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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 - informal suggestions from the Commission on Article 12

Delegations will find, in annex to this note, informal suggestions from the Commission for a possible approach to Article 12 for further consideration by the co-legislators.

The texts below reflect some changes to bridge the positions expressed by the EP and Council at informal discussions during the summer.

Once key elements are agreed, a revision could be prepared to integrate the two articles into one provision, for the sake of clarity. The recitals would remain the same.

A bridging compromise is also suggested on the definition, based on the intention to retain broad scope and technological neutrality, but also to include the specific items identified as of interest in the EP text. The text takes into account in particular Cases C-252/21 and C-184/20

New changes are indicated in yellow. Other changes were made by the co-legislators in the negotiations.

The intended effect of these provisions are as follows:

- Ban the presentation by publishers of ads via all targeting using profiling based on special categories of personal data. This would include data collected by observation or created by inference, where it is linked to the special categories of personal data.
- Profiling which might reveal a special category characteristic of an individual would not be available for targeting political ads.
- Among other things, this would prevent an online platform from including data provided by an individual when using its services in a profile and to use this to target political messages when the message or the criteria used for would reveal a special category characteristic of the individual.
- Further bans the use of other personal data for targeting of political advertising when it is not explicitly consented to for this purpose by the subject.
- Third party data and data which the subject is not aware might be used for targeting political ads would not be available for targeting.
- Microtargeting and optimisation of political messages will be impossible. Contextual advertising would remain possible. Traditional campaign activities, such as using a public electoral roll to canvass voters should remain possible.

These restrictions are suggested to apply online only. Additional clarification might be needed to distinguish online political advertising from other political advertising.

Complementary text could be prepared for inclusion in the recitals on supervision and enforcement to note the enforcement principle under the GDPR illustrated in Case C-252/21, where a national competition authority seized of a matter involving a question of data protection involving an undertaking established in another Member State, eventually performed its own assessment on that point.

Article -12

Political advertising publishers shall not present online political advertising based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679 and in Article 5, point (4), of Regulation (EU) 2018/1725 using special categories of personal data referred to in Article 9(1) of Regulation (EU) 2016/679 and in Article 10(1) of Regulation (EU) 2018/1725.

1. ~~90 days immediately preceding an election or a referendum, targeting and ad delivery~~ amplification techniques that involve the processing of special categories of personal data as referred to in Article 9(1) of Regulation (EU) 2016/679 and in Article 10(1) of Regulation (EU) 2018/1725 in the context of political advertising [services] are prohibited.
2. Targeting and ~~ad delivery~~ amplification techniques that involve the processing of special categories of personal data as referred to in Article 9(1) of Regulation (EU) 2016/679 and in Article 10(1) of Regulation (EU) 2018/1725 shall be permitted outside the time period referred to in paragraph 1, subject to the following conditions:
 - a. those personal data has been provided to the data controller by the data subject; and
 - b. the requirements laid down in Regulation (EU) 2016/679 and Regulation (EU) 2018/1725 for explicit consent have been fulfilled. In particular, the data subject shall give his/her explicit consent to the processing of his/her personal data separately and specifically for the purpose of political advertising.

The personal data collected from the data subject by virtue of using a service or device, including obtained content, shall not be considered as provided personal data.

3. This Article shall not apply to internal communications of any political party, 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 and are based on personal data provided by them and do not involve further processing of personal data to target or otherwise further select the recipients and the messages they receive. ***Such forms of direct marketing fall under the scope of Regulation (EU) 2016/679 and Directive 2002/58/EC.***

Accompanying recital:

[whereas], according to Regulation (EU) 2022/2065 (DSA), providers of online platforms should not present advertisements to recipients of intermediary platform services based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679 using special categories of personal data referred to in Article 9(1) of Regulation (EU) 2016/679 **This prohibition should also apply to political advertising publishers when they present political advertising online on based on profiling using special categories of personal data. In this regard, this prohibition should apply to profiling using special category of data generated on the basis of personal data which are not special category of data, but become so through inferences, including when combined with other data. This could be the case, for instance, if a publisher uses personal data to categorise users as having certain religious, philosophical or political beliefs, regardless of whether such categorisation is correct or not. As long as the categorisation enables targeting based on special category data, it should not matter how the category is labelled. In particular, where the user of an online social network visits websites or apps to which one or more of the categories referred to in in Article 9(1) of Regulation (EU) 2016/679 relate and, as the case may be, enters information into them when registering or when placing online orders, the processing of personal data by the operator of that online social network, which entails the collection – by means of integrated interfaces, cookies or similar storage technologies – of data from visits to those sites and apps and of the information entered by the user, the linking of all those data with the user’s social network account and the use of those data by that operator, must be regarded as ‘processing of special categories of personal data’ within the meaning of that provision, which is in principle prohibited, where that data processing allows information falling within one of those categories to be revealed, irrespective of whether that information concerns a user of that network or any other natural person. This is the case regardless whether the data subject was made aware of the intention to use such data for the purpose of targeting political advertising at the time that it was collected.**

~~[additional recital: [whereas] anonymised IP address information does not constitute personal data and can be used for determining the approximate location and language]~~

Article 12

Specific requirements related to the processing of personal data for online targeting and ad delivery amplification techniques

1. Targeting and *ad delivery* amplification techniques that involve the processing of personal data other than in situations defined in Article -12, *in the context of political advertising* [online] shall be permitted subject to the following conditions:

- e. ~~personal data have been provided to the controller by the data subject; and~~
- a. the controller collected the personal data from the data subject;
- b. data subject has provided explicit consent within the meaning of Regulation (EU) 2016/679 and Regulation (EU) 2018/1725 to the processing of personal data separately for the purpose of political advertising;

~~2. The personal data collected from the data subject by virtue of using a service or device, including obtained content, shall not be considered as provided personal data.~~

3. Targeting and amplification *ad delivery* techniques that involve the processing of personal data of a data subject, that is known by the controller with reasonable certainty, to be at least one year under the voting age established by national rules in the context of political advertising are prohibited. Compliance with the obligations set out in this Article shall not oblige providers of online platforms to process additional personal data in order to assess whether the user of the service is a minor.

[4. Targeting and ad delivery techniques referred to in this Article and in Article -12 shall not be based on combination of more than five categories of personal data.]

5. Articles 12 and -12 shall not apply to internal communications of any political party, 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 and are based on personal data provided by them and do not involve processing of personal data to target or otherwise further select the recipients and the messages they receive.

Accompanying recitals:

Consent to processing of personal data is given and withdrawn in accordance with Regulation (EU) 2016/679 and Regulation (EU) 2018/1725. Such **consent should be given by a clear affirmative action or statement establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data for the purpose of political advertising.**

The internal communications of political parties, foundations, associations or any other non-profit body to their members and former members and to communications, such as newsletters, linked to their political activities are not political advertising and should not be subject to the specific rules considered here, provided that their dissemination or delivery is solely based on subscription data and therefore strictly limited to their members, former members or subscribers and are based on personal data provided by them and do not involve processing of personal data to target or otherwise further select the recipients and the messages they receive. Such forms of direct marketing fall under the scope of Regulation (EU) 2016/679 and Directive 2002/58/EC. For the purpose of this Regulation, consent should be obtained by controllers presenting a user-friendly solution to the data subject to provide, modify or withdraw consent in an explicit, clear and straightforward manner. Controllers should not design, organise and operate interfaces in a way that deceives, manipulates or otherwise materially distort or impairs the ability of data subject to freely give consent for this specific purpose. **For the purposes of this Regulation the requirement to obtain consent to the processing of personal data cannot be avoided by establishing that the personal data in question was made accessible to the general public by the data subject.**

In addition, for the purpose of this Regulation it should be given separately for the purpose of political advertising. Where consent to the processing of personal data to target or deliver political advertising is obtained during the provision of an online service, at the time of obtaining consent, the controller should offer an explicit consent screen where the data subject is able to provide his or her consent for the processing of **the specific categories** of personal data for which consent is sought.

Refusing to give consent or withdrawing consent should not be more difficult or time-consuming to the data subject than giving consent.

~~Data controllers should not target or deliver political advertising by processing personal data inferred or observed from the categories of personal data to which the data subject has consented to.~~

Data controllers should not use personal data obtained from third parties to target or deliver political advertising, and in line with principle of data minimization, targeting and ad delivery techniques should always be designed to minimize the personal data used, and should not require the combination of more than five categories of data, such as location, age, identification data and two others.

Data controllers should not target or deliver political advertising by making use of personal data processing techniques which consist in profiling a data subject, particularly in order to analyse or predict her or his personal preferences or interests except as permitted.

On definitions

Article 2, first paragraph, point (8)

Compromise merging: in yellow the EP in blue the Council

‘targeting techniques’ means techniques that are used to address a political advertisement, usually with tailored content, only to a specific person or group of persons, based on the processing of personal data, or to exclude them by processing personal data;

‘ad delivery techniques’ means optimisation techniques that typically rely on ~~algorithms or~~ the automated processing of data that are used to increase the circulation, reach or visibility of a political advertisement based on the processing of personal data and which may serve to deliver the political advertisement only to a specific person or group of persons within a potential audience;

Recital

(5) In the context of political advertising, frequent use is made of targeting and ad delivery techniques are frequently used. Targeting or amplification based on processing of personal data, including special categories of personal data, such as data revealing political opinions. Moreover, the controller often target individuals based on evaluations and predictions created on the basis of the personal data, s techniques that are used either to address a tailored political advertisement only to a specific person or group of persons or to exclude them, including by tailoring the content, based on the processing of personal data, regardless of how the personal data has been obtained. Ad delivery techniques, which include a wide range of optimisation and other amplification techniques, aim or to increase the circulation, reach or visibility of a political advertisement based on the processing of personal data, regardless of how the personal data has been obtained. These may include automated techniques of processing of personal data that are used to determine a specific audience, as a specific person or group of persons within the potential audience, for the dissemination of political advertisements. Such techniques are used by political advertising publishers and especially by very large online platforms within the meaning of Regulation (EU) 2022/2065 (Digital Services Act), to deliver political advertisements to a targeted audience based on personal data and on the content of advertisements. Delivering advertisements using such techniques can involve the use of opaque algorithms and can differ from what the sponsors and providers of advertising services, acting on behalf of sponsors, intended, making some users less likely than others to see particular political advertisement advertisements. Given the power and the potential for the misuse of personal data of through targeting, including through microtargeting and other advanced techniques, such techniques may present particular threats to legitimate public interests, such as fairness, freedom of expression, equal opportunities and transparency in the electoral process and the fundamental ~~right~~ rights to be informed in an objective, transparent and pluralistic way, to privacy and the protection of personal data and equality and non-discrimination.