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NOTE

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	11214/23
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 25 September 2023, delegations will find in Annex comments from Member States.

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BULGARIA

We support **a clear scope of the regulation** that defines political advertising only in relation to the provision of a paid service. In this respect, we can support the compromise proposal in the EC (WK 10246), in particular the formulation in art 2(2): "*'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 in-house activities, or as part of a political advertising campaign."*

At the same time we find it pertinent that the whole text be aligned with the definition proposed above. Accordingly, some texts still need adjustments. E.g. the definition of 'political advertising campaign' (Article 2(1)(6)) should be aligned with the definition of political advertising and the same goes for recitals 15 and 16.

Phased implementation of the regulation. As a matter of principle, we retain a preference for adherence to the Council mandate - implementation of the whole Regulation 12 months after its publication in the Official Journal. Yet, we could show possible flexibility under Article 3a (obligation of non-discrimination of sponsors of political advertising).

We do not support early implementation of the transparency obligations for political advertising services - Article 5(1) and (2a), [Article 6a, Article 7(1a) and (1b)] due to concerns about introducing additional administrative burdens on service providers at an early stage, when they cannot be met. We share the same arguments about the introduction of additional administrative burden with regard to the provisions on supervision and enforcement and specifically the designation of a legal representative [Articles 14(1)-(2)], competent enforcement authorities - Article 15 and sanctions - Article 16(1).

GERMANY

Reiterating our points on Art. -12/12:

Concerning Art. -12 and Art. 12:Organic content, in particular any social media posting, should not be covered by these provisions to protect freedom of expression. If both provisions are to be combined in one Article, this exception should be included for instance in a new paragraph Art. 12 (6).

Concerning Art. -12: DE would prefer to extend this prohibition to all political advertising by electronic means as previously suggested, and not limit the scope to online political advertising by „political advertising publishers“.

Concerning Art. 12: As long as no explicit exception for organic content is included and subject to the review of the concrete wording of such exception:

DE suggests to review the use of the term “controller” in Art. 12 para. 1 and 3 within the meaning of the GDPR as the addressee of the provision, in particular in light of the ECJ case law on joint controllership for the use of online platforms. If online platform users can also be "controllers" when they post "organic content", they could also be addressees under the proposed wording of Art. 12.

In DE opinion, it may be possible to replace the term "controller" in Article 12 para. 1 and 3 with the entities using such techniques, i.e. cumulatively "sponsors, political advertising publishers or providers of political advertising services" (cf. for example, Doc. 11214/23 line 121 on "targeting or amplification techniques", or line 121b on the proposed definition of "ad delivery techniques", where EP lists certain users of such techniques). This suggestion is however subject to review of definitions of these terms in Art. 2 of the draft, which aren’t entirely finalised yet.

DE supports CZ proposal to amend the wording of Art. 12 para. 1 to „…processing of personal data in situations other than those defined in Article -12“ to also include the prohibition of „processing of sensitive data“ (as Art. -12 only covers the „use“ of it). It makes sense to apply the regulation in Art. 12 to the processing of sensitive data as well.

Dok. WK 11606/2023 (Art. 7a, Art. 15)

DE supports propositions on Art. 7a (transparency notices):

DE is in general open for the compromise text proposals.

Concerning the proposal on Art. 15 (compentent authorities and contact points):

DE is open for text proposals, as mainly lingustic adaptations

However, the added value of the reference in Art. 15 para. 3 to the competent authorities under AVMSD is questioned. A narrowing of the MS' leeway should be avoided. Also, the reference to Art. 49 DSA in Art. 15 para. 2 sentence 4 should be specified in order to avoid a contradiction with sentence 1.

Concerning row 222a: DE asks whether it is necessary to include that the network of national contact points shall meet „at least twice a year“ – and not leave it up to the request of COM or the MS.

Dok. WK 11776/23 (Art. 20, phased entry into force)

DE reiterates its general scrutiny reservation with regard to the proposed deadlines/entry into force for the necessary implementing measures or steps on national level.

DE supports in general a "phased entry into force approach". We would welcome the proposed gradual application in order to prevent unwanted exertion of influence in the elections to the European Parliament next year.

With regard to the proposed amendment in Art. 20 para. 2 [page 1, row 255, 4th column]:

The proposed entry into force on 1 January 2024 would give sponsors and companies less than 2 months to adapt practices and implement measures to comply with the articles concerned. DE wonders, whether this period is sufficient and proportionate and would like to ask the PCY and the COM for their assessment.

In any case, DE underlines the importance to consider the impact on already booked or running campaigns (for instance, elections on local or regional level). If obliged to adapt within less than 2 months, very likely disproportionate and unforeseeable burdens. Thus, need to address this situation appropriately.

DE would like to point out that the Digital Services Act (DSA) in its whole is only applicable from 17 February 2024 – alignment should be considered for the following provisions:

Art. 3a (non-discrimination against sponsors for political advertising services)

Art. 5 para. 1 and 2a (identification of political advertising)

Art. -12 (prohibition of profiling)

Art. 12 para. 1, 2, 2a and 2b (requirements for targeting and amplification)

Art. 14 para. 1 and 2 (legal representative)

However, DE cannot support the inclusion of:

Art. 15 (designation of competent authorities by MS + monitoring): 1 January 2024 seems not possible (!).

With regard to Art. 15 para 1 - in DE, possibly 17 different authorities are competent under Art. 51 GDPR because of the federal system (the 16 Data Protection Supervisory Authorities of the Länder and the Federal Commissioner for Data Protection and Freedom of Information (BfDI)) – depending on the addressees of Art. -12, 12 of the draft which are currently still being discussed. DE authorities would require more time to prepare for the monitoring.

With regard to Art. 15 para. 2 – the digital services coordinator (DSC) for the monitoring of intermediary services under the DSA on MS level has not yet been appointed in DE; deadline under DSA is the 17 February 2024. Obligatory national legislative procedures have to be followed before designation is possible. 18 months after entry into force seem more realistic, in line with the DSA.

However, DE is open for supervision for/monitoring of VLOPs and VLOSEs by European Data Protection Board (EDPB) (Art. 15 para. 1a) and the COM (Art. 15 para. 2a) from an earlier point of time than 18 months after entry into force. The 17 February 2024 might be a possible entry date.

Art. 16 para. 1 (sanctions): DE cannot lay down rules in national law until 1 January 2024. 18 months after entry into force seem more realistic (in line with the DSA).

Concerning the list of deadlines [page 3]:

Concerning the repository: striking that COM gets more than twice as much time than MS (48 months vs. otherwise max. 18 months). DE would like to know the reason and proposes alignment with MS obligations, i.e. 18 months. In addition, repository should be in place well before the evaluation of the regulation, so that the necessary information is available then.

Concerning the designation of competent authorities and the enactment of rules on sanctions: DE prefers 18 months [instead of 12 months] after entry into force, in line with the DSA.

Dok. WK 11970/2023 (Art. 3a(3))

DE raises a scrutiny reservation with regard to Art. 3a(3) as well as to the proposed new recital.

Reaktive Sprechpunkte zu Art. 2 und recital 18 (definitions / scope of the regulation)

DE maintains its support for 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 (row 107d). In particular, DE stresses importance of the wording “they are not designed to influence” instead of “they are not liable to influence”. This is in line with the general approach of the Council as well as the recent COM proposal (WK 8362/23).

IRELAND

Document WK 10058/2023

- Row 163v – Ireland has no specific comments to make and is flexible on the suggested revisions to Article 7b(1)(a).
- Row 163x - Ireland notes the suggested revisions to the second subparagraph of Article 7b(1). While Ireland is flexible on the issue of a public repository for online political advertisements established by the Commission to host all online political advertisements from political advertising publishers that are not very large online platforms (VLOPs) nor very large online search engines (VLOSEs) and the period after which such online political advertisements should be placed in the repository, we would have concerns that any charges for the hosting of such advertisements would give rise to additional costs on small and medium sized enterprises.
- Row 163aa - Ireland notes that this amendment proposes to make online political advertisements available in the public repository within 48 hours of its first publication. Clarification would be appreciated on how this reconciles with the requirements in row 163x which proposes that online political advertising should be hosted in the public repository *"…for the period after the period of availability required of the publishers of political advertising by this regulation."*.

Document WK 10245/2023

- Recital for risk assessment – Ireland has no specific comments to make on the proposed recital.
- Recital on COM oversight – Ireland has no specific comments to make on the proposed recital.
- Recital on reach of message – Ireland supports the text of the proposed recital.
- Recital on sanctions – Ireland is flexible on the text of the proposed recital.
- Recital on urgency procedure - Ireland has no specific comments to make on the proposed recital.

- Entry into force (phased approach) – while Ireland would broadly support the early entry into force of the provisions in respect the labelling of political advertisements and their accompaniment by transparency notices, we would have concerns that there is not sufficient time for the entry in force of the provisions in the proposal relating to compliance and enforcement in advance of the European Parliament elections in 2024. The designation of competent authorities, development of compliant mechanisms and design of sanctions for non-compliance will require an adequate period of time for the necessary arrangements to be put in place and for the requirements of the proposal to bed down among both service providers, sponsors, competent authorities and the general public alike. A period of 18 months along the lines of the Digital Services Act would be considered an adequate period of time before entry into force becomes fully effective.

Document WK 10246/2023

- Row 25 – Ireland supports the proposed text for recital 15 in the fourth column of the working document.
- Row 26 – Ireland supports the proposed text for recital 16 in the fourth column of the working document.
- Row 27 – Ireland has no specific comments to make on the proposed text for recital 17 in the fourth column of the working document.
- Row 27a – Ireland welcomes and supports the proposed text for recital 17a in the fourth column of the working document. However, the text may need to also clarify that communications between an elected member and his/her staff/team do not constitute political advertising to provide a level playing field for (independent) candidates who may wish to stand for election and who are not members of political parties. Furthermore, it should be made clear that normal written communications such as newsletters, circulars etc by political parties, elected members and candidates which are either unaddressed and circulated to households by hand or are addressed to households and circulated through the postal system are similarly not considered political advertising.
- Row 27b – Ireland has no specific comments to make on the proposed text for recital 17b in the fourth column of the working document.

- Row 27c – Ireland has no specific comments to make on the proposed text for recital 17c in the fourth column of the working document.
- Row 28 - Ireland supports the proposed text for recital 18 in the fourth column of the working document.
- Row 28a - Ireland has no specific comments to make on the proposed text for recital 18a in the fourth column of the working document.
- Row 29 - Ireland supports the proposed text for recitals 19 and 19a in the fourth column of the working document.
- Row 105 – Ireland has no specific comments to make on the proposed text in the fourth column of the working document.
- Row 106 – Ireland has no specific comments to make on the proposed text in the fourth column of the working document.
- Row 107a to 107e - Ireland welcomes the additional text in the fourth column of the working document clarifying what does not constitute political advertising.
- Row 126a - Ireland has no specific comments to make on the proposed text in the fourth column of the working document.
- Row 126h - Ireland supports the proposed text in the fourth column of the working document.

Document WK 11970/2023

- Ireland is flexible on the compromise text on the non-discrimination provisions proposed in Article 3a(3) and on the accompanying new recital. For the purposes of clarity, Ireland would suggest the inclusion of "within the Union" at the end of the draft Article 3a(3).

Document WK 11606/2023

- Rows 163a-n – these amendments insert an entire new article on transparency notices into the proposal setting out in detail the information and detail that should inform a transparency notice. In broad terms, the requirements for more precise information to be included in transparency notices may bring a greater of clarity of what is required of political advertising service providers. Accordingly, Ireland notes the comments set out in the fifth column and could support the proposed amendments as part of an overall compromise package;

- Row 163o - Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 163p - Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 163q - Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 213 - Ireland has no specific comments to make;
- Row 214a-d - Ireland opposes the proposed amendments from the European Parliament strongly on the grounds that responsibility for compliance and enforcement of data protection laws should rest with the national data protection authorities and should respect the country of origin principle;
- Row 215 – Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 215a - Ireland requests more information / clarification on this proposed amendment and its potential impact on the compliance monitoring / enforcement regimes under the proposed regulation;
- Row 216 - Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 217 - Ireland has no specific comments to make;
- Row 218 - Ireland has no specific comments to make;
- Row 218a - Ireland notes the comments set out in the fifth column;
- Row 219 - Ireland has no specific comments to make;
- Row 219b - Ireland notes the comments set out in the fifth column;
- Row 220 - Ireland has no specific comments to make;
- Row 221 - Ireland notes the comments set out in the fifth column;
- Row 221a-c - Ireland notes the comments set out in the fifth column;
- Row 222 - Ireland has no specific comments to make;
- Row 222a - Ireland notes the comments set out in the fifth column and is flexible in this matter;
- Row 223 - Ireland notes the comments set out in the fifth column and is flexible in this matter.

MALTA

As a general note, Malta would like to start by highlighting that caution is needed not to hinder political participation and to provide the necessary support for smaller service providers. To this end, **with the aim to decrease the difficulties encountered, we feel that the Regulation should be limited to political advertising services only**. In smaller jurisdictions like ours, such risks and challenges are very real especially when political advertising in a very smaller context - where it might be too cumbersome to comply with the rules, particularly for younger and new candidates or parties who campaign for local elections as well as for smaller service providers.

AUSTRIA

We thank the Commission for the informal suggestion concerning a phased entry into force. Upholding our general reservation concerning this legislative act we consider it indispensable to have a sufficiently long period

1. for the preparation and enactment of the accompanying legislative measures and
2. for the services concerned to adequately prepare for their manifold future obligations.

This means that – as a minimum period for the preparation – none of the obligations should apply before 2025.