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Subject:	Regulation on the transparency and targeting of political advertising - Comments from Member States received following the GAG meeting of 26 April 2022

Delegations will find attached the comments from Austria, Czech Republic, Germany and Hungary received following the discussions at the meeting of the Working Party on General Affairs on 26 April 2022.

Member States' replies
Regulation on the transparency and targeting of political advertising
- Comments from Member States
following the discussion in the GAG meeting on 26 April 2022

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1. Definition of political advertising [Article 2]

Do you consider the way in which the scope of the definition of political advertising takes into account both advertising by political actors and issue-based advertising to be appropriate?

No. As also expressed in detail in our written statements, we are convinced that the scope and the definitions are not precise enough. A lot of work in improving the text is still ahead of us. Many vague terms (especially but not only in Art 2, number 2 letter a and b) make it difficult or even impossible to draw a clear line. We could not identify an appropriate demarcation between political and „issue-based“ advertising.

If it were to be clarified, would it be necessary to introduce additional conditions or criteria (intentional element, remuneration, more precision on the link (direct, substantial or other) with an election, a regulatory process or electoral behaviour, others), in particular regarding issue-based political advertising?

Yes. As already expressed several times in our various written statements (with several proposals) the terms used need more precision and especially „objective“ (provable/verifiable) criteria instead of mere subjective approaches (e.g.: what exactly is the „liability to influence the outcome, a process or behaviour“ in Art. 2?).

Would it be necessary to provide explicit exclusions for certain types of content (editorial or journalistic, purely private, purely commercial, others)?

The actual formulations in the last sentence of Art. 2 clearly demonstrate the urgent need for revision: They explicitly exclude messages which do not at all fall under the scope of the definitions. If the understanding of the definitions were really clear, it would not be necessary to provide exemptions. Especially Art. 2 Number 2 letter a and b in their actual wording are perfect examples that the terms used („preparation, placement, promotion, publication or dissemination, by any means, of a message) are too far reaching and give rise to the interpretation that even editorial or journalistic content fall under the scope. We have also expressed in our written statements that several terms used in the proposal (and especially also „purely private“ or „purely commercial“) need a fundamental revision to make them more precise as a line for demarcation. We must not forget that financial sanctions are impending in case of infringements.

2. Chain of responsibility [Article 5-8]

Do you think it is necessary to clarify or modify the chain of responsibility between the different actors?

Yes definitely. In all our (written) statements we have shown several examples, where the division or allocation of responsibilities between the different actors is either not clear or should be modified. The provisions in Chapter II are not limited to the necessary minimum: both, the different obligations for the „publisher“ in Art. 7 and those for the „service provider“ or „advertising publishers“ are not at all proportionate.

Do you think it is necessary to clarify and strengthen the obligations on sponsors (obligation to transmit information) and the control obligations for the service providers (control of declarations)? What additional check should be carried out, what criteria should be taken into account and who involved in such a process?

Yes. We have stressed throughout all our (also written) statements that the obligations for the creator/originator/initiator (we decline the term „sponsor“) of the advertising must be

strengthened. The obligations should not be constructed as a huge administrative burden solely for the „service providers“. Once again we may also repeat our question why any service involved at any stage of the process, e.g. also a mere graphic artist or ad-writer working on the design and content of an advertisement would have to fall under the regulation and would have to meet all the transparency requirements (collecting, retaining and communicating the information)?

3. Notification mechanism [Article 9]

Do you think the notification mechanism is sufficient or should it be strengthened (form, follow-up, other)?

Yes, it should be strengthened. It is not clear which cases of „non-compliance“ of which responsible „player“ a user would be able to notify and why (see additionally our detailed remarks in our written statements).

4. Targeting and amplification techniques [Chapter 3]

Do you think it is necessary to distinguish the regime applicable to targeting and amplification techniques?

Art. 2 para 8 defines “targeting” as any technique that is used to address a tailored political advertisement only to a specific person or group of persons and “amplification” as any technique used to increase the circulation, reach or visibility of a political advertisement. In our opinion, the differentiation between the terms is irrelevant because the way to increase circulation, reach or visibility of a political advertisement is to reach specific persons or groups of persons.

Therefore, we are concerned that a further distinction between targeting and amplification techniques would only serve to lessen the effect of the prohibition of targeting and amplification techniques based on the processing of personal data as envisioned in Art. 12 para 1.

If the Presidency further pursues this issue, then definitions must be found that prevent any overlap between targeting techniques and amplification techniques. Otherwise, any prohibited practices of targeting could in practice simply be reinterpreted as “very specific amplification techniques”, making the prohibition of targeting practices obsolete.

Do you think it is necessary to further limit or even prohibit targeting and/or amplification techniques for political advertising involving the processing of specific categories of data within the meaning of the GDPR (sensitive data)? What about those involving the processing of non-sensitive data?

As stated before we understand that, as of now, the aim of Article 12 para 1 and 2 is that no targeting or amplification based on the processing of special categories of personal data can take place without the data subject being aware of that targeting because

- either the data subject has given his/her explicit consent to the processing for one or more specific purposes (Art. 9/2/a GDPR)
- or processing is carried out by a not-for-profit body with a political, philosophical, religious or trade union aim and only relates to their members’ personal data (Art. 9/2/d GDPR).

The first exemption based on the consent of the data subject seems problematic as it does not address the problem of targeted political advertising on social media platforms, which is based on the profiling of their users. In this context note must be taken of the pending request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 20 July 2021 — Maximilian Schrems v Facebook Ireland Ltd, C-446/21 (Question 3).

We ask Presidency and COM to explain their stance on this issue.

5. Delegated acts [Articles 7.8 and 12.8]

Do you think that the use of delegated acts is necessary? If so, should they be further regulated (additional criteria, restrictions, etc.)?

AT is open for convincing arguments, why delegated acts would really be necessary. We prefer a clear and precise wording and an exhaustive provision in the Regulation to avoid legal fragmentation by adding several delegated acts. If there really were a convincing argument for having delegated acts then there would have to be a clear determination to what the Commission is exactly empowered. The actual wording in Art. 7 (8) about empowering the Commission to „adding, modifying or removing elements from the list of information (...) where, in the light of technological developments, such an amendment is necessary for the wider context of the political advertisement and its aims to be understood“ is too vague and far-reaching.

EPS/EPN 1. Definition of political advertising [Article 2]

Do you consider the way in which the scope of the definition of political advertising takes into account both advertising by political actors and issue-based advertising to be appropriate? If it were to be clarified, would it be necessary to introduce additional conditions or criteria (intentional element, remuneration, more precision on the link (direct, substantial or other) with an election, a regulatory process or electoral behaviour, others), in particular regarding issue-based political advertising? Would it be necessary to provide explicit exclusions for certain types of content (editorial or journalistic, purely private, purely commercial, others)?

- **We generally perceive the need to define clear preconditions for what is to be considered political advertising that can effectively cover a wide range of real scenarios to avoid confusing both the supervisory authorities and, above all, the political actors involved. As the current definition produces disproportionately more questions than answers, we consider it crucial to clarify it and to elaborate the relevant recitals to provide a more profound overview of the situations that would be affected by the regulation and which, on the contrary, would not be covered by these rules.**
- **It is in itself difficult to distinguish between the political character of a message, especially when it comes to assessing whether a message is of a purely private or commercial nature. In this respect, it is still not clear to us how to evaluate, for example, the articulated views of political actors on a current issue, mainly if it takes the form of a social media post that is placed online for free, either on the actor's official account but especially on their private account which is, however, followed by a wider audience. Currently, it follows from the regulation that possibly any message of this kind could be described as political advertising, as virtually any opinion of a political actor ultimately aims to influence the attitudes of voters.**
- **In connection to this, it would also be appropriate to outline the position of professionally processed advertising, i.e. advertising prepared from agencies designed for that effect. While the definitions and recitals imply significant broadness, some parts of the regulation (in particular Article 5) indicate that it is the aspect of professionalism that should play a key role in identifying political advertisement.**
- **At the same time, we still believe that remuneration should be reflected in the definition if this is an elementary precondition. Having said that, we also need to clarify how to deal with messages that have been processed for political actors by their regular staff or assistants (especially when these are placed on social media platforms free of charge) since the messages are prepared de facto against remuneration.**
- **With regard to explicit exceptions to the regulation, we agree with the delegations that have expressed the need to protect editorial content.**
- **Last but not least, we would like to recall our concerns about the appropriateness of applying the regulation to all types of national elections.**

2. Chain of responsibility [Article 5-8]

Do you think it is necessary to clarify or modify the chain of responsibility between the different actors?

Do you think it is necessary to clarify and strengthen the obligations on sponsors (obligation to transmit information) and the control obligations for the service providers (control of declarations)? What additional check should be carried out, what criteria should be taken into account and who should be involved in such a process?

- **We believe that Article 5 should also specify the status of political advertising publishers.**
- **In a similar vein, we recall our previous comments on the rights and obligations of political advertising publishers outlined in Article 7, which, in our view, are not sufficiently addressed.**
- **At the same time, it would make more sense for us to leave the responsibility for delivering the information automatically to the sponsor, thus also procedurally facilitating the provision of services by other actors in the chain.**

3. Notification mechanism [Article 9]

Do you think the notification mechanism is sufficient or should it be strengthened (form, follow-up, other)?

- **We believe that the notification mechanism shall be "user friendly" not only for individuals exposed to political advertising but especially for the publishers themselves in terms of its provision.**
- **We already perceive the set requirements as considerably disadvantaging offline publishers, especially small ones. Therefore, taking into account the offline environment, we find any further strengthening of provisions to be undesirable.**

4. Targeting and amplification techniques [Chapter 3]

Do you think it is necessary to distinguish the regime applicable to targeting and amplification techniques? Do you think it is necessary to further limit or even prohibit targeting and/or amplification techniques for political advertising involving the processing of specific categories of data within the meaning of the GDPR (sensitive data)? What about those involving the processing of non-sensitive data?

- **We believe that when considering regulating targeting and amplification techniques, it is of crucial importance to keep in mind the practical impact on the offline environment. In case any targeting based on sensitive data would be a priori prohibited, some traditional ways of advertising and political campaigning could be significantly disrupted to the point that we would find it more appropriate to exclude the offline environment from the requirement to obtain an explicit consent, as we cannot imagine how, in relevant cases, individual actors would ask for the citizens' consent in practice.**
- **Since some political parties, especially at the municipal level, profile themselves, for example, on social issues connected to a specific ethnic group (which is also typically associated with certain localities), or on topics related to health in polluted areas, we believe the provisions would not only limit the possibility of articulating political views, but at the same time, it could also put these political entities at a significant disadvantage vis-à-vis others who do not profile themselves on the given issues.**
- **Additionally, these comments illustrate an example of why we think it would be more appropriate for the regulation not to apply to lower-level elections.**
- **In terms of further tightening of conditions, we believe that extending the category of data also to insensitive data could easily get lost in the flood of other**

notifications and approvals online, while in the offline environment, further tightening could lead to the practical infeasibility of political advertising.

5. Delegated acts [Articles 7.8 and 12.8]

Do you think that the use of delegated acts is necessary? If so, should they be further regulated (additional criteria, restrictions, etc.)?

- **We are aware that the issues targeted by the regulation are evolving over time, and we, therefore, understand the logic of including delegated acts in related articles.**
- **It might be more appropriate to consult the individual institutions first, but in principle, we have no fundamental comments.**

- The assessments on Chapter 3 (targeting and amplification of political advertising) and the related definitions have not yet been completed within the Federal Government. We therefore enter a scrutiny reservation on this issue especially regarding consent as a legal basis for processing data for targeted political advertisement.

1. Definition of political advertising [Article 2]

“Do you consider the way in which the scope of the definition of political advertising takes into account both advertising by political actors and issue-based advertising to be appropriate? If it were to be clarified, would it be necessary to introduce additional conditions or criteria (intentional element, remuneration, more precision on the link (direct, substantial or other) with an election, a regulatory process or electoral behaviour, others), in particular regarding issue-based political advertising? Would it be necessary to provide explicit exclusions for certain types of content (editorial or journalistic, purely private, purely commercial, others)?”

- We welcome the fact that the scope of the definition of political advertising takes into account both advertising by political actors and issue-based advertising covers. In this way, the definition and thus the scope of the regulation potentially covers actors who do not identify themselves as political actors, such as NGOs, lobbyists or influencers.
- However, as we have already expressed in our comments, the broad scope of the definition also leads to legal uncertainties and disadvantages for (e. g.) civil society organisations as their messages can likely be considered as political advertising.
- We therefore believe that the definition of "political advertising", which is fundamental to this proposal, should be clarified.
- We would like to point out the necessity of inserting "and intended" after "liable" in Article 2(2) (b) once again. To address the concerns that this is a subjective standard: It can be objectified on the basis of the external circumstances.
- Alternatively, we could support the wording "which seeks [instead of "is liable"] to directly influence the outcome of an election [...]."

- A clarification only in the recitals would be an improvement, but would not provide the necessary legal certainty. Without any clarification, we see a strong risk of overregulation in the area of commercial advertising.
- In order to facilitate the further work on definitions, we suggest running an assessment by defining case groups to clarify the group of norm addressees. In certain cases, 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. We have to keep in mind, that the EU has no competence to regulate national elections in the Member States.
- We cannot support a general exclusion for certain types of content (editorial or journalistic, purely private, purely commercial, others). There should at least be the possibility to look at the concrete individual case.

2. Chain of responsibility [Articles 5-8]

Do you think it is necessary to clarify or modify the chain of responsibility between the different actors? Do you think it is necessary to clarify and strengthen the obligations on sponsors (obligation to transmit information) and the control obligations for the service providers (control of declarations)? What additional check should be carried out, what criteria should be taken into account and who should be involved in such a process?

- The obligation under Art. 5(1) involves the risk that providers of advertisement services will always request a statement about the political character of the performed services from every client, even when there clearly is no political advertising involved. This may lead to unnecessary administrative burden.
- A more practical approach might be that the sponsor who approaches an advertising service provider with a request to prepare, place, promote, or disseminate a political advertisement has to inform the advertising service provider on its own initiative that the request is for political advertising.
- It is important to clearly define the responsibilities along the advertising value chain:
 - The provider of advertising services should be able to rely in good faith on the information provided or not provided by sponsors or providers of advertising services acting on behalf of a sponsor.

- The political advertising publisher should be able to rely in good faith on the information provided or not provided by providers of political advertising services.

3. Notification mechanism [Article 9]

Do you think the notification mechanism is sufficient or should it be strengthened (form, follow-up, other)?

- The notification mechanism seems to be sufficient. In particular, we welcome the fact that the proposal does not lay down detailed requirements for the operation and design of reporting mechanisms, but merely sets out general requirements in Art. 9.
- At this point, the references to the Digital Services Act (DSA) must be taken into account: The DSA will also contain a notice and action mechanism for illegal content. Since the addressees of the DSA may also be political advertising publishers, care should be taken not to duplicate implementation efforts with regard to illegal political advertising content.

4. Targeting and amplification techniques [Chapter 3]

Do you think it is necessary to distinguish the regime applicable to targeting and amplification techniques? Do you think it is necessary to further limit or even prohibit targeting and/or amplification techniques for political advertising involving the processing of specific categories of data within the meaning of the GDPR (sensitive data)? What about those involving the processing of non-sensitive data?

- As we understand it, amplification techniques do not have a separate role in the proposal apart from targeting techniques. If a separate need for regulation of amplification techniques is seen, this should also be reflected in a substantive regulation.
- The main issue is whether data processing for targeted political advertisement can be legitimised by individual consent. The integrity of the electoral process is an issue of general democratic importance. The proposal needs to reflect this further and consider whether the integrity of the electoral process should be at the disposal of individuals.

- A differentiated approach should be taken that goes beyond the proposal of COM. In this approach, last week's provisional political agreement on the Digital Services Act with regard to personalised advertising have to be taken into account as a baseline for the level of protection.
- It should be considered to also include in the scope of Art. 12 constellations in which a political opinion can be predicted with a certain degree of accuracy from data available on a data subject but where the data does not directly reveal political opinions or party memberships (i.e. the data not falling under Article 9(1) GDPR).
- Given the provisions of the proposal it seems possible to show users political ads that are relevant to them (example: Electoral ads focusing on a specific state or local elections should be able to be displayed to users in the relevant area) without processing of personal data. The use of non-personal data for the purpose of targeting techniques in political online advertising should not be fully banned. Whether targeted political advertisement is possible without processing of non-sensitive personal data is possible requires further assessment.
- The processing of non-sensitive data for the purpose of targeted political ads does not fall within the scope of this proposal.

5. **Delegated acts [Articles 7.8 and 12.8]**

Do you think that the use of delegated acts is necessary? If so, should they be further regulated (additional criteria, restrictions, etc.)?

- In this technically complex matter and in view of the rapid technological developments, the use of delegated acts could be an effective instrument.
- Exercise of the delegation in Art. 19: standard clause of consultation of Member States experts should be added in the legal text (*wording: Before adopting a delegated act, the Commission shall consult experts designated by each Member State in accordance with the principles laid down in the Interinstitutional Agreement on Better Law-Making of 13 April 2016.*).

Additional Hungarian comments regarding the proposed regulation on the transparency and targeting of political advertising

Definition of political advertisements

Hungary is convinced that **transparency rules should only apply to advertisements published during campaign periods in the Member States**. As it has been already established, the concept of political advertising as defined in the proposal cannot be equated to the Member States' notion of that, thus **we deem it necessary to include in Article 3 that Member States may maintain their own national rules** on the concept of political advertising, in which they may apply a different definition in matters other than transparency. Furthermore, we must emphasize that **the definition of political advertising** (and also the scope of the proposal) **cannot cover the activities of public authorities related to the provision of information to citizens** on matters of general public interest that may nonetheless generate political debate, such as vaccination campaigns.

We believe that there is an **inconsistency between the preamble** (recital 29 for example) **and the operative part**, which needs to be resolved in such a way that makes it **clear and explicit** that the **definition of political advertising pertains only to advertisements that are published for remuneration or any other kind of consideration**.

Moreover, if intentionality is to become part of the definition of issue-based political advertisements, further clarification would be needed on **who would be empowered to rule on issue-based political advertisements and what kind of legal remedy would exist thereto**. It is an especially sensitive question as **it cannot be defined objectively what is considered to be an advertisement with political purpose**, thus **there is a potential for the disproportionate restriction of the freedom of expression**.

Chain of responsibility

Concerning the question on the **chain of responsibility**, **we do not see it guaranteed that by indicating the sponsor the true beneficiaries of the investment would be revealed**. **Third countries might easily advertise in the Member States through their entities and affiliates based in the EU**, thus exerting their influence while avoiding responsibility. We have to consider the difficulties inherent in investigating such chains and the potential of identifying the true beneficiaries.

Delegated acts

We find that the proposal would authorise the Commission to adopt an overly broad scope of delegated acts. For this reason, **we should define the scope of the implementing rules in a clear and unambiguous way**.