art 19 para 2 lasts.

6.3 Do you think that a process is needed to make codes and standards binding (cf. Article 40GDPR)?

Answer to question 6.3

It is not clear to which „codes and standards“ the question is related to. If it were only Art 7 para 7 (codes for the proper application of transparency notices) then it would superfluous to regulate a specific process.

FRANCE

CHAPITRE III – CIBLAGE ET AMPLIFICATION DE LA PUBLICITÉ À CARACTÈRE POLITIQUE

1. Article 12 – Exigences en matière de ciblage et d'amplification

1.1 Distinction entre les différents types de données (fournies, inférées, observées).

1.1a Pensez-vous que l'article 12 devrait différencier les techniques de profilage ou différencier les données personnelles sensibles observées ou déduites des autres données personnelles ?

L'interdiction du traitement des données à caractère personnel sensibles aux fins de ciblage et d'amplification prévue par l'article 12.1 pourrait utilement viser les données sensibles, inférées, déduites et observées. Le texte doit par ailleurs prendre en compte l'articulation avec l'article 24 (3) du DSA, qui prévoit une règle d'interdiction du ciblage publicitaire sur la base du profilage, au sens de l'article 4 (4) du RGPD, impliquant le traitement de données sensibles.

Une restriction des données non-sensibles pouvant être traitées aux fins de ciblage et d'amplification permettrait d'anticiper les techniques de ciblage et d'amplification en développement et à venir. Cette limitation pourrait se matérialiser par l'introduction d'une disposition interdisant ou restreignant les catégories de données à caractère personnel pouvant être traitées aux fins de ciblage et d'amplification.

S'agissant plus spécifiquement de la différenciation des techniques de profilage, nous pouvons soutenir la différenciation des techniques par l'introduction à l'article 2 de définitions différentes.

1.2 Interdiction complète des techniques de ciblage et d'amplification utilisant des données sensibles

1.2a Si vous êtes favorable à l'interdiction totale de l'utilisation des techniques de ciblage et d'amplification impliquant le traitement de données sensibles, seriez-vous d'accord pour conserver l'exception (article 9.2 (d) du RGPG) ou pour ajouter une exception lorsqu'il s'agit de communication intra-parti (messages aux membres actuels et anciens) ?

Les autorités françaises estiment que l'interdiction des techniques de ciblage et d'amplification impliquant le traitement des données sensibles prévue à l'article 12.1 ainsi que les deux exceptions prévues par l'article 12.2 dans les situations visées à l'article 9, paragraphe 2, point a) et d) du RGPD apparaissent comme permettant de trouver un équilibre délicat entre deux éléments essentiels du débat démocratique, l'accès de tous les citoyens à l'information politique, en particulier à travers l'action des partis politiques, et la protection de la capacité des citoyens à exercer leur liberté de manière éclairée.

Cela étant, dans la mise en œuvre de ces dispositions, il conviendra de ne pas remettre en cause à l'égard des opérateurs de plateforme en ligne, l'interdiction prévue par l'article 24 (3) du DSA (Digital Services Act – législation sur les services numériques).

Une disposition pourrait être introduite afin de restreindre les catégories de données à caractère personnel sensibles pouvant être traitées par le recours à des techniques de ciblage et d'amplification afin de limiter l'usage de ces techniques. En effet, s'il peut sembler légitime que, sous réserve du respect des conditions posées à l'article 12.1, les techniques de ciblage impliquent le traitement des données sensibles relatives aux convictions politiques des individus, il apparaît en revanche non justifié que des données relatives, par exemple, à l'orientation sexuelle ou à la santé des personnes soient utilisées pour le ciblage de publicités politiques.

1.2b Si vous ne soutenez pas une telle interdiction complète, pensez-vous que les techniques de ciblage et d'amplification utilisant des données sensibles devraient être spécifiquement interdites en période électorale ?

Les autorités françaises estiment que les dispositions de l'article 12 permettent de limiter l'usage des techniques de ciblage et d'amplification impliquant le traitement des données sensibles. Par ailleurs, une interdiction spécifique en période électorale viendrait considérablement limiter le débat démocratique, alors qu'il est fondamental pour les citoyens de disposer d'un accès à l'information politique en cette période.

1.2c Existe-t-il d'autres catégories de techniques impliquant le traitement de données à caractère personnel qui devraient être traitées spécifiquement ?

Compte tenu de la complexité inhérente à la multiplication des définitions juridiques d'une part et de la portée générale des obligations posées par le RGPD et la proposition de règlement d'autre part, il est préférable de ne pas mentionner explicitement dans la proposition de règlement d'autres techniques de ciblage ou d'amplification. En effet, les principes posés par le RGPD s'appliquent nécessairement si des données à caractère personnel sont en jeu, en plus de ceux posés par la proposition de règlement en présence d'un ciblage ou d'une amplification.

1.3 Obligations des responsables du traitement des données et des éditeurs de publicité politique

1.3a Pensez-vous que les dispositions énoncées aux paragraphes 3 à 6, telles que proposées par la présidence française, doivent être révisées (par exemple, clarification des obligations, étendue des informations à inclure dans l'avis de transparence, etc.) ?

Outre les précisions apportées aux paragraphes 3 à 6, il est à rappeler que la transmission des informations à l'éditeur de publicité à caractère politique est indispensable de la part du responsable de traitement.

CHAPITRE V – DISPOSITIONS FINALES

2. Article 14 – Représentant légal

2.1 Les États membres doivent-ils établir un registre accessible au public de tous les représentants légaux visés à l'article 14, paragraphe 1 ?

L'établissement de registre accessible au public contenant des informations sur l'ensemble des représentants légaux enregistrés sur le territoire des États membres est une proposition du rapporteur de la commission IMCO au Parlement européen, que les autorités françaises peuvent soutenir. Il conviendrait cependant de s'assurer de la bonne articulation de cette mesure avec l'interdiction des prestations de services de publicité à caractère politique commanditées par des parraineurs de nationalité d'un pays tiers de l'Union européenne proposée par le rapporteur.

3. Article 15 – Autorités compétentes et points de contact

3.1 Clarification des compétences – Article 15.1 à 15.5

3.1a Pensez-vous que l'article 15 devrait préciser davantage les rôles et les pouvoirs des autorités différentes nationales compétentes ?

Les compétences des autorités de contrôle compétentes pour contrôler l'application de l'article 12, visées au paragraphe 1 de l'article 15 sont explicitées au sein du RGPD, sans qu'il soit nécessaire d'ajouter des dispositions spécifiques. De la même manière, les compétences des autorités de de contrôle du respect du règlement par les prestataires de services intermédiaires sont précisées par la législation sur les services numériques (DSA).

En revanche, il est prévu au paragraphe 3 de désigner d'autres autorités compétentes en dehors de celles visées aux paragraphes 1 et 2. Il pourrait être utile de préciser que ces autorités peuvent être différentes de celles visées par le RGPD et le DSA, et que le contrôle puisse être opéré par le juge judiciaire.

Compte tenu de la situation particulière des éditeurs de presse et des médias, ces entités devraient être expressément exclues de l'article afin que le contrôle du respect des obligations de la proposition de règlement soit opéré par le juge judiciaire.

3.1b *Le pouvoir d'exiger des informations des prestataires de services de publicité politique devrait-il être explicitement inclus dans l'article 15.5 ?*

Le paragraphe 4 de l'article 15 indique que les autorités compétentes visées au paragraphe 3 peuvent exercer des missions de surveillance, notamment en demandant aux prestataires de services de publicité à caractère politique de leur donner accès aux informations nécessaires.

Le paragraphe 5 quant à lui prévoit les différents pouvoirs d'exécution des autorités compétentes et il semblerait, sur le modèle notamment du RGPD et du DSA, que les demandes d'accès aux documents ne constituent pas des pouvoirs d'exécution.

3.2 Clarifications de la coopération au niveau national ou au niveau européen – Article 15.6-15.9

3.2a Le cadre proposé pour la coopération au sein des États membres et entre eux, ainsi qu'au niveau de l'UE (réseaux électoraux nationaux, réseau européen de coopération en matière électorale) est-il approprié ?

Les autorités françaises estiment que la coopération entre les autorités nationales compétentes pourrait être clarifiée, d'autant qu'il est prévu au paragraphe 7 de l'article 15 que les États membres désignent une autorité compétente comme point de contact au niveau de l'Union. Le rôle dévolu à cette autorité nationale compétente (point focal, *primus inter pares*, autorité en charge de missions spécifiques, etc.) mériterait à cet égard d'être précisé, d'autant que cette autorité aura, en règle générale, également été désignée par les États membres parmi leurs autorités nationales compétentes au sens du paragraphe 6 de l'article 15.

Il conviendra également, à cet égard, de veiller à la bonne articulation entre ces mécanismes de coordination / coopération et les structures préexistantes tel le réseau européen de coopération en matière électorale (RECE), afin d'éviter d'éventuels doublons mais aussi de tenir compte de cas où l'autorité désignée comme autorité compétente au titre du paragraphe 7 de l'article 15 ne ferait pas partie du RECE.

De plus, il pourrait être utile de préciser la coopération entre les autorités compétentes, en dehors des campagnes électorales, d'autant plus que la publicité politique en France est interdite dans cette période.

3.2b Les dispositions relatives à la coopération entre les États membres énoncées à l'article 15.8 doivent-elles être clarifiées, par exemple en ce qui concerne les délais ?

Les autorités françaises estiment qu'un délai dûment déterminé de transmission des informations entre les différentes autorités compétentes des différents États membres pourrait être établi pour la période précédant immédiatement la tenue d'un scrutin (par exemple le mois précédent), afin d'agir plus rapidement dans cette période particulièrement sensible. Il convient en effet que des délais exigeants de réponse aux demandes d'informations soient prévus dans les périodes de campagne électorale, afin qu'il soit remédié dans les meilleurs délais aux pratiques qui ne seraient pas conformes aux exigences du règlement.

L'ajout dans le projet de règlement du nouveau §3 de l'article 10, s'agissant des obligations de réponse incombant aux prestataires de services de publicité politique, s'inscrivait dans la même logique et l'ajout en miroir de dispositions concernant les délais applicables à la coopération entre autorités compétentes aux fins de la mise en œuvre du règlement permettrait donc d'assurer la robustesse du règlement et d'éviter que la coopération entre États membres s'avère, le cas échéant, moins réactive que la coopération entre autorités nationales et prestataires de services.

4. Article 16 – Sanctions

4.1 Prise en compte des responsabilités qui s'appliquent aux parraineurs dans les dispositions de l'article 16 (par exemple, en excluant explicitement l'applicabilité des sanctions aux prestataires de services si le parraineur a fourni de fausses informations qui n'étaient pas manifestement erronées).

Les autorités françaises estiment qu'il est essentiel de prendre en compte la responsabilité du parraineur dans les dispositions des sanctions, et seraient favorables à l'exclusion, voire la limitation, des sanctions aux prestataires de services, en particulier quand ce dernier s'est conformé à ses obligations en vertu du présent règlement (demande de correction de la part du parraineur lors d'une erreur manifeste [Article 5.3], s'assurer que les informations transmises sont complètes et exactes, contacter les prestataires de services ou le parraineur s'il a connaissance d'une information inexactes etc.).

4.2 *Harmonisation du niveau de sanctions (par exemple, en introduisant un montant minimum et/ou maximum*

Les autorités françaises sont favorables à l'introduction d'un montant maximum, à l'instar du mécanisme prévu à l'article 83, paragraphe 5, du RGPD et à l'article 66, paragraphe 3, du RPDUE.

4.2 Renforcer/modifier la portée des infractions à considérer comme particulièrement graves en période électorale (par exemple en faisant également référence à d'autres articles du règlement) - article 16.4.

Les autorités françaises sont favorables à considérer comme particulièrement graves la violation des obligations définies à l'article 7 de la proposition de règlement, lors du mois précédant un scrutin.

4.3 Introduction d'une obligation pour les États membres de faire un rapport annuel sur le type et le montant des sanctions imposées

Il est important de tenir compte de la multiplicité des autorités compétentes et de la complexité liée, en particulier s'il est nécessaire d'effectuer des remontées d'informations sur l'ensemble du territoire. S'il était décidé d'introduire un tel rapport, en plus du rapport de la Commission prévu à l'article 18 de la proposition de règlement, il apparaitrait préférable de ne pas circonscrire son champ.

CHAPITRE V – DISPOSITIONS FINALES

5. Article 18 – Évaluation et révision

5.1 Pensez-vous que le contenu du rapport devrait être précisé ?

A l'instar de l'article 97 du RGPD, il pourrait être utile que le rapport comporte des indications sur les critères utilisés et, en cas de recommandation de modifications du règlement, sur les données qui ont présidées à cette recommandation.

6. *Article 19 – Exercice de la délégation*

6.1 Pensez-vous que le pouvoir d'adopter des actes délégués devrait être complété par d'autres critères (par exemple, obligation de consulter les États membres au préalable) ?

Les autorités françaises sont favorables à l'introduction d'une obligation de consultation préalable des États membres dans le cadre du pouvoir de la Commission d'adopter des actes délégués.

6.2 Quelle est votre position sur la période pendant laquelle la Commission est habilitée à adopter des actes délégués ?

Les autorités françaises sont favorables à ce que le pouvoir conféré à la Commission d'adopter des actes délégués soit conféré pour une durée déterminée.

6.3 Pensez-vous qu'une procédure soit nécessaire pour rendre les codes de conduites et standards contraignants (cf. : article 40 du RGPD) ?

Pas de position déterminée à ce stade. En première analyse, un régime similaire à celui prévu par l'article 40 du RGPD pourrait convenir (acte d'exécution).

ITALY

CHAPTER III

Article 12 – Specific requirements to targeting and amplification

Q 1.1 a) This prohibition should be referred to all categories of sensitive data (provided, observed or inferred). As for observed or inferred data, we suggest including further restrictions, such as the prohibition of targeted advertising based on pervasive tracking, i.e. the processing of personal data concerning individuals' behaviour across websites and services with a view of targeted political advertising on the basis of profiling, regardless of the sensitive nature of the personal data processed.

Q 1.2.a) We support **completely prohibiting the use of targeting or amplification techniques** involving the processing of sensitive data, taking into account the detrimental effects on the integrity of democracy and its political institutions that may result from the processing of personal data to target political messages to a specific person or groups of persons (microtargeting). Indeed, we believe that it is necessary to provide specific additional protection to personal data when it used in the context of targeting political advertising and therefore to complement the provisions contained in the GDPR and the EUDPR for the processing of personal data in this context as underlined by the EDPS in the Opinion 2/2022.

Q 1.2.c) See the answer to Q 1.1.a above.

Q.1.3.a) We suggest deleting the following text in paragraph 5: "*in particular, a reference to individuals' right to give or withdraw consent as applicable, and the right to object, in the context of political advertising and targeting or amplification techniques involving the processing of personal data referred to in Article 9(1) of Regulation (EU) 2016/679 and Article 10(1) of Regulation (EU) 2018/1725*" as it would be incompatible with a complete prohibition of the use of targeting or amplification techniques involving the processing of sensitive data. Moreover, further amendments are needed to paragraphs 3-5 to clarify that 'controllers' refers to "controllers using targeting or amplification techniques" and that also 'providers of advertising services', as well as 'political advertiser publishers' may act as 'controllers' either alone jointly with others. In this regard, for the sake of clarity**,** we suggest adding, even in a recital, that in the latter case those entities shall together ensure compliance with Article 26 of the GDPR and Article 28 of the EUDPR as applicable.

Chapter IV

Article 14 - Legal representative

Q.2.1 Yes, it could be a measure to ensure transparency

Article 15 - Competent authorities and contact points

Q.3.1.a) Yes. The competent authorities should be explicitly given a) the power to access the repositories of the digital services and to monitor their compliance and; b) the power to issue guidelines to ensure that the digital services repositories are structured and organized according to harmonized standards.

More in detail, we recommend the introduction of an obligation for the platforms to keep an improved version of their repositories of political ads, which should:

- grant access in real time to the repositories data, not to batches of data that could be filtered or organized by the platforms;

- be comprehensive, that is providing more data granularity on each individual advertising message published but also allowing analyses of the whole campaign;

- be harmonized, which means designed and structured in the same manner, respecting precise format standards provided by guidelines drafted by ERGA or by the European Commission. In any case, they should be comparable and allow benchmarking;

- be easily accessible, which means be accessible online and possibly be developed in machine-readable format;

- contain all the information listed in Article 7, Paragraph 1), Annex I and Annex II (of the Regulation) for each and every political ad.

In particular, through such repositories, public authorities and citizens should be able to link the ads they see to the political actor on whose behalf the ad is published and its political and sponsored nature, see how much has been spent on the ads or on the campaign, see why they are targeted with an ad and what data source was used for this targeting.

In addition, in Article 15(1), the reference to the monitoring of the application of Article 12 by data protection authorities should be deleted, since this could be interpreted as limiting the competences of those authorities. On the contrary, to avoid legal uncertainties that would hinder the provision of political advertising services and more in general the smooth functioning of the oversight system laid down by the proposed regulation, we strongly suggest replacing this reference by the following: "as far as personal data is concerned", taking into account that other aspects of the activities of political advertising may affect or relate to the processing of personal data, thus falling under the supervisory competences of data protection authorities referred to Article 51 of the GDPR and Article 52 of the EUDPR.

Q 3.1b) Yes.

Q 3.2a) Partly. It is appreciated the explicit reference to the national regulatory authorities or bodies under Article 30 of the AVMS Directive (Recital 58), as well as to ERGA, as a suitable body to ensure cooperation among authorities competent for the oversight of the Regulation (Recital 60), together with the European Cooperation Network on Elections. However, it is not clear why only the European Cooperation Network on Elections, and not ERGA, is mentioned by Article 15, Paragraph 9, when referring to the meetings of contact points aimed at facilitating the swift and secured exchange of information. Since both the European Cooperation Network on Elections and ERGA are considered "existing structures" that should be used to facilitate the cooperation among competent authorities, this should be reflected in Article 15, Para. 9, where also ERGA should be mentioned.

Furthermore some concerns arise concerning the identification of the single point of contact at EU level (Article 15, Paragraph 7), aimed at ensuring the effectiveness of the cross border cooperation among competent authorities. The concerns are based on the following considerations: in one of its clauses, Recital 62 stipulates that "the contact point should, if possible, be a member of the European Cooperation Network on Elections." As a matter of fact, not many national regulatory authorities under Article 30 of the AVMS Directive are also members of the European Cooperation Network on Elections. On the other hand, the rationale of this clause is quite unclear; if the goal of the contact points is to ensure proper coordination among Member States and between Member States and the European Commission, it has proved on many occasions that effective synergies may be fostered between the Commission and relevant NRAs, who have competences and experience to be tasked with the responsibility to monitor the implementation of this Regulation. There is no reason, therefore, to limit the chances of the audiovisual NRAs to be appointed as "contact points"; for such reason, it is proposed that the mentioned clause in Recital 62 is deleted.

Finally, we suggest including a reference to "supervisory authorities" in Article 15(6) to clarify the cooperation framework and avoid legal uncertainties with regard to the different competent authorities involved.

Article 16 - Sanctions

Q 4.2 The logic behind the decision to let the Member States lay down their own rules in sanctions is clear: the proposed Regulation does not intend to interfere with other nationally regulated aspects and does not want to deprive the Member States from their freedom to choose what sanctions may be suitable and adequate for the breaches to the Regulation's provisions. For this reason, Article 16 states that "*in relation to Articles 5 to 11, 13 and 14 Member States shall lay down rules on sanctions including administrative fines and financial penalties applicable to providers of political advertising services under their jurisdiction for infringements of the present Regulation*", and leaves to the privacy regulators the task to impose administrative fines for the violation of article 12.

However, since online advertising services are very often provided on a cross-border basis, the lack of a coordinated approach may jeopardize the success of the Regulation. Therefore, it is recommended that Article 16 should introduce a more coordinated and consistent sanctioning regime and an additional framework for proportionate, dissuasive, and effective sanctions in all Member States.

Besides the main aim of this draft Regulation is to foster transparency of political ads (and thus protect the democratic process) and to encourage and facilitate compliance. Therefore, the early reaction to a breach of the Regulation's provisions should be aimed at restoring the transparency, by promptly correcting the errors and repairing the damage done. Only in case the publisher does not correct the mistake and repair the damage (or in case it is too late to do so), a financial penalty should be applied. Following this approach, the adoption of a two-tier sanctioning system is recommended (in line with the provision of Article 15, Paragraph 5 of the proposed Regulation[1]), initially imposing the publisher to remedy the damage done by the violation of the rules:

[1] The proposed Regulation at Article 15 Paragraph 5 states: Competent authorities referred to in paragraph 3, where exercising their enforcement powers in relation to this Regulation, shall have the power to: (a) issue warnings addressed to the providers of political advertising services regarding their non-compliance with the obligations under this Regulation; (b) publish a statement which identifies the legal and natural person(s) responsible for the infringement of an obligation laid down in this Regulations and the nature of that infringement; (c) impose administrative fines and financial penalties

1. the Regulation should give the competent authorities the corrective powers, once the infringement has been spotted, not only to issue a warning against a non-compliant provider but also to issue an adequately reasoned order to any actor of the value chain to promptly correct the errors and repair the damage done[2];

2. a higher financial penalty should be issued at a later stage by the competent authority, only if the order has not been complied with in the specified timeline. And the financial penalty should be addressed to the actor responsible for the offence, which is not necessarily the publisher.

This two-tier system would solve the problem of restoring the damage done by the violation, because it would impose to the publisher the obligation to correct the ad to ensure adequate transparency, also (if possible) by sending a message to all the users who have already seen the ad.

In case there is the need of issuing a financial penalty, to ensure that the Member States have sufficient autonomy, the identification of minimum and maximum penalty ranges is recommenden. Both ranges are needed: the minimum range, in particular, is highly needed because some Countries might decide not to sanction the breaches to the Regulation on political ads, or to apply pecuniary fines that are irrelevant in order to induce the publishers to establish their headquarters in the Country. These ranges may be expressed as fixed amounts of money or in percentages, and the percentages may refer to the turnover of the company or to the value of the political ad campaign

Q 4.3 Yes. The infringements should be considered particularly serious during the electoral campaign.

Chapter V

Article 18 – Evaluation and review

No specific comments

[2] The order might as well be accompanied by a moderate financial penalty: without a financial penalty, in fact, the publishers might be less stimulated to check the correctness of the transparency note, knowing that the competent authority's initial reaction would be only a letter asking to correct the ad

Article 19 delegation

Q 6.1 Yes. We think that the power to adopt delegated acts should be supported by other criteria such as the obligation to consult Member States in advance.

Q 6.2 Yes. It would be preferable to limit expressly the period for which the Commission is empowered to adopt delegated acts.

Q 6.3 As for codes of conduct, first of all it should be clarified the relationship of the codes of conduct mentioned in Article 7(7) of the compromise text to Article 40 GDPR: notably if those codes are to be intended as the codes of conduct referred to in Article 40 GDPR, as the reference to this provision in recital 52 might suggest. If this is the case, the procedure outlined in Article 40 (9-10) to make those codes binding would be applicable. Secondly, it should be clarified if the scope of those codes of conduct is limited to the application of the transparency obligations set out in Article 7 of the proposed regulation as stated in Article 7(7) of the compromise text or if they could cover other aspects of the proposed regulation as the reference to "the exercise of data subjects' rights" in recital 52 might suggest. In any case a clear cooperation framework among the data protection authorities and the competent authorities to be designated under Article 15 of the compromise text should be established with regard to the assessment of the codes of conduct drawn up pursuant to the proposed regulation.