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NOTE

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

Following the meeting of the Working Party on General Affairs on 7 February 2023, delegations will find in Annex comments from Member States on the European Parliament's report.

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GERMANY

- Still need to analyse the EP's position. In particular, with a view to the **practical impact of the suggestions** for political advertising and regarding implementation in Member States.
- We fully support the efforts of the Presidency. While we have supported the Council's general approach, we have stated in the protocol we advocate for a complete ban on **targeting using sensitive personal data** in order to achieve coherence with the regulations of the DSA. In view of the positions of the EP, we will continue to pursue this position of the joint statement in the trilogue negotiations all the more and, in the sense of finding a compromise, campaign strongly for a rapprochement towards the EP position. With regard to the issue of sensitive personal data, we think it would be important for the Council to deal with the issue at short notice and, ideally, to invite external expertise, such as the **European Data Protection Supervisor**, to the next meeting of our working group.
- Furthermore, we would also like to ask the Presidency to take into consideration the **concern of civil society raised** in the open letters and carefully evaluate how the different scopes of Chapter II (transparency) and Chapter III (targeting and personalised delivery of political content) touch upon that. In this context, we would like to point out that civil society expressed concern regarding covering unpaid political expression, but has not called for safeguarding the business model of online platforms by being able to target and amplify political content using personal data.
- Finally, we would like to remind you not to lose sight of the **practical implementability of the regulation**. We would like to **ensure timely applicability before the EP elections** in 2024. At the same time it is clear that **implementation deadlines of six or even three months are unrealistic** in view of the complexity of the regulations. In the case of the Digital Services Act, which contains comparable regulations in this respect, an implementation period of 15 months was agreed in the trilogue, after the majority of the Member States in the Council had even spoken out in favour of a period of 24 months. Here we should remain realistic and remember that not only the providers have to comply with the regulations, but the Member States have to create the legal basis for the enforcement of the regulation.
- With this in mind, it seems all the more necessary to come to a conclusion as soon as possible.

ESTONIA

1. → New recital 14 and article 3a - political advertising services shall be provided only to a sponsor or a service provider acting on behalf of a sponsor who is a citizen of the Union, or a natural or legal person residing or established in the Union. The purpose of the extension is clear. However, it is an important additional restriction in the field of advertising, and thus we need to further analyse the impact. ¶
2. → Article 12. European Parliament proposes some amendments that we would support, notably the prohibition concerning the use of sensitive personal data in the context of political advertising. However, some of the data processing limitations are likely to be too restrictive, such as the prohibition to combine more than four categories of personal data. ¶
3. → Articles 15 and 16. We do not support assigning investigative powers and the right to impose penalties to the European Data Protection Board. ∞ ¶
4. → Article 20. We do not support EP-s proposal that the regulation should already apply 3 months after the entry into force. This is too soon. ¶

CROATIA

Ministry of Justice and Public Administration's comments with regard to the EP's amendments toward the Article 12 – **amendments No. 202-210:**

The EP's amendments No. 202-210 are generally aimed at the complete prohibition of the processing of special categories of personal data in the context of political advertising, without any possible derogations in terms of the existing provisions of Article 12, paragraphs 2 and 3.

From that point of view, these amendments are in accordance with the objectives from the Joint statement on the general approach from 13 December 2022 (16013/22, ADD 1) as adopted by Germany, Croatia, Cyprus, Greece, Luxembourg and Spain.

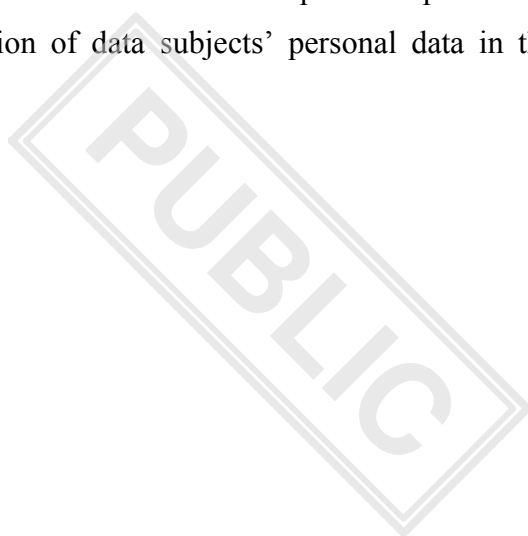
The EP's amendments significantly limit the processing of "regular categories" of personal data. In this sense, the advertising techniques and delivery of advertisements ("ad delivery"), which include the processing of personal data, will be limited to those personal data which are explicitly provided by the data subject, and the consent is provided as the legal basis for processing. The purpose of processing is solely the presentation of a political ad.

At the same time, the mentioned techniques may combine a maximum of four categories of personal data, including the location of the data subject, which is limited at the level of the constituency if the political advertisement is related to an elections or a referendum. If not, the location used for targeting and ad delivery techniques must not be below the municipality level, and if two or more categories of personal data are processed, the targeted group must comprise a minimum of 0.4% of the population of the Member state, but at least 50,000 citizens (data subjects).

Also, 60 days preceding an election or a referendum, the categories of personal data are additionally limited to the language of the data subject, the location of the data subject at the level of the constituency and on the information that the data subject is voting for the first time.

According to the amendment No. 209, the Article 12 shall not apply to internal communications within *inter alia* political parties, foundation, association or any other non-profit body, to their members and former members and to communications, such as newsletters, linked to their political activities, as long as those communications are solely based on subscription data and therefore strictly limited to their members, former members or subscribers.

Our general assessment is that the EP's amendments to the Article 12 of the Proposal are presenting significant progress in relation to the level of protection of data subjects' personal data in the context of political advertising.



LATVIA

Article 15 paragraph 5 b and Article 20 paragraph 5

Latvia is concerned about the short period that will be allocated to the member states to change the national regulation. According to the good practice of election regulation, amendments to election laws cannot be made later than one year before the elections. Three months is a short period of time in which new national laws and regulations must be developed and adopted and amendments to existing laws and regulations must be made (for example, administrative fines and financial sanctions regarding ad targeting). Also, time is needed to provide the necessary funding for the competent authorities to perform the tasks provided for in the proposal for the regulation.

Article 16

Article 16 of the proposal for a regulation mentions the obligation of Member States to provide for provisions on sanctions, including administrative fines and financial sanctions. In this aspect, it should be ensured that these sanctions can also be non-punitive administrative legal coercive measures (for example, an administrative act with the obligation to perform certain actions and its forced execution). At least part of the violations mentioned in the proposal of the regulation could be prevented in Latvia by issuing an administrative act (priority principle of the administrative process), instead of using punitive measures. Apparently, the proposals of the regulation do not prohibit the use of such coercive measures. In Latvia's opinion, it would be necessary to supplement recital points with a relevant explanation.

Article 16 paragraph 1

Amendment no. 247 typical sanctions criteria (effective, proportionate and dissuasive sanctions) are supplemented by the word "timely". Such an approach differs from the usual practice of defining the criteria for sanctions used in the legislation of the European Union. In Latvia's view, the timeliness of sanctions is already included in the criteria of both efficiency (effectiveness) and deterrent (preventive) impact. Therefore, the need for such a criterion is questionable, including when evaluating the legal system as a whole.

Article 16 paragraph 3 point a

Amendment no. 248 provides for a new criterion for the application of punishment, namely repetition. Committing the same or a similar violation can be taken into account when applying a sanction, as a characterizing circumstance. However, Article 16(3)(d) of the proposal of the Regulation already provides that "any relevant previous infringements" are taken into account. Consequently, here the same criterion is at least partially repeated twice.

Article 16 paragraph 3 point b

In the initial version of Article 16, Paragraph 3, Subpoint "b" of the proposal of the Regulation, it is provided that when deciding on the type and amount of sanctions, it is also taken into account whether the violation was committed intentionally or due to carelessness. If administrative responsibility will be expected for any of the violations in Latvia, then the existence of such a penalty criterion will not correspond to the administrative responsibility system of Latvia. In Latvia, forms of guilt are no longer distinguished and in practice they are not assessed in the process of an administrative violation. Therefore, amendments to this subsection would be desirable. In the opinion of Latvia, possible solutions would be either to delete the mentioned subsection, or to make the list of criteria optional (not "takes into account", but "may take into account").

Regarding the data issue, Latvia points out that it conceptually supports the changes made by European Parliament (EP) strengthening the protection of personal data and introducing more stringent rules in cases where personal data are processed for political advertisement purposes. In particular:

- Latvia welcomes EP amendments 63 to Recital 47 which stresses the risks associated with manipulation. Indeed, the person is not in position to form her opinion independently and objectively where presented only with the facts which corresponds to her already formed views.
- Latvia is greatly in favor of EP proposed Amendment 68 which adds new Recital 47 e prohibiting targeting and ad delivery techniques based on special categories of personal data, and the corresponding Amendment 202 proposing changes in Article 12.
- Latvia supports the EP efforts to strengthen the idea that the processing of personal data shall take place only when explicit consent of the data subject for the specific purpose of political advertising is provided. Therefore, Latvia supports the EP proposed Amendment 207 to Article 12 (1c).

- Latvia welcomes the amendment 215 by EP to Article 12 (3) ca according to which an annual risks assessment shall be made.

At the same time Latvia strongly disagrees with EP proposed Amendment 245 to Article 15a according to which any person shall have the right to lodge a complaint with the competent authority alleging an infringement of this Regulation. In Latvia's opinion any person could lodge a complaint, but it should be authority's prerogative to act on it. Complainant should not have a subjective right to ask for the punishing of another person, in particular where this person is not affected directly by the advertisement. For this reason, Latvia supports the version of Article 15 proposed by the Council.

According to Amendment 11 "Proposal for a regulation Recital 13" this Regulation should not affect, in particular, the fundamental right to freedom of opinion and freedom of speech. In this case Latvia doesn't support the proposed wording of the recital as right to freedom of opinion is affected per se, the main point being that those restrictions are justified and proportional to the legitimate aim. In fact EP Amendment 41 to Recital 31 points to the fact that freedom of expression is subjected to modulations and restrictions which are necessary and justified by the pursuit of a legitimate public interest.

Latvia doesn't support EP Amendment 64 which proposes new Recital 47 and states that the abusing of data protection rules stipulated in Regulation (EU) 2016/679 cannot be solved under the current regulatory framework. In Latvia's opinion there are rules and mechanisms in place for situations where GDPR, in particular Article 5 and 6, is breached. Latvia agrees that those mechanisms are robust and slow and not fitted to political advertising where reaction to such breaches should be swift.

Latvia is skeptical about EP proposed Amendment 154 to Article 6 (2) which states that the information shall be retained in a machine-readable format for a period of ten years as far as it concerns personal data. Latvia sees no reason to prolong period for retaining personal data especially in machine-readable format as it poses greater risk to data subjects rights to privacy and data protection.

As for Amendment 203 concerning the title of Article 12, Latvia doesn't support the EP text proposing to apply rules only to online targeting.

AUSTRIA

Preliminary remarks on EP report from a data protection perspective:

- Amendment 64 (Recital 47a): This passage seems to be particularly harsh and should be reconsidered or deleted. The aim of the existing data protection law is to provide a general framework for the processing of personal data and to provide sufficient protection for all processing of personal data in all sectors by all controllers. Nevertheless, it is also firmly understood that there is a need for sector-specific stricter data protection rules in certain areas such as election law or electronic communication.
- Amendment 65 (Recital 47b): We fully support the reference to “dark patterns” in the context of political advertising. The negative effects of the use of “dark patterns” on online platforms and services are amplified exponentially when dark patterns are used for the purpose of political analysis as it puts into question the freedom of democratic choices and therefore weakens the democratic process as a whole.
- Amendment 68 (Recital 47e): In this context again, we have to point to the ECJ decision from 1 August 2022, C-184/20, paras 117-128, in particular para. 127, which states that the processing of personal data that are liable indirectly to reveal sensitive information concerning a natural person are also included in the strengthened protection regime prescribed by those provisions. This means that even data that prima facie are not considered as sensitive data, such as data regarding sex, age, addresses etc. fall – when processed for the purpose of targeting or amplifying in the context of political advertising – under Article 9 (1) of the GDPR, since those data will then (indirectly) reveal political opinions. The impact of this decision on the Proposal should be considered.
- Amendment 112 (Art. 1 para 4a): A clarification of the relationship of the Proposal with the GDPR is much appreciated; particularly the second sentence would safeguard against any misapplication of the Proposal in order to bypass data protection requirements.

POLAND

AM 154 (Article 6 Paragraph 2) – we do not support that proposal. Setting a period of 10 years for retaining the information collected by providers of political advertising services, both in written and electronic form, as well as in a machine-readable format will lead to a potential increase in the financial burden on entrepreneurs.

AM 143 (Article 5 Paragraph 2b), AM 145 (Article 5a), AM 149 (Article 6 Paragraph 1 Point ba), AM 151 (Article 6 Paragraph 1 Point ca), AM 152 (Article 6 Paragraph 1 Point d), AM 153 (Article 6 Paragraph 1 Point da), AM 162 (Article 7 Paragraph 1 Subparagraph 1 Point ba), AM 176 and 177 (Articles 7a and 7b) – Poland does not support additional requirements regarding the identification of political advertisements, as well as record-keeping and transparency imposed on providers and publishers of political advertising. In our view, those proposals do not create any visible benefits for users.

AM 167 (Article 7 Paragraph 1b) in connection with AM 174 (Article 7 Paragraph 7) – EU Member States should play a meaningful role in defining transparency rules for the activities undertaken by the political advertising publishers as it is foreseen in the text of the Council's general approach. Therefore, we are not in favour of the adoption of delegated acts by the European Commission establishing standardised techniques for labelling political advertising as foreseen in EP amendments.

AM 178 (Article 8 Paragraph 1) – we emphasise that a political advertising report should be created and published as a separate report, not as part of a management report defined in the 2013/34/EU Directive. The content of the provision proposed by the EP raises some doubts of interpretation. Therefore, we would like to maintain wording of Article 8 as it is contained in the Council's general approach that better reflects Poland's request and provides more legal certainty.

AM 202 – 220 (Articles -12 and 12) – while expressing its support for the adoption of the Council's general approach to the draft regulation (GAC meeting on 13 December 2022), the Government of Poland pointed out that there should be an exemption from the prohibition of Article 12(1) of the draft Regulation, allowing the use of targeting or amplification techniques when the data subject has clearly, and without any restriction from the mechanisms provided by the platform, made his or her political views public.

The EP's amendments in Article 12 introduce much greater restrictions on the processing of personal data compared to the EC's proposal and the Council's general approach. The EP proposes a complete ban on the use of sensitive data for targeting and political advertising delivery techniques and significant restrictions on the use of other personal data.

The EP's amendments in Article 12 are incompatible with the Polish position as described above. We are therefore opposed to the amendments tabled by the EP regarding the processing of personal data for targeting and ad delivery techniques. We consider them too restrictive.

AM 225 – 228 (Article 15 Paragraphs 1b – 1d) – In Poland's view, granting the European Data Protection Board the supervision of proceedings potentially raises the level of compliance with the provisions of this Regulation. On the other hand, this new power of the Data Protection Board raises some doubts as the supervisory role of the Board is not clearly defined. Therefore this issue requires further clarification.

AM 257 (Article 16 Paragraph 7a) – Poland is not in favour of imposing an additional administrative burden on Member States when it comes to preparing extra reports on this issue. We do not see an added value in this reporting.

AM 265 (Article 20 Paragraph 2) – the period of 3 months to implement the provisions of the Regulation from its entry into force is too short, given the complexity of these provisions. We advocate maintaining the 12 months proposed in the Council's general approach.

FINLAND

Finland supports the Council's general approach. Our comments regarding EP position

- Finland has been concerned about the administrative burden on SMEs. Although concerns are addressed in Gozi's report (the new recital 13a), the report also creates new due diligence and reporting requirements that may place an administrative burden on small actors in particular – in this case, they will have to consider whether to accept political advertising anymore. On the other hand, the obligations proposed in the report for large online platforms and very large search engines can be considered justified.
- The Commission's proposal is balanced, including the processing of data belonging to special categories of personal data (Article 12). The proposal for a full ban on data belonging to special categories of personal data (Article 12) goes beyond what is necessary and proportionate. It is essential to ensure that the use of amplification techniques and targeting are based on sufficient transparency and explicit consent given by the person.
- the increases in the supervisory role of the European Data Protection Board are not clear enough and differ significantly from the current tasks and powers of the Board and blur the role of the Member states' data protection authorities as authorities supervising the processing of personal data (Articles 15 and 16).
- Finland has also considered it important that the sanctions provided for in the proposed regulation are proportionate to the seriousness of the infringement without jeopardising the operating conditions of SMEs. The statement of the Parliament of Finland's Constitutional Committee stresses that the proposals for breaching obligations must not be so great that they would have a so-called "chilling effect" on freedom of expression.