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NOTE

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

Following the meetings of the Working Party on General Affairs on 8 September 2023, delegations will find in Annex comments from Member States.

ANNEX

CZECH REPUBLIC	3
DENMARK	6
GERMANY	7
FRANCE.....	10
POLAND	12

CZECH REPUBLIC

WK 10245/23

Points 1 to 5

- We can, in principle, accept the proposals in points 1 to 5.
- Nevertheless, it is unclear whether the proposed recitals on risk assessment and COM's oversight on VLOPs represent only additional recitals or whether it is meant to replace the relevant articles and move them to the recitals. In the latter case, reference to ensuring compliance with Article 5(2d) would possibly have to be reworded (and in any event, the referencing is not correct as paragraph 2d is not contained in the original EP text).
- Concerning the recital on the reach of a message, we would welcome, linguistically, a somewhat contextual introduction as to why it is necessary to collect information on the reach of online advertisement. Otherwise, we agree with the conceptual definition.
- We can agree with and, therefore, support also the wording of the recital on the urgency procedure.

Point 6 – Entry into force

- As regards the applicability of the Regulation, we would first like to thank the COM for preparing of this analytical input, which we consider very useful.
- In our view, the phased application regime seems to be the only feasible option if the aim is to have the new rules applicable for the upcoming European elections.
- However, we cannot present a more precise position at this point, as this will require deeper coordination at the national level.
- In any case, we would like to recall and emphasise that, for us, designation of any competent authority (i.e. including Article 14) will have to be done by legislative means, with the legislative process taking approximately one year in the CZ, if not more.

New definition of political advertising

- To start with, our presented comments should be understood along the lines of the current COM's proposal.
- As we have previously indicated, we consider narrowing the scope of the Regulation only to paid political advertising as potentially risky. However, in view of the application practice and the concerns raised in relation to the scope, we do not oppose limiting the scope to paid content only – while of course being aware that proving the actual remuneration will pose a challenge and that this regime will also create some room for circumvention.
- We would like to state that we agree in principle with the proposed definition and with the Commission's attempt to capture cases which do not have a direct remuneration element. However, the proposal, or its interpretation in the recital, raises further questions, and we fear that it may further complicate the application practice and interfere with freedom of speech even more than the original COM proposal and the Council's agreed mandate.
- Moreover, according to our understanding, transparent requirements (Chapter II) would now affect also certain legitimate situations, which so far have been potentially covered only by Chapter III, as foreseen by the Council.
- Perhaps a more precise definition of in-house activities would help, but we still believe that this might apply even to situations where it is not necessarily appropriate and that it will create further confusion for the competent authorities and hence would require a solid methodological support at the EU level.
- We do not, therefore, oppose changing the scope, but we consider it necessary to define more precise limits.

European public repository

- As regards the period of availability, we can ultimately be flexible in this respect. Still, we would welcome an explanation as to whether this period refers to the period after the publication by the publisher or even after the whole retention period.
- If the latter is the case, we would also welcome an explanation as to why the COM has opted for this approach and whether this will impact public control/research activities, which the proposal apparently seeks to achieve.
- In this sense, if we set up a public repository at the European level, it makes sense to us to make the advertisements available within a period close to real-time publication or immediately after its contractual publication period. In any event, if making advertisements available in the repository becomes relevant only after a certain period, it would seem appropriate to adjust the deadline in row163aa.
- Moreover, from a research point of view, it makes sense to keep the advertisement in the repository for a reasonable period of time, though it is not clear to us whether the COM intended to circumscribe this period.
- As far as the inclusion of VLOPs is concerned, we think that if we proceed with the creation of a project like this, which will also entail obligations for small and micro enterprises (to which we have reservations), the repository should in principle cover all political advertisements centrally.
- Last but not least, we strongly disagree with the idea that publishers obliged by this Regulation to make advertisements available in the repository have to pay fees in order to comply with the obligations.

DENMARK

Proposal of phased approach to entry into force (WK 10245/2023)

Denmark has concerns that Member States will not be able to implement a number of provisions in time before the elections for the European Parliament, if a compromise on article 20 and entry into force is not reached.

Denmark would generally prefer that the regulation enter into force 12 months after its publication in the Official Journal of the European Union, as outlined in the Council's mandate. This would allow Member States to make the necessary arrangements to ensure correct implementation of the Regulation. However, Denmark is open to a longer implementation period than 12 months for certain provisions e.g. as proposed by the Commission inspired of the DSA.

EP proposal of a European online repository

Denmark is hesitant to support imposing advertising publishers who are not a VLOP or VLOSE an obligation to provide information to the European Agency for Online Political Ads within 48 hours, as proposed by the EP in row 163aa. As previously stated by Denmark, it is important that small and medium-sized enterprises are not subject to unnecessary administrative burdens, which is why we would like small and medium-sized enterprises to be exempted from this obligation to provide information.

Furthermore, it is noted that if the proposal is to be implemented, the Commission must bear the costs within the existing budgetary framework through possible reprioritisation.

GERMANY

DEU maintains its general scrutiny reservation.

DEU asks the ESP PCY to provide an updated 4 column table representating the latest state of play.

Doc. WK 10246/2023 (issue of scope)

DEU supports the 6 steps proposed by the COM to adapt the scope:

[Step 1:] DEU supports the proposed amendments to clarify that **messages from non-political actors** need not only to be liable but also **to be designed** to influence the outcome of an election [...] in order to be considered political advertising (Row 27 and Row 107) ; and that such messages must have a **clear and substantial link** to the potential to influence such democratic processes. This is in line with the Council's GA.

[Step 2:] DEU also welcomes the clarifications in rows 29 and 107b to **exclude** political views expressed under **editorial responsibility**.

[Step 3:] DEU supports the clarification that **fund-raising messages of civil society organisations (CSOs) in their own** should not be regarded as designed to influence the outcome of an election, etc.

[Step 4:] DEU as well welcomes 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. **The wording in row 107d is** in line with the wording of the general approach of the Council.

[Step 5:] DEU supports the newly proposed row 19a and the clarification in row 107b, which are in line with the aim to exclude purely personal messages from the scope of application of the regulation.

[Step 6:] Further, DEU welcomes the aim to **clarify the scope and exclusion of purely personal messages in row 26 (recital 16)**. There should be no inappropriate limitation of expression of opinion by individuals and should also exclude messages placed directly by politicians through their social media accounts.

Concerning the EP proposal to limit the scope of Chapter III (targeting requirements):

DEU is open for the proposal to add “**delivery**” in Art. 2. Regarding the suggestion to limit the definition of “political advertising” to activities “in return for payment or for similar consideration...” we would like to ask the PCY and the Commission for their assessment.

Doc. WK 10245/23 (informal COM suggestions on several recitals, sanctions, entry into force)

First of all, DEU reiterates that it is against different obligations for VLOPs/VLOSEs in the one hand and other political advertising publishers on the other hand.

Concerning the text under discussion (recital for the risk assessment to cover EP proposal in 135d):

The text seems to go into the right direction as it only refers to the already existing obligations under Arts. 34 and 35 DSA and clarifies that these are also applicable to political advertising publishers that are VLOPs/VLOSEs.

Concerning the recital on VLOPs COM oversight:

With respect to the COM’s exclusive competence with regard to monitor and oversight VLOPs, the **national digital services coordinators** should also be **mentioned**, as they as well safeguard coherence with the DSA and will work closely with COM.

Concerning the recital on the “reach of message”:

DEU is open for the text proposal.

Concerning “sanctions”:

DEU welcomes the proposal to refer to the sanctions as stipulated in the DSA with regard to coherence of EU legislation.

Concerning the recital on “urgency procedure”:

DEU is open to refer to Art. 66 GDPR. However, the “period preceding elections or referendums” should be clarified.

- Concerning the “entry into force, phased approach”

DEU raises a **general scrutiny reservation** with regard to the proposed deadlines/entry into force for the necessary implementing measures or steps on national level. In general, DEU supports the underlying idea to have a common EU framework on transparency of political advertising in place for the next EU elections in June 2024. However, obligatory national legislative procedures have to be followed. With regard to the DSA, the DEU national implementing act is still in the middle of the national legislative process and the mentioned entry into force by February is extremely tight.

Doc. WK 10058/23 (informal COM suggestions on possible EU public repository)

- DEU reiterates that the request of the EP for a European public repository for all political ads online is reasonable. Concerning the informal propositions of the COM DEU has some preliminary remarks:
- **Row 163x:** DEU understands the COM’s concern that the cost to the Union budget might significantly increase by establishing a hosting service and that a proportionate fee may be charged which will be reviewed. DEU still has to examine this proposal as well as whether VLOPs should be taken into account in this provision or not.

FRANCE

- WK 10246/2023 sur le champ d'application

. Rappeler notre soutien à la limitation de la définition des publicités politiques thématiques (*designed to*) et à l'exclusion des contenus éditoriaux et journalistiques. Saluer la rédaction proposée au considérant 19 introduisant : « political advertising should be clearly distinguished from editorial content ».

. Indiquer que les autorités françaises préfèrent la proposition d'ajout d'un critère de rémunération au sein de la définition de la publicité politique (page 4) plutôt que les rédactions proposées aux lignes 107b et 26 (ajout de « *in a personal capacity* ») qui viennent vider le règlement de sa substance.

- WK 10245/2023 : rédaction de différents considérants et entrée en vigueur du règlement

. Considérant sur la portée de la publicité politique : rappeler que vérifier la complétude de telles informations (nombre de clics, de vues etc.) sera difficile à mettre en oeuvre pour une partie des services de publicités politiques, notamment du secteur de l'audiovisuel et de la presse..

Considérant sur l'évaluation des risques pour couvrir la proposition du PE (135d) : rappeler que les services de publicité politique sont d'ores et déjà visés par l'article 35 du DSA et qu'un renvoi ne semble pas nécessaire, mais reste néanmoins acceptable s'il se limite à un considérant.

. Considérant relatif aux pouvoirs de la Commission s'agissant des VLOPSE : Prévoir que la Commission européenne est l'autorité en charge de la supervision de certaines obligations applicables aux VLOPSE apparaît cohérent avec le schéma de gouvernance prévu dans le DSA. Néanmoins, la référence à l'article 5(2d) devrait être supprimée, dès lors que ce dernier a été déplacé dans un considérant et se limite à de simples renvois au DSA.

. Entrée en vigueur du règlement : rappeler que les autorités françaises restent attentives à l'impact d'une entrée en vigueur trop rapide sur la proportionnalité des obligations applicables aux plateformes ainsi que sur leur cohérence avec les dispositions du DSA ; elles sont également attentives à l'impact de l'entrée en vigueur des obligations applicables pour les plus petits éditeurs de publicité politique qui ne sont des VLOPSE afin qu'elles disposent de suffisamment de temps pour assurer la mise en oeuvre de leurs obligations, notamment pour le secteur de l'audiovisuel et de la presse.

- WK 10058/2023 relatif au répertoire européen de publicités politiques

163 aa : rappeler qu'il serait préférable que le délai soit de 72 heures, notamment pour les éditeurs de publicité politique qui ne sont pas des VLOPSE, même si la possibilité pour les plateformes de réaliser cette transmission de manière automatique rend un délai de 48 heures acceptable.

163x : Indiquer que les précisions apportées par la Commission européenne visant à une meilleure prise en compte des VLOPSE vont dans le bon sens afin d'assurer la bonne articulation de ce registre avec celui que les VLOPSE devront mettre en place conformément à l'article 39 du DSA.

En outre, s'agissant de la proposition de la Commission de faire payer des « frais d'hébergement » de ce registre, demander plus de précisions mais bien rappeler que la délégation française sera attentive à ce que ces derniers n'entraînent pas de charges disproportionnées pour les acteurs.

POLAND

Document WK 10246/2023

Approaches to adapting scope

Our concerns in relation to the interpretation of the provisions lead us to support the EP's approach of limiting the scope of the Regulation to 'political advertising services.' This will limit possible threats to the respect of the right to freedom of expression and access to information. Otherwise, there may be a practical problem for both service providers (or sponsors) and the competent regulatory authorities responsible for overseeing compliance with the Regulation, in terms of assessing what communications are to be treated as political advertising.

The current proposals aimed at clarifying definitions, or limiting advertising to paid advertisements we assess positively, however we would prefer that there be a clear limitation of Article 12 to services as well. This will reduce legal uncertainty.

Definition of 'targeting techniques'

- We are interested in receiving an explanation of the reasons for including the phrase 'exclude them by processing personal data, in particular through the collection of their data' in the definition.

Article 2, paragraph 1, point (2)

- PL supports the definition that includes the provision 'in return for payment'. This definition clearly determines what content is covered by the Regulation.

We ask for justification for adding the provision 'or for similar consideration, or which would normally have been paid for'.

Article 2, paragraph 1, point (6)

- We express flexibility to the proposed provisions.

Recital 15, line 25

- We express flexibility to the proposed provisions.

Recital 16, line 26

- PL supports the incorporation of the exemption 'except for messages of purely private or purely commercial nature'. Please clarify the need to add a definition of 'corporate control'. In our view, it has no added value and overextends the definition of political advertising.

Recital 17, line 27

- In our view, the phrase 'Fundraising messages of non-profit entities' used in the compromise proposal is too narrow, and should be expanded also on other entities - alternatively, please explain why this particular type of organization was emphasized in the recital.

Recital 17a, line 27a

- PL supports the compromise proposal.

Recital 17b, line 27b

- We express flexibility to the proposed provisions.

Recital 17c, line 27c

- We express flexibility to the proposed provisions.

Recital 18, line 28

- PL supports the EP's proposal. We strongly oppose the compromise proposal, particularly the addition of the provision 'Public communications by, for or on behalf of public authorities aiming to create a favourable perception towards a given political party or candidate in order to impact an election, referendum, regulatory process or voting behaviour should constitute political advertising'. The wording is too vague and imprecise. This will result in different interpretation of the provision by the Member States. Moreover, under a broad interpretation of the phrase, any information can be classified as political advertising.

Recital 18a, line 28a

- We express flexibility to the proposed provisions.

Recital 19, line 29

- We express flexibility to the proposed provisions.

Recital 19a

- PL supports the compromise proposal.

Article 2, lines 105, 106, and 107b

- The proposals included in the document are unclear to us. We are interested in receiving some explanation, in particular if this is an alternative proposal to the one put forward on page 4 of the definition document – 'political advertising means the preparation, placement, promotion, publication, **delivery** or dissemination, by any means, of a message, **in return for payment or for similar consideration, or which would normally have been paid for, including inhouse activities, or as part of a political advertising campaign**'.
- We express flexibility to the provisions proposed in the line 106. The compromise proposal that we agree with the most includes the phrase '**in return for payment**'.

Article 2, line 106

- We support the provision that includes the exemption 'unless it is of a purely private or a purely commercial nature'.

Line 107d

- We accept the change.

Recital on risk assessment to accommodate EP's request in 135d

- We have no objections to the compromise proposal.

Recital on VLOPs COM oversight

- We have no objections to the compromise proposal.

A recital on what the reach of the message could mean in row 163 m (transparency notice element from the EP text)

- We have no objections to the compromise proposal.

Sanctions - a new paragraph in article 16 to complement rows 230a and 230b:

- PL supports the proposal.

Recital on urgency procedure

- We have no objections to the compromise proposal. However, we see it necessary to specify the length of the period prior to elections or referendums during which these requirements will be applied.

Annex - assessment of proposal for earlier entry into force

We assess the presented proposal negatively. We understand the need to adopt the Regulation in such a way that it will apply to the upcoming EP elections in 2024. However, taking into consideration that this Regulation is a completely new legal act, its implementation at the national level in Polish conditions will first of all require the establishment of an institutional framework and therefore legislative changes. This legal changes are subject to specific deadlines throughout the legislative process and will also require the approval of both houses of parliament. Member States should therefore be given a reasonable timeframe for the necessary adjustments, and in this respect, Poland fully supports the Council's mandate of 12 months for implementation of this regulation. We are concerned about the risk that with shorter timeframe we will not be able to ensure that the institutional framework is established in time, especially when it comes to defining competencies between relevant authorities. We disagree with the proposal that some of the provisions should enter into force earlier. The list of provisions does not indicate how the provisions that are to come into force sooner should be applied and enforced at the Member State level prior to the entry into effect of the remaining provisions including those establishing the institutional framework. Please clarify the approaches used in determining which provisions are to come into effect sooner and which are to come into effect later. Please also clarify how these provisions are to be enforced in the Member States without, for example, identifying a competent authority at the national level for supervision.

Document WK 10243/2023

Article 3a

- We express flexibility to the proposed provisions.

Document WK 10058/2023

Article 7b

- As a general comment on Article 7b regarding the establishment of a repository – the EP's justification for this idea is insufficient. Such an obligation to create a repository for all online advertising (not just political advertising) is already in place for Very Large Online Platforms (VLOPs) and stems from Regulation 2022/2065 - here we note that VLOPs virtually control most of the online advertising market.
- We oppose the proposal of fees for storing ads with related information in the repository. This is an excessive burden on businesses.

Article 7b, line 163t

- We have no objections to the compromise proposal.

Article 7b, line 163u

- We express flexibility to the provisions proposed by the EP.

Article 7b (1) a, line 163v

- We express flexibility to the provisions proposed by the EP.

Article 7b (1) b, line 163w

- We express flexibility to the provisions proposed by the EP.

Article 7b (1) b, sub-paragraph 2, line 163x

- The text of the provision should be more precise. The retention period should be clearly indicated and unified throughout the Regulation. The period of obligation to ensure the availability of online political advertising and the information published with it should be explicitly stated and should not be excessive.

Article 7b (2), line 163y

- We have no objections to the compromise proposal.

Article 7b (3), line 163z

- We have no objections to the compromise proposal.

Article 7b (4), line 163aa

- We oppose specifying a short timeframe for the publisher to submit information to the repository. This could result in a potential increase in financial burdens for businesses, especially SMEs. Bearing in mind the search for compromise solutions when it is necessary to maintain in the text of the Regulation a specific time for submitting information to the repository, we prefer the longest possible period.

Article 7b (5), line 163ab

- We agree with the comment that keeping this provision is not necessary - it is now included in the proposal in line 163z.

Article 7b (6), line 163ac

- We express flexibility to the provisions proposed by the EP.

Article 7b (6) a, line 163ad

- We have no objections to the compromise proposal.

Article 7b (6) b, line 163ae

- We have no objections to the compromise proposal.

Article 7b (6) c, line 163af

- We have no objections to the compromise proposal.

Article 7b (6) d, line 163ag

- We have no objections to the compromise proposal.

Article 7b (6) e, line 163ah

- We have no objections to the compromise proposal.
