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Subject:	Regulation on the transparency and targeting of political advertising - Comments from Member States: Chapter 1 and related Recitals

Delegations will find attached the comments from comments received from Estonia, Germany, Latvia, Lithuania, Poland, Slovakia and Sweden following the discussions at the General Affairs Group meeting on 8 January 2022.

Member States' replies
Regulation on the transparency and targeting of political advertising
- Comments from Member States: Chapter 1 and related Recitals
(following the discussion in the GAG meeting on 8 January 2022)

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Article 2

We consider that the definitions have to be clearly defined for the uniform application of the Regulation. Since this Regulation defines a number of terms for the first time at the level of EU legislation, close attention needs to be paid to these definitions.

1. Firstly, 'the concept of 'political advertising' in Article 2(2) — How or on the basis of which methodology it is to be assessed whether a message is likely to affect the outcome of an election or referendum, the legislative or regulatory process or the voting behaviour? We consider that assessing this impact may become difficult when implementing the new Regulation. Does the Political Advertising Regulation also cover propaganda from third countries, and if yes, then how to define it? Does a person closely linked to a third country political advertising on any subject commission a 'message'? Finally - in which case is a 'message' made public by a political actor of a purely private or commercial nature?
2. Secondly, 'the term 'political actor' in Article 2(4) — Do the Member States political parties fall under point (a)? Who is to be considered as an elected or non-elected official or candidate whose promoted or published messages are to be regarded as political advertising? Does Article 2(4)(h) mean that any natural or legal person, who represents or acts on behalf of the persons or organisations referred to in the preceding paragraphs, and promotes their policy objectives, shall be considered as a political participant? Can a political actor also be a ministry advisor representing a ministry led by a minister or for example a local municipal officer who speaks on a local topic?
3. Thirdly, the concept of 'period of election' in Article 2(9) — In cases where the Member States do not define the term 'electoral period', is it necessary to define it for the purposes of implementing the Regulation, or whether the Member States may regard an electoral period, for example, the period from the registration of candidates to the day of election, or any other specific time period relevant to the organisation of elections? In addition, if the Member States are obliged to define the relevant period in national legislation, can such an obligation be imposed on the Member States at the EU level?

- We provisionally comment on the content of the first chapter of the proposal and maintain our scrutiny reservation.
- Before we get into detailed exchange on the articles of the proposal, we would like to point out a concern, that is equally important to the federal government and the German Länder:

on Article 1 – “Subject matter and scope”

- As mentioned before, DE welcomes the COM’s aim to ensure a functioning internal market for political advertising services and a high level of protection for the processing of personal data in the context of personalised political advertising.
- We ask the COM to explain in more detail whether Article 114 TFEU is indeed the relevant legal basis here and whether, accordingly, there is an underlying economic situation that would justify harmonisation of the internal market.
- We would be very grateful to receive a more substantiated justification of the legal basis. We will then examine this and provide feedback as soon as possible.
- Furthermore, there are some open questions with regard to subsidiarity insofar as the proposal does not only refer to the elections for the EP and the formation of political will at European level, but extend directly or indirectly to areas of national electoral and party law.
- We have to keep in mind, that the EU has no competence to regulate national elections in the Member States. We still feel the need to clarify whether the objectives of the measures cannot be sufficiently achieved by the Member States at either central, regional or local level.
- The importance of political advertising goes beyond internal market aspects. It is essential to the shaping of democratic will by citizens in free constitutional states. Therefore, any regulation must respect the high hurdles for restrictions of basic fundamental rights such as the freedom of expression or the freedom of political parties.
- Irrespective of this, the scope of the proposal seems suitable and broad enough to achieve the objectives pursued by the proposed Regulation. We welcome the approach of covering all relevant actors in the advertising value chain.
- As developments in the online environment are undoubtedly focused by the proposal, it is important to avoid unintended effects on existing offline business models, which are equally covered. In particular with regard to the Transparency requirements [esp. Art. 7] it is questionable whether the applicability to offline business models has been sufficiently taken into account.
- According to Art. 1(2) the Regulation shall apply to political advertising prepared, placed, promoted, published or disseminated in the Union. We would like to ask the COM for clarification why preparatory acts already fall within the scope of application.
- For clarification purposes it should be further specified in Article 1 that the Proposal complements and is without prejudice to the application of both the GDPR and the EUDPR.

On Article 2 – “Definitions”

- In our view, the definitions appear to be suitable in principle to cover all relevant actors and business models. At the same time, it should be examined whether the addressees of the measures can be further specified.

Art. 2 (2) “political advertising”

- The proposal covers as 'political advertising' not only messages by or for a political actor or on its behalf, but also those likely to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.
- We welcome the fact that accordingly the definition of political advertising potentially covers actors who do not identify themselves as political actors, such as NGOs, lobbyists or influencers.
- On the other hand, the broad definition may also lead to uncertainties and disadvantages for (e. g.) civil society organisations and even for public authorities with regard to public information campaigns as their messages can likely be considered as political advertising.
 - o We therefore believe that the definition of "political advertising", which is fundamental to this proposal, should be defined more narrowly.
 - o Clarification may be achieved by the insertion of the words "and intended" after the word "liable" in Article 2(2)(b).
 - o This makes it possible to distinguish messages that are likely to influence voting behaviour but do not intend to do so from advertising messages with a political motivation. At the same time, it remains ensured that not only messages of a political actor or a person acting on his behalf fall under the term "political advertising", but also messages of a third party who thereby pursues political intentions.
- At this point, we would like to add a definition of the term "advertising" in the regulation in order to achieve a common understanding. Art. 2(2) refers only to the term “message”, which also needs clarification.
- The distinction between advertising and editorial content (Art. 2, rec. 19) is not sufficiently clear. Therefore, a clarification in Art. 2 should be considered. Rec. 19 gives some indications, but falls short because only linear services are covered (and not also non-linear/online services).

Art. 2 (3) “political advertisement” [... means an instance of political advertising.]

- The definition is redundant in its current form.

Art. 2 (5) “political advertising service”

- According to rec. 26, the personal scope of application ("providers of political advertising services") should be broadly defined to cover "the broad range" of relevant service providers in relation to political advertising.
- We understand that basically all providers involved in the preparation, placement, promotion, publication and dissemination of political advertising are to be covered (rec. 26), insofar as these are services against remuneration (rec. 29). Consequently, all service providers involved along the advertising value chain have to fulfil the transparency requirements.
- A definition of the term "provider" would also contribute to clarification, as this is the addressee of central provisions of the proposal.
- It would be helpful for us to know what type of advertising service providers the COM specifically had in mind when drafting the proposed regulation.
- In our view, it could be sufficient and more proportionate to provide an exception for certain (mainly technical and creative) support services that contractors typically use in the preparation, placement and dissemination of political advertising (e.g. graphic and sound design, advertising copy, design, photography, camera and direction etc.).

Art. 2 (7) "sponsor"

- We would like to point out that "sponsorship" has a different meaning in the Audiovisual Media Services (AVMS) Directive. In this regard, a sponsor is someone who, as a third party, contributes to the financing of audiovisual media services, video-sharing platform services, user-generated videos or broadcasts with the aim of promoting himself. However, he has no influence on the funded content itself.
- In the proposal, on the other hand, "sponsor" means the person who commissions the preparation, placement and dissemination of a political advertisement in his own name from the "provider of political advertising services" and thus also determines its content.
- In order to avoid inconsistencies in the legal system in European secondary law and to facilitate the application of the law, it would be better to use the term "principal".

Art. 2 (9) "electoral period"

- We would like to note that the legal definition of "electoral period" without any specification of the temporal component is not suitable to determine the concept of the election period in a legally secure manner.
- It has to be taken into account that stricter sanctions are linked to this. [Art. 16(4)]. A specification of the indeterminate legal term thus appears necessary.

Art. 2 (10) "relevant electorate"

- Legal remark: The term "relevant electorate" is not used elsewhere in the proposal (only mentioned in Annex II).

Art. 2 (11) "political advertising publisher"

- We have a question regarding the term "political advertising publisher": Could the COM please explain whether the term "provider of political advertising services" is to be understood as an umbrella term which covers, in particular, the "publisher of political

advertising" as well, or do the terms stand side by side or are the two roles even mutually exclusive?

- Finally, we would just like to point out that the term „publisher“ in the German translation of the proposal is „Herausgeber“ and is used in a different context in common usage [ENG: „editor“].

On Article 3 – “Level of Harmonisation”

- With regard to Article 3(1), we assume that regulations of the MS concerning political advertising, which serve to guarantee the freedom of expression or the freedom of political parties, are not subject to the provision.
- For example, the German Interstate Media Treaty (Medienstaatsvertrag - MStV) provides for a general prohibition of political advertising in the broadcasting sector, with exceptions for election campaigns.
- We would like to make sure that these advertising rules – which apply especially to national, regional and local elections – remain applicable. We kindly ask the COM to confirm this.

Definition (Article No .2)

1. Paragraph 1(b) "Service" means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU. Latvia draws attention to the fact that the term "self-employed" according to Latvian law is an individual performer of economic activity. According to Article 57 TFEU, services are considered to be "services" within the meaning of the Treaty if they are normally provided for remuneration, insofar as they are not covered by the rules on the free movement of goods, capital and persons, thereby not including a reference to "self-employed". *In view of this, Latvia calls for clarification of the definition of "service" contained in the regulation.*

2. Paragraph 2(b) states that 'political advertising' means the preparation, placement, promotion, publication or dissemination, by any means, of a message which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour.

Latvia would appreciate, additional clarification regarding the following aspects of the definition:

1) it shall be indicated that in Latvia **an unrelated person** may also perform a pre-election campaign - a natural person, a legal person or a registered association of such persons who, in his or her name, performs a pre-election campaign. An unrelated person shall, in pursuing his or her own interests, perform the campaign in his or her own name, enter into contracts relating to the production and placement of the advertising, and pay the costs related to the production and placement of the advertising itself. Therefore, it is not clear whether Article 2(2)(b) of the Regulation also includes political advertising by such an "unrelated party".

2) it is not understandable what is involved in influencing the "regulatory process", given that the regulatory process can be influenced, for example, by different legislative initiatives proposed by groups set up by individuals or by voters themselves (e.g. via the portal "manabalss.lv").

3. Paragraph 3 political advertisement' means an instance of political advertising. Latvia calls for clarification of the definition of "political advertising" by identifying signs for communication to be identified as political advertising, as the current wording is no clear. Moreover, in the context of Article 2 (2) (a) of the Regulation, it is not clear what message from *political actor* are supposed to be political advertising, taking into account that messages may relate to the fulfilment of the duties of political actor.

4. Points (d) and (e) of paragraph 4 provide that "political actor" means a candidate for any elected candidate for any elected office at European, national, regional and local level, or for one of the leadership positions within a political party, as well as an elected official within a public institution at European, national, regional or local level.

Latvia presumes, that this definition is too broad, as officials such as judges, heads of an independent body, such as the head of the Ombudsman or the head of State control, might also be involved, which would actually violate the principles of political neutrality attributable to them. In the light of this, Latvia requests to supplement the recitals of the Regulation with an explanation that the provisions of the Regulation do not apply to such officials.

5. Point 4(h) provides that the political actor shall also be any natural or legal person representing or acting on behalf of any of the persons or organisations in points (a) to (g),

promoting the political objectives of any of those. *Latvia calls for an assessment of the need to clarify this definition*, indicating that the person may not only promote the political objectives of an organisation, but also call for a matter of interest to be against another person or organisation or society.

Latvia also states that the definition of "political actor" does not include the wording **"natural or legal person not related to political parties or their associations"** included in Latvian legislation, which, similarly to political actors, may carry out political advertising to influence public opinion and elections. results. It is therefore necessary to clarify whether such a person will be subject to the provisions of the Regulation or to the existing national framework, which provides for stricter requirements than those laid down in the Regulation. Or Latvia calls for the regulation to be supplemented by the definition of the following "unrelated person", for example: "unrelated person" – political actors within the meaning of this article (a) – (h), an unrelated natural person, a legal person or a registered association of such persons who performs or orders political advertising in their own name.

Paragraph 6: "political advertising campaign" means the preparation, placement, promotion, publication or dissemination of a series of linked advertisements in the course of a contract for political advertising, on the basis of common preparation, sponsorship or funding.

Latvia considers that it is necessary to clarify whether the definition of "political campaign" includes a set of political advertising contracts with all service providers within the framework of a political campaign or with one service provider within a specific contract.

Level of harmonisation (Article 3):

Pursuant to Article 3 of the Regulation, Member States shall not maintain or introduce, on grounds related to transparency, provisions or measures diverging from those laid down in this Regulation. The provisions of political advertising services shall not be prohibited nor restricted on grounds related to transparency when the requirements of this Regulation are complied with.

Latvia asks for clarification as to whether the purpose of this Article is to ensure that national regulatory requirements do not impair the transparency of political advertising. If more stringent requirements are set at national level, would it be possible to apply them together with the requirements of the Regulation?

I would like to explain, that Latvia has developed and implemented a set of requirements to increase the transparency of political advertising. For example:

- there are restrictions on pre-election campaign expenses, which are determined by the Law on the Financing of Political Organizations (Parties). Latvia has also imposed a general ban on political advertising of pre-election campaigns in several cases, and not only in relation to so-called silence periods before election day, but also, for example:

- places where pre-election campaign materials are prohibited (e.g. State and local government institutional buildings, church buildings and prayer houses; buildings of terminals, railway stations, airports and passenger ports; architectural and artistic monuments of national importance);

- during the pre-election campaign, electronic media that ensure the retransmission of foreign electronic media programs in Latvia may not include campaign materials about political parties and associations of political parties in programs retransmitted in Latvia.

Latvia also has a separate ban on the placement of pre-election campaign materials.¹

There is also a requirement for service providers to submit political advertising charges in order to establish the principle of equality for all political actors, as well as a requirement for service providers to submit contract information to the controlling authority within three days of the conclusion of the agreement on the placement of political advertising.

All the above-mentioned requirements significantly increase the transparency of political advertising (compared to the requirements of the Regulation).

Latvia suggests, in order to clarify the scope of the Regulation and to allow for the continued application of existing restrictions on campaign expenses, advertising bans and pricing requirements, the Regulation should clearly state that these provisions fall within the competence of each Member State and do not apply to campaign limits, advertising bans and submission of advertising pricing. If the purpose of Article 2 of the Regulation is to equalise the requirements, it would be necessary to provide an explanation as to whether the requirements introduced in Latvia would be applicable to local political advertising providers.

Unfair electoral processes can seriously undermine the principles of the country's democratic system, including the principle of equal elections, given that the scope of the principle of free elections extends not only to the moment of voting but also to the formation of the will of the electorate during the pre-election period. Therefore, restrictions on pre-election campaign are necessary.

In addition, it would be necessary to consider the issues related to political advertising, which should be left to the discretion of each Member State. In that case, this should be clearly stated in the regulation.

Article 1

Lithuania supports a proposal on article 1. We would suggest to specify the aims of the Regulation (article 1, point 3) with an additional aim (c):

3. The aims of this Regulation are:

- (a) to contribute to the proper functioning of the internal market for political advertising and related services;
- (b) to protect natural persons with regard to the processing of personal data;
- (c) to ensure transparent and democratic elections and political campaigns.**

Article 2

The definition of political advertising, proposed by the European Commission, is too wide. It will need to be further clarified. Furthermore, we miss references to negative campaigning and definition of non-political actors.

We would suggest to expand definition of 'service':

1. 'service' means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 TFEU, **as well as such service, where funds are not transferred directly, but benefit is provided.**

We assume that definition of political advertising could be supplemented by delineating the main principles of unpaid communication of political actors, including (1) freely circulated political ads, (2) negative campaigning ads and (3) ads circulated by third persons. As well as adding provision that **same rules should apply to political ads across the EU irrespective of election type** (national or EU) **and type of media** (traditional or social media).

Therefore, we would suggest the following adjustments:

'Political advertising' means the **paid or unpaid** preparation, placement, promotion, publication or dissemination, by any means, of a message **in any type of media**:

- (a) by, for or on behalf of a political actor, as well as without its consent or agitating against it (unless it is of a purely private or a purely commercial nature; or
- (b) which is liable to influence the outcome of an election or referendum, ~~a legislative or regulatory process or voting behaviour~~ **or the promotion of a political entity's ideas, objectives, program, including possible influence on the legislative or regulatory process and negative campaigning.**

Regarding to the last paragraph of Article 2, we would be in favor for the following corrections:

For the purposes of the first paragraph, point (2) **informational** messages from official sources regarding **the activities of politicians, political parties and its governing bodies,**

organisation and modalities for participation in elections or referendums or for promoting participation in elections or referendums shall not constitute political advertising.

Article 3

As for the article 3, we agree with provided provisions and we do not have any suggestions.

Q 1 [the scope]

Poland supports the proposal as some aspects of provision of the political advertising services should be unified across the EU countries to allow for more transparent and easier services within the proposed scope. It is especially important since online advertising (including political one) is rising its prominence. Needless to say, we need to be especially careful when it comes to the definitions. They need to be clear on all possible aspects, not leaving any doubts with regards to the legislative intention and its subsequent implementation. We hope to explore this further in the course of the forthcoming discussions.

Q 2 [Transparency]

Transparency is very important since it directly translates into citizens trust. The information addressed to the recipient of the political advertising should be clear and easy to understand. At the same time, it would be worthwhile to analyse whether complying with the transparency requirements will not mean too much organizational effort and financial outlay for entities concerned, especially SMEs.

Q 3 [Targeting]

This concerns in particular the clarification of the obligations of all actors including online platforms. We should ensure protection of sensitive data to the widest degree. We welcome the provisions regarding the protection of the personal data to be compatible with other acts in force and under discussion, such as DSA. It is also crucial to ensure the transparency of the algorithms used by commercial actors to target political ads.

Q 4 [Control]

We emphasise the need to ensure complementarity between this draft regulation and currently negotiated DSA, which contains provisions aimed at increasing the transparency of all online advertising, in particular those aimed at very large online platforms (VLOPs). Nevertheless, it would be worth further discussion on the adequacy of the proposed solutions to the potential increase of business costs for political advertising of commercial actors (especially SMEs).

Q 5 & 6 [Supervision and Sanctions]

We welcome that supervision and sanctions have been left up to national provisions and legislators.

Recitals

Recitals 11 and 13: Recital 11 of the preamble prohibits derogations from national political advertising, with recital 13 stating that this Regulation should not affect the substantive content of advertising, the rules governing the display of political advertising and compliance with the pre-election silence period. The exclusion of the substantive content of political advertising and the electoral silence period is clear, but we consider the term "rules regulating the display of political advertising" to be very vague, which is not defined and it is not clear to which rules it applies. Nor does it follow from the text that, in addition to the electoral silence procedure, there may exist special national rules on other rules of political advertising at the time of the election campaign, the existence of which is provided for in the regulation itself in Art. 2.9 (see comment on Article 2.9 below). **We therefore propose to explicitly state which "rules regulating the display of political advertising" are excluded from the application of this regulation, as well as to provide for the possibility of specific election campaign rules.**

Chapter 1

Article 2:

We request to revise 2.2.b - definition of political advertising, which can also be performed by non-political actors, i.e. any natural or legal persons. It is not clear whether the rules on political advertising under this Regulation should also apply to all natural or legal persons who are not political actors but who prepare, place, promote, publish or disseminate messages which may be considered political advertising under this definition. Such a definition is, in our view, too broad and may lead to a situation where any expression of political opinion that is prepared, placed, promoted, published or disseminated may be likely to affect the outcome of the election or to affect the legislative process.

2.4.g - there are no organizations (legal entities) in the legal order of the Slovak Republic that are established in order to achieve a specific result in elections. It is not clear from this definition whether these organizations must be established since their inception as organizations with the stated goal or this applies to so-called third parties, i.e. natural and legal persons registered as a third party to which special rules apply, or the rules that apply for political actors. It is therefore necessary to define which persons can be such an organization (or a third party), or to allow Member States to define this. **We also consider necessary to define which natural or legal persons cannot be such an organization (eg public institutions, organizations based abroad) – either by this Regulation or by the national law of Member States.**

Overall comment on 2.4 - we request that Member States retain the right to decide that they do not allow foreign political actors to intervene in political competition and election campaigns in another Member State in all types of elections. At present, the Slovak Republic, as well as many other states, restrict or prohibit the financing of political parties and candidates and conducting an election campaign by foreign entities in order to prevent the elections and their results from being influenced from abroad.

2.9 - the wording of this provision implies the possibility of special rules for the election campaign period. However, the regulation does not provide for such rules for the election campaign period. The Slovak Republic has introduced a separate regulation of political advertising and its rules at the time of the election campaign in its national law (for example, financial limits for the election campaign, the obligation to keep funds in a transparent bank account, keeping special records of gifts and other gratuitous services, reporting on expenditures on the election campaign). It does not follow from the Regulation that national legislation may have different rules on political advertising at time of the election campaign.

It is also not clear whether the regulation aims to completely remove the financial limits for campaigning and other rules such as obligation to keep a transparent account.

We therefore propose to amend this provision so that it clearly states the possibility to have specific national legislation for national campaigns.

Article 3:

It ensues from Article 3 that the Regulation prohibits derogations from national rules on political advertising. However, recital 13 of the preamble states that this Regulation should not affect the substantive content of advertising, the rules governing the display of political advertising and compliance with the pre-election silence period. The exclusion of the substantive content of political advertising and the electoral moratorium is clear, but we consider the term "rules regulating the display of political advertising" to be very vague, which is not defined and it is not clear to which rules it applies. Nor does it follow from the text that, in addition to the electoral silence period, there may be special national rules on other rules of political advertising at the time of the election campaign, the existence of which is provided for in the regulation itself in Art. 2.9. **We therefore request to explicitly state which "rules regulating the display of political advertising" are excluded from the application of this regulation. We also request that the right of a Member State to lay down special election campaign rules be enshrined in national law.**

Since we didn't have time to raise our questions re political advertising (article 2, except for art 2.2, and article 3), here are our questions which I aimed to raise during the meeting on the 8th of February. I have already sent them to the Commission, but I also understood that we should send them to you as well:

Article 2 paragraph 3: The definition is rather imprecise. Should one understand that this is a typical case of the broader concept of "political advertising"? If there are no clear criteria, there should not be a reason to have a specific definition, correct? If this definition is to remain, we suggest that the definition should be developed on the basis of terms used in other acts of advertising (i. e the The audiovisual media services directive AVMSD).

Article 2 paragraph 5: Its challenging to understand the content of the provision. What should be exempted and why? Is the intention to exclude services where no compensation has been paid for a platform with user-generated content? In that case, is it already clear from the definition of , "service"?

Article 2 paragraph 11: Why are other terms used to define "political advertising publisher" rather than those used in the definition of political advertising? In this paragraph, the following is stated: "... or a legal person that broadcasts, makes available through an interface or otherwise brings to the public domain political advertising through any medium;" while the definition of political advertising (Article 2 paragraph 2) speaks of "publication or dissemination". How are the concepts intended to relate to each other?