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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	8647/3/22 REV3
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 meeting of the Working Party on General Affairs on 27 September 2022, delegations will find attached comments from Portugal on the Presidency compromise text (ST 8647 2022 REV3).

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PORTUGAL

1. Portugal shares the goal of promoting open and fair political debate and protecting the integrity of elections. It also recognizes the importance of increased transparency regarding political advertising and related services.
2. Taking into consideration the reference made to article 57 TFEU and the scope of the matters covered, it should be clearer to what extent political advertising services are offered on a cross- border basis, in particular with regard to elections at local and regional level. In this respect, it should be further discussed to what extent a directive could be a more adequate legal instrument to attain the proposed goal.
3. Regarding the legal definitions foreseen in Article 2, Portugal has the following main general comments:
 - a) The concept of “political advertising” seems unnecessarily diffuse, going beyond election and referendum campaigns and proposing to also include campaigns aimed at influencing legislative or regulatory processes. These matters are much closer to lobbying, that has a particular regulatory framework at EU level and different approaches among Member- States. The related concept of “issue-based advertisement”, on the other hand, is not clarified.
 - b) The concept of “political actor” is both excessive in scope and confusing in its boundaries. When referring to *candidates for one of the leadership positions of a political party*, it is not clear if it encompasses both national and local leadership positions. Furthermore, it is difficult to verify the existence of legal rules in all Member States defining the status of internal candidates or the existence of legal regulation of campaigns and internal electoral acts related to political parties. The reference to *campaign organizations with or without legal personality* points in a sense of informality that is not in line with the frequent requirements of electoral laws regarding proper identification and accountability. The reference to *any natural or legal person who represents or acts on behalf of any of the other persons* previously mentioned, creates uncertainty regarding the form of representation and raises the problem of compatibility with strict rules of accountability and oversight common to Member- States legal frameworks.

Finally, it is not clear to what extent the concept of “political actor” is distinguished from the concept of “sponsor”, given its significant extension. In this regard, it should be clarified why such a broad concept was constructed if it is used in a very limited way in the remaining articles, while the concept of sponsor dominates the main substantive provisions of the text.

4. On the broader topic of protecting fundamental rights, the draft regulation does not always draw clear boundaries between what would be considered political advertising and what could be limited to the exercise of the fundamental freedoms of expression or press (particularly if one takes into account the fact that individual candidates are included in the broad concept of political actors).
5. The transparency obligations for political advertising services (Chapter II) pose compatibility difficulties with some legal institutes specific to the Portuguese legal system regarding political communication. Examples of this are the legal regime, constitutionally determined and guaranteed, foreseen in electoral and referendum legislation, of the right to airtime; or the legal regime of journalistic coverage during electoral periods, that regulates electoral propaganda through commercial advertising media, which determines a ban on the purchase of commercial advertising for election campaign purposes, extended to online platforms. Therefore, further clarification on the impact of the provisions foreseen in the draft regulation on these matters is still required.
6. As regards the transparency requirements for each political advertisement (Article 7), the scale of the obligations foreseen may jeopardize the effectiveness of the intended communication and increase the costs associated with it, particularly in Member States where campaigns are regulated and time-bound and the appearance of advertisements is properly contextualized in traditional media, to which the Regulation applies in the same terms as to online media. In other words, even though the concern underlying the proposal is relevant regarding content shared online, particularly through social networks, in the classic media the application of the regime seems inappropriate.
7. The provisions regarding targeting and amplification of political advertising (Chapter III) call for a more comprehensive reflection on the admissibility of the use of targeting and amplification whenever it is carried out with the sacrifice of citizens' fundamental rights, in particular their personal data, especially those qualified as sensitive under the terms of the current legislation on data protection.

8. As regards the supervision and enforcement provisions (Chapter IV), we consider that the power to request access data, documents, or any necessary information from the political advertising service providers by competent authorities should be included in Article 15.5. We also consider that the provisions on cooperation between the Member States laid out in Article 15.8 need further clarification, including the setting of deadlines, that are crucial in any electoral period. Regarding the rules on sanctions (Article 16), we do not favour the introduction of an obligation for the Member States to annually report on the type and amount of sanctions imposed, but we could consider a recommendation to that effect.
9. Regarding the final provisions (Chapter V), we consider important to include other criteria for the adoption of delegated acts (Article 19), including the obligation to consult Member- States in advance.
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