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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

Further to the meetings of the Working Party on General Affairs on 24 and 27 April 2023, please find in Annex comments received from delegations.

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DENMARK

28 April 2023

Concerning row 134a

From Danish perspective, the text in the Council's mandate is preferred. It is considered to be disproportionately burdensome for providers of political advertising services to assess to the best of their ability the truthfulness of the sponsors' statement as to whether it is a political advertisement, which follows from EP's proposal.

Concerning row 135

The text in the Council's mandate is preferred as it is considered sufficient pursuant to article 5 (2) to oblige providers of political advertising services to ensure that the contract stipulates that the sponsor etc. must provide the necessary information.

Concerning row 142 (previously presented on GAG 27 March 2023)

Denmark notes that no agreement has been reached on row 142. Denmark continues to support Council mandate, which foresees that providers of political advertising services must keep the information they provide in connection with the provision of their services for five years. The Regulation should not lead to unnecessary administrative burdens for companies.

If it is agreed that the data should be kept for 10 years, it is important to maintain the text from the Council's mandate regarding line 142a in order to ensure that the obligation to maintain the data does not apply to companies falling under Article 3 (1) of Directive 2013/34/EU.

Concerning rows 163a-c

The text of Council's mandate is preferable as EP's proposals in the rows in question seem at first sight to unnecessarily elaborate on the text of Council's mandate on transparency communications.

Concerning row 163o

The text of Council's mandate is preferred as the proposed elaboration in row 163o seems more detailed than necessary.

Concerning row 168

Denmark overall supports the proposed draft but the notification of any illegal advertisements should be possible without a payment requirement.

Concerning rows 169a-e

The text of Council's mandate is preferred as it is difficult to see the value of a specification of the obligation of political advertising publishers to facilitate the possibility of communicating information on possible illegal political advertisements to the provider of political advertising services.

Concerning row 177

Unnecessarily tight deadlines should be avoided for providers of political advertising services. In view of the shorter deadline for elections, we do not see the need to tighten the deadlines further in general.

Concerning row 177a

From Danish perspective, we support the addition of the shorter deadline in the month leading up to an election. However, we are concerned that it will be too burdensome for medium-sized companies to be included under the 48 hour deadline in article 10 (2a) as proposed in the circulated compromise text draft. It is important to ensure that the article will work as intended and does not affect medium-sized companies disproportionately.

Concerning rows 214a-d

In regards to row 214a, it should be considered to clarify the reference to Regulation 2022/2065 Article 33 to 'Article 33, para 1'.

Concerning Article 15 (2)

It is unclear to us which powers the nationally designated supervisory authorities under Article 15 (2) will have in connection with the enforcement of the rules of the Regulation on political advertising. It is only clear that those authorities must 'monitor the compliance'.

A previous presentation by the Commission gives the impression that it is the Member State's Digital Services Coordinator who has to enforce the rules (and has "enforcement powers"). However, it does not appear from the proposed regulation that the DSC has powers in relation to the rules of the Political Advertising Regulation, for example in the form of access to fines or warnings or to carry out inspections.

In Denmark, it is being considered if the supervision under Article 15 (2) should not lie with the supervisory authority supervising compliance with the DSA, and in this context it is unclear whether Denmark has the freedom to give the necessary powers to that supervisory authority if it is not the DSC that is responsible for enforcement.

24 April 2023

Denmark can support the wording of the draft agreement text in rows 144-148.

Concerning row 147, it should be specified what is meant by "financing the sponsor" as otherwise this could contribute to vagueness which affects the actors that have to comply with the regulation.

Furthermore, it should be considered if it is sufficiently clear what is meant by "the entity controlling the sponsor" which could be either understood as a company with the voting majority or if it could also be understood as a company that has control on other grounds such as actual influence for example via a contractually determined control via a shareholders agreement or another de facto control.

GERMANY

DEU has assessed both the relevant EP text proposals as well as the draft agreements and comments on these as follows:

a. 123 (Art. 2 Para. 1 Nr. 10)

DEU is open for the draft agreement in Art. 2 para. 1 point 10 (line 123)

b. 134a (Art. 5 Para. 1a)

DEU is open for this text proposal which could be used as a bargaining chip in the trilogue negotiations.

c. 135 (Art. 5 Para. 2)

With regard line 135 DEU prefers the General Approach. The EP proposal is partly inconsistent and goes from the content beyond the scope what is necessary for the providers of political advertising services to comply with Art. 6 para. 1 by referencing e.g. to Art. 7 para. 1 or Art. 7(a) para. 1 that are only with relevance for political advertising publisher.

d. 135a (Art. 5 Para. 2a)

DEU is open for the draft agreement in line 135a.

e. 135e and 135j (Art. 5 a)

DEU is also open for the draft agreement in lines 135e and 135j.

f. 136 and 142 (Art. 6 Para. 2)

DEU is open for the draft agreement in lines 136 and 142.

g. 163a-c (Art. 7a)

DEU is open for the draft agreement in lines 163a-163cj.

h. 163o

DEU is in general flexible with regards to the text proposals of the EP in Art. 7a para. 2 subpara 1 and 2 (line 163o).

DEU prefers in general the text of the General approach in Art. 7 para. 3 sentences 1 (in line 158) in contrast to the text proposals of the EP in Art. 7a para. 2 subpara 3 and 4 (line 163o) but is open with regards the level of ensurance to replace the notion “reasonable efforts” with “best efforts” if the PCY needs to make a compromise to the EP.

DEU is open for the text proposal of the EP in Art. 7a para. 2 supara 5 as it is almost identical with Art. 7 para. 3 sentences 2 (see line 158).

Regarding the EP text proposal in Art. 7a para 2 subpara. 6, DEU has a preference for the General approach (see Art. Art. 7 para. 3 sentences 3 (in line 158)) but gives the SWE PCY room for maneuver.

Concerning the EP text proposals in Art. 7a para 2 subpara. 7 and 8 DEU is flexible as it is almost identical to the General Approach (see Art. Art. 7 para. 3 sentences 4 and 5 (line 158)).

i. 165 (Art. 8 Para. 1)

DEU is open for the draft agreement in line 165 for Art. 8 para. 1.

j. 166a (Art. 8 Para. 2a)

DEU wants to ask the PCY what the intention of the EP is with its text proposal and how important this proposal is for the EP.

DEU wonders what the added value of the text proposal of the EP in line 166a is and has doubts whether it could be implemented in practice. Therefore, DEU is not supportive of the proposal in line 166a.

k. 168 and 169 a-e (Art. 9)

DEU is open for the draft agreement in lines 168 and 169a-e (Art. 9).

These text proposals are inspired by Art. 16 of the Digital Services Act which puts forward a notice and action mechanism. DEU suggests that the wording of the text proposals in line 168 and 169a-e should be as far as possible identical with the Digital Services Act whilst considering the specifications of this Regulation.

l. 177 and 177a (Art. 10 Para 2 and 2a)

DEU is open for the draft agreement in lines 177 and 177a.

m. 190-192 (Art. 11 Para. 5, 6 and 7)

DEU is open for the draft agreement in lines 190, 191 and 192.

n. 214a-d (Art. 15 Para. 1a, 1b, 1c, and 1d)

DEU understands the rationale of the EP text proposals in lines 214a-d with the attempt to supervise VLOPs/VLOSEs at EU-level as in the Digital Services Act in order to avoid a potential bottleneck in some Member States.

DEU would like to know from the SWE PCY how important a centralized supervision of VLOPs/VLOSEs at EU-level is for the EP.

DEU wonders also whether this provision is aiming at increasing the competences and widening the tasks of the European Data Protection Board and suggests to evaluate whether the EDPB see itself sufficiently suited for the task assigned to it in lines 214a-d.

In addition, DEU wonders what the COM thinks about these EP proposals and would like to know if the COM could be an alternative option to the EDPB for being competent for a centralized supervision of VLOPs/VLOSEs in this Regulation as in the Digital Services Act?

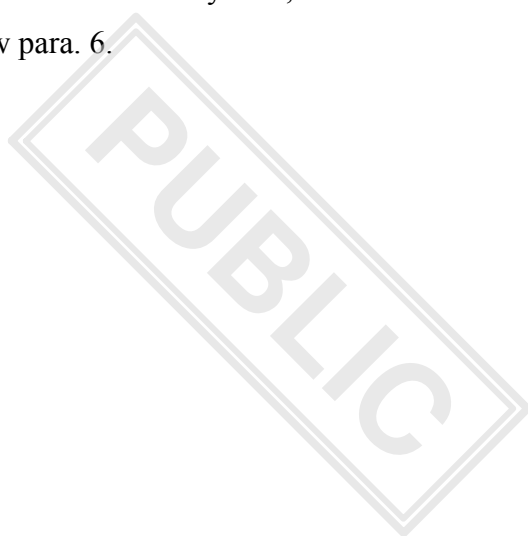
o. 215a (Art. 15 para. 2a)

DEU wonders what the position of the COM is concerning the text proposal in line 215a as the COM shall be assigned with the relevant competence. DEU intends to follow the position of the COM.

p. 217 (Art. 15 Para. 4)

DEU favors the General Approach with regard to Art. 15 para. 4 sentence 1 which foresees a deletion as there seems no added value of the content considering the content of Art. 15 para. 5. However, DEU would agree if the SWE PCY intends to merge the relevant wording with para. 5 in case the the PCY needs flexibility.

DEU is open for the EP text proposal in Art. 15 para. 4 sentence 2. In any case, this content should be moved to Art. 15 para. 5 as a new subpara. or as a new para. 6.



IRELAND

- Row 134a – Ireland has no particular objections in relation to the proposed amendment. However, we wonder what would “best efforts” constitute in practical terms and would this be placing a general monitoring obligation on all providers of advertising services?
- Row 135 – the EP proposal would appear to be more precise in terms of the retention of information for record keeping purposes and, as such, may bring a greater of clarity for the providers of advertising service;
- Row 163o – this appears to be quite an extensive amendment which on the surface places obligations on sponsors, providers of political advertising acting on behalf of sponsors and political advertising publishers to ensure that information provided in respect of political advertising and accompanying transparency notices is accurate and correct. In that context, Ireland would have no objections to it although clarification is sought by HQ on whether this amendment is intended to replace some of Article 7;
- Row 166a – As stated in the General Affairs Working Group Ireland would not support this. It would appear to be placing an additional administrative burden on providers of political advertising;
- Row 169 a-e – Ireland is proposing to make similar amendments to those proposed here in Part 4 of the Irish Electoral Reform Act 2022. These amendments would appear to be consistent with provisions in the Digital Services Act and would appear to be intended to assist providers of political advertising in determining “actual knowledge”;
- Row 214 a-d – As stated in the General Affairs Working Group Ireland would oppose these amendments strongly. Responsibility for compliance and enforcement of data protection laws rests with the national data protection authorities and should respect the country of origin principle;
- Row 215a – Ireland would request more information / clarification on this proposed amendment and its potential impact on compliance monitoring / enforcement; and
- Row 217 – Ireland has no particular objections in relation to the proposed amendment.

FRANCE

1) S'agissant des propositions de compromis qui ont été transmises le 25 avril par la présidence (1123, 1135a, 1135j, 1142, 1163a-c, 1165, 1168, 1169, 1177, 1177a, 1190, 1192) :

(1135a) : Rappeler – comme déjà fait lors du groupe du 27 mars – qu'elle aurait préféré le maintien du libellé du Conseil (« *become aware* »), qui était plus équilibré.

(1135j) : Demander à la présidence suédoise de préciser ce point, qui est une reprise du mandat du Parlement européen. Le support utilisé pour diffuser un message (presse, audiovisuel, plateforme...) deviendrait-il un critère permettant d'identifier une publicité politique ?

(1142) : Le délai de conservation des données étant toujours en discussion, souligner que les autorités françaises sont attachées au mandat du Conseil sur ce point (délai de 5 ans).

(1168) : Souligner encore une fois qu'elle aurait préféré le maintien du libellé du Conseil, qui permettait plus de flexibilité pour la réception des signalements.

(1177a) : Saluer la dérogation introduisant un délai de 48h pour fournir les informations aux autorités compétentes, le mois précédent les élections, qui figurait dans le mandat du Conseil. Noter que cela n'a pas été fait sans concession puisque les « *reasonable efforts* » ont été supprimés s'agissant de l'exception pour les PME, ce qui vide celle-ci de son sens. La formulation du Conseil aurait été préférable.

2) S'agissant des nouvelles propositions du Parlement, et des points qui n'ont pas encore fait l'objet de compromis :

(1135 et 1163o) Indiquer que la présidence suédoise peut faire preuve de flexibilité à cet égard, à conditions que la transmission des informations continue d'être garantie tout au long de la chaîne de valeur. De plus, le Parlement européen tient uniquement responsable de la véracité des informations liées aux techniques de ciblage l'éditeur de publicité à caractère politique. Il sera nécessaire de prévoir une transmission de ces informations de la part des responsables de traitement vers l'éditeur de publicité à caractère politique. Enfin, les autres propositions correspondantes à la ligne 163o sont cohérentes avec les propositions du Conseil à l'article 7 (3).

(1166a) Indiquer que la proposition du Parlement européen est intéressante mais qu'il sera nécessaire de s'assurer que cela ne constitue pas une contrainte trop lourde pour les entreprises, en particulier les PME, et qu'elle laisse suffisamment de flexibilité pour répondre aux contraintes nationales (notamment en ce qui concerne la presse écrite pour la France).

(1169 b-e) : Il est proposé un mécanisme de justification d'un signalement réalisé en cas de publicité politique illégale, sur le modèle du DSA. Indiquer que la présidence suédoise peut faire preuve de flexibilité sur ce point, qui permettrait de limiter les signalements injustifiés.

(1214a-d/1215a/1217) : 1214a-d : S'agissant du pouvoir conféré au Comité européen de la protection des données d'initier des enquêtes en cas de non-respect par les très grandes plateformes ou très grands moteurs de recherche de l'article 12 et suiv., des précisions supplémentaires pourront être demandées concernant son articulation avec le DSA, ainsi qu'avec le RGPD./.

CROATIA

I. General remark

Our positions toward the Article 12 and special categories of personal data were confirmed in the joint statement that Croatia submitted, with 5 other member-states, with regard to the general approach text from 13 December 2022 – it reaffirmed our principled position: *„We therefore prefer a ban on the use of special categories of personal data (Art. 9 (1) GDPR) in the context of the targeting and amplification of political advertising. Art. 12 (2) and (2a) should be deleted so as to not allow for the use of such data, regardless of consent...“*.

Our views for the meeting of Working Party on General Affairs (GAG), on 27 April 2023, are with regard to the working document from 25 April 2023:

II. Points 214 and 214 a-d regarding the competent authorities and contact points

With regard to the proposal from point 214 to delete, in art. 15 paragraph 1, the reference to Art. 12a of the Proposal of the Regulation regarding the specific requirements related to targeting and amplification – we see no reason for such an approach, especially considering that Article 12a expressly refers to, and in this sense builds on, the requirements established in Regulation (EU) 2016/679.

That said, we support the general approach text with the reference to Art. 12a.

Regarding the proposals from points 214 a-d – first we would like point out that the Article 16, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU) stipulates that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.

Furthermore, Article 8 of the Charter of Fundamental Rights of the European Union sets the principles with regard to the protection of personal data: Everyone has the right to the protection of personal data concerning him or her. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the

right to have it rectified. Compliance with these rules shall be subject to control by an independent authority.

In this regard, we point out that the introductory statement No. 47 of the Proposal for the Regulation confirms that *„The conditions set out in this Regulation on the use of targeting and amplification techniques involving the processing of personal data in the context of political advertising should be based on Article 16 TFEU.“*

Also, we point out that in accordance with Art. 55, paragraph 1 of the General Data Protection Regulation (GDPR) *„each supervisory authority shall be competent for the performance of the tasks assigned to and the exercise of the powers conferred on it in accordance with this Regulation on the territory of its own Member State.“*

In addition, we would like to point out that in accordance with the Regulation (EU) 2016/679, the European Data Protection Board does not have the authority to initiate, run or conduct legal proceedings against a controller or processor who has establishment in the member states, in particular, it does not have the authority „to relieve“ powers from the national supervisory authorities.

Finally, one of the fundamental postulates related to the implementation of tasks and authorities of supervisory bodies is the right of natural or legal person to an effective legal remedy against the decisions of the supervisory body – such a legal proceedings, in accordance with the GDPR, should be brought before the courts of the Member State where the supervisory authority is established.

Given the arguments provided above, we do not support the proposals from points 214 a-d.

III. Point 217

In the context of competent authorities and contact points, we would like to point out that according to the Article 54 of the Regulation (EU) 2016/679 each member state shall provide by law, among others, the conditions governing the obligations of the member or members and staff of each supervisory authority, prohibitions on actions, occupations and benefits incompatible therewith during and after the term of office and rules governing the cessation of employment. Also, it

stipulates that the member or members and the staff of each supervisory authority shall, in accordance with Union or Member State law, be subject to a duty of professional secrecy both during and after their term of office, with regard to any confidential information which has come to their knowledge in the course of the performance of their tasks or exercise of their powers.

That said, from the aspect of supervisory authorities responsible for monitoring the implementation of the GDPR, this proposal is in line with the Regulation (EU) 2016/679 and national legal framework.

LUXEMBOURG

- 166a : we are concerned that this provision increases the administrative burden for service providers and are wondering whether it would make sense to limit the provision to electoral campaigns. Regular reporting could be limited to once a year.
- 169a-169e: while we support efforts to avoid abuses of the notification mechanism, some of these provisions are too detailed and burdensome. We are wondering whether the elaboration of guidelines could be an option.
- 214a-d: as already mentioned by several other Member States, these provisions shall be in line with the DSA and the GDPR provisions.

AUSTRIA

Regarding line 214a-d:

- We support the proposal to enable the EDPB to assess the adherence to the special provision for data protection in the context of political advertising and issue guidelines or recommendations on the application of Art. 12 et seq. of this Regulation. This competence should not be limited to VLOPs (very large online platforms) and VLOSEs (very large online search engines) but should cover the application of Art. 12 et seq. of this Regulation in general.
- Nevertheless Art. 70 of the GDPR establishes the EDPB as an advisory institution. As it does not have the structure and resources of an enforcement authority it should not be put in charge of the enforcement of the obligations under this Regulation as proposed in line 214b. Therefore the powers to enforce the obligations under this Regulation should remain with the national data protection authorities.
- Furthermore we do not see the need to introduce a special procedure for the communication between national data protection authorities and the EDPB as set out in lines 214c and 214d.

Nevertheless we maintain our principal reservations when it comes to the question of proportionality of the manifold obligations of the publishers and service providers.

FINLAND

Targeted political advertising (Articles -12, 12, 12a):

Finland supports the Council Mandate, but is open to additional requirements and safeguards the EP has proposed.

We suggest a balanced compromise proposal that would allow the use of targeting techniques that involve the processing of special categories of personal data when the data subject has given an explicit consent. We share the EP's concerns relating to consent and targeted political advertising and therefore welcome some of the stricter requirements the EP has suggested (see especially EP Mandate line 202, the requirement of specific user interface for targeted online political advertising).

In order to guarantee that the user has a real possibility to give a free, specific and informed consent, there should be an easily accessible interface in which users can give and withdraw their consent and specify/modify what type of personal data the user wants to include for targeted political advertising. The interface should also include the possibility to give an explicit consent to processing special categories of data and the possibility to choose what type of special categories of personal data the user is willing to include for targeted political advertising. The explicit consent for processing of special categories of data should be asked for each category of data separately. (I.e. the user should have an option to allow targeted political advertising based on the user's political options. However, there should also be an option to explicitly ban the use of other special categories of data such as ethnic origin, health data, sexual orientation or religious beliefs.)

We also welcome the clarifications the EP proposes in the recitals [see line 57g EP Mandate] that only personal data which the user has explicitly and actively provided in the interface can be processed for the purpose of targeted political advertisement (ie. the data subjects should not be targeted with political advertisement by data controllers to whom they have not provided their personal data and that personal data that is processed in the course of the normal use of the service cannot be processed for the purpose of targeted online political advertising).

Competent authorities (Articles 15 and 16)

Finland supports the Council Mandate and invites the EP to accept the Council text.

Overall an effective supervision concerning the processing of personal data in the context of targeted political advertising is important. The national supervisory authorities pursuant to Article 51 of Regulation 2016/679 (GDPR) should supervise and monitor the processing of personal data related to the targeted political advertising.

Concerning the EP Mandate and the EDPBs role [see lines 214b to 214d EP Mandate], we have following concerns:

- At the moment the EDPB is not a data protection supervisory authority and does not have similar competence, tasks or powers than the national data protection authorities or the European Data Protection Supervisor (hereinafter the EDPS). Expanding the EDPB's tasks would require significant additional resources.
- The proposal would also affect and undermine the competence, powers and tasks of the national data protection authorities pursuant to Articles 55 and 57-58 of Regulation 2016/679 [see line 214b EP Mandate, where the initiation of investigation by the EDPB would relieve the national data protection authority of its powers].
- The proposal also appears to be problematic as the EP's proposal does not seem to ensure a similar level of independence and/or conditions compared to what is required of the national supervisory authorities in Regulation 2016/679 or the EDPS in Regulation 2018/1725.
