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Subject:	Regulation on the transparency and targeting of political advertising (chapter 2) - Comments from Member States on the Presidency compromise text of 3 May 2022

Delegations will find attached the comments from Belgium, Denmark, Germany, Italy, Slovenia, Spain and Sweden on the Presidency compromise text of 3 May 2022 received following the discussions at the meeting of the Working Party on General Affairs on 24 May 2022.

Please take note that the comments of the Italian delegation included in the present document cover all chapters of the proposal.

**Regulation on the transparency and targeting
of political advertising (Chapter 2)**
**- Comments on the Presidency compromise text
of 3 May 2022 received following the
GAG meeting of 24 May 2022**

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Belgium

Ci-dessous, je me permets de vous faire parvenir une question et une suggestion d'amendements sur le texte de compromis à l'article 5.3 :

"In case of a declaration or information that is manifestly erroneous, providers of advertising services shall request the sponsors and ~~and~~ or the providers of advertising services acting on behalf of sponsors to correct their declaration."

Si nous avons bien compris l'intention du texte de compromis de la présidence, la logique sous-jacente de ce nouveau paragraphe est de préciser la responsabilité de chacun des acteurs de la chaîne en indiquant que chaque acteur est responsable de demander à l'acteur avec lequel il est en contact de corriger l'information nécessaire tout au long de la chaîne au lieu de retourner systématiquement directement jusqu'au sponsor. Notre impression est que si l'on maintient la conjonction de coordination « and », le texte peut être lu comme une obligation pour les prestataires de services de publicité politique de contacter non seulement les autres prestataires de services avec lesquels ils sont en contact mais également le sponsor, ce qui nous semble créer une charge administrative plus importante (évidemment tout cela dans l'hypothèse où le sponsor fait appel à ce genre de services intermédiaires). Nous sommes évidemment ouvert à une autre formulation qui préciserait davantage le mécanisme à l'œuvre.

Chapter II („Transparency obligations for political services providers”); Arts. 4 - 11 and recitals 28 to 46

- We welcome the addition in Art. 5(2). Only the sponsor has the information necessary for the provider to comply with Art. 6.
- In this context, we would like to point out that the requirements of Chapter 2 do not directly address all actors involved in the advertising process. However, we **should also hold the sponsor responsible for the reliability of his information. It is doubtful whether the additions to Article 5 are already sufficient.**
- We can basically support the addition in Art. 5(3). However, the introduction of the term **"manifestly erroneous" raises questions in relationship to the terms "inaccurate or incomplete" used in Art. 7(3). If necessary, this should be adjusted in order to prevent contradictions.**
- In addition, the question arises as to **what happens to the advertising based on the erroneous information until the correction has taken place.** Should it remain published and for how long? What about further publications? The new recitals 28a, 28b do not give any indications. In our view, it could be **useful to add that no (further) publication may take place until the correction has been made.** The revised Art. 7(3), on the other hand, obliges publishers to depublishing/non-publishing, if correction/completion is not possible.
- Furthermore, we do **not consider the wording "to ensure" in rec. 28 to be really appropriate.** We recommend a wording similar to Art. 6a (1) ("to enable political advertising publishers to comply with their obligations...").
- Changes resulting from the restructuring and adjustments of Art. 6, 6a (rec. 34) can be supported. Just an editorial note: In the **second sentence of rec. 34, an "and"** should probably be inserted after the addition and before "consider".
- With regard to the revised Art. 7, we first of all welcome the fact that the addressee of the obligation is now made clear.

- Furthermore, we have two minor adjustment requests:
 - First, we ask for a linguistic clarification in Art. 7(1) and rec. 38: After **"make available"**, it should read **"in each advertisement" instead of "for each advertisement"**. This is to clarify that the information according to Art. 7(1) is inseparably linked to the advertisement itself.
 - Secondly, we think it would be helpful if the **different transparency notices of Art. 7(1) and (2) were given its own term**. The information in Art. 7(1) could be called a "short transparency note" and the detailed information in Art. 7(2) could be called a "full transparency note". Art. 7(2a) also only applies to the "full transparency note". Since most citizens won't look at the detailed notice or follow the link, the short notice gains in relevance.
- In line with our position, it has been clarified in rec. 38 and 40 that, in particular in the case of an offline medium advertisement, it is sufficient to refer to a transparency note submitted online by means of a QR code.
- The revision of Art. 7(3) is a step into the right direction, but creates new questions. In particular, the terms **"reasonable efforts" and "reasonable period" are far too vague**, for example, in the context of short-term elections. We therefore suggest the following wording: *"Where the information cannot be completed or corrected **without undue delay**, the publisher shall not make available or shall discontinue the publication or dissemination of the political advertisement and inform the service provider concerned and, where relevant, the sponsor."* If the proposal meets approval, rec. 34a and 42 should also be adjusted accordingly.
- Furthermore, it corresponds with our position that VLOPs provide the repositories in real time in accordance with Art. 7(6).

- In this context, we would like to make clear that **we consider it necessary to make all political advertising accessible to public debate**. Regulators and civil society should have the possibility to get an EU-wide overview of what political advertising is published or disseminated and, if necessary, to become aware of contradictory and erroneous advertising. Against this background, we see the need for an **EU-wide repository that does not only cover political advertisements published by VLOPs**. In view of the **proposals already circulating in this regard**, we think that e.g. SMEs cannot be burdened with the costs in the same way as VLOPs and that real-time transmission (as with VLOPs) is not necessary, but given the technical possibilities for automated transfer the time period should be short.
- We support the new Art. 9(3). The additions to **Art. 9(4), however, raise questions**: What redress possibilities does the regulation provide for an addressee of a notification? In our view, the proposal does not specify this. Therefore, we propose an internal complaint-handling system modelled on Art. 17 DSA.
- To prevent misuse, it should be ensured that the **notifications are not made by bots but by humans**. We propose an explicit permission clause for the use of identification techniques such as so-called CAPTCHAs to determine that the user is a human being.
- Once again, we would like to point out **that Art. 9 does not regulate what happens to published advertising if it violates the provisions of the Regulation. As stated before, it would be useful to add that no (further) publication may take place until the correction, if possible, has been made.**
- In view of the newly introduced periods of one month before an election or referendum, in which special deadlines to provide information under Art. 9(4) and Art. 10(2) take effect, we understand that these provisions are inserted to reflect the heightened interest in timely protection of voters, political parties and candidates before the elections. We would appreciate if the Presidency could confirm this reasoning.
- We understand that **Art. 11** is intended to give “other interested entities” a **material claim** to access information unless an exception in para. 7 applies. We ask that this is **clarified in the wording, e.g. “upon request, providers of political advertising services transmit the information referred to in article 6 and 7.”**

- We welcome that the specifications of “interested entities” in Art. 11(2) have been revised so that the provision does not presuppose any state accreditation of political actors, electoral observers or journalists, which would not be admissible under Germany’s constitutional and legal order. **From our point of view, however, the information should not only be available to a limited group of people (“interested entities”), but in the sense of the greatest possible transparency for the interested public as a whole (“anyone who claims an interest”).**

Comments on the Presidency compromise text of 3 May 2022 concerning the Regulation on the transparency and targeting of political advertising (Chapter 2)

Denmark thanks the Presidency for their compromise text, which seeks to address many of the questions that Denmark has had.

Denmark finds it positive that the Presidency has tried to clarify the obligations for providers of political advertising services that are covered by the proposal, including addressing the questions of when the responsibility for the obligations within the proposal rests with political advertising publishers and providers of political advertising services, respectively.

Denmark maintains the parliamentary scrutiny reservation.

Regarding article 7(1):

Denmark is supportive of the proposed clarification in article 7(1), whereby the obligation to make the information covered by the article available lies with the political advertising publisher.

Regarding the term "reasonable efforts" in article 6a(1) and 7(3):

In addition, Denmark finds it positive that the Presidency has tried to clarify what is meant by "reasonable efforts". From a Danish perspective, however, it is still not entirely clear what is meant by making reasonable efforts to ensure that the information is complete and accurate in accordance with article 6a(1) and article 7(3). Denmark wishes to clarify whether the reasonable efforts presupposes a material assessment of the accuracy and precision of the information, and especially in relation to the transparency notice. For example, it will be relevant to clarify whether providers of political advertising services are required under Article 6a(1) to make a substantial and qualified assessment of the content of the transparency notices they receive in relation to the Regulation's requirements for the notification.

Regarding a proposed change to article 8(1):

Denmark proposes a change, so the amount, on which the political advertising publishers shall include information on, shall have been received *during the financial year*. Denmark can propose the following wording (the proposed addition is marked in bold): *“Where they provide political advertising services, advertising publishers shall include information on the amounts or the value of other benefits received in part or full exchange for those services, including on the use of targeting and amplification techniques **during the financial year and**, aggregated by campaign, as part of their management report within the meaning of Article 19 of Directive 2013/34/EU in their annual financial statements.”*

Regarding the addition to article 9(4) and 10(2):

Denmark welcomes the addition to both article 9(4) and article 10(2), which introduces a shorter deadline in the last month preceeding an election or a referendum to process any received notice and provide requested information, respectively. At the same time, it is very positive that small and medium-sized companies have been taken into account. However, Denmark proposes, that “Providers of political advertising services” in article 9(4), 3rd sentence is changed to “Political advertising publishers” so that this exception only applies to political advertising publishers in line with the obligations of article 9.

INTRODUCTORY REMARKS

In the framework of a steady support to the objectives of the EC legislative proposal, Italy appreciates the efforts put forward by the French Presidency to provide further clarity and legal predictability to the text on the basis of the debate held in the Council Working Group.

The amendments proposed represent valuable improvements a) in terms of clarification of the scope of the Regulation and of the responsibility of the chain of the players -which is crucial for implementation and enforcement - as well as b) in order to ensure a more appropriate approach on delegated acts.

While considering the text a substantial progress in the right direction, Italy suggests the following matters to be addressed:

RECITAL 4

In light of the gravity of the recent surge of fake news 'circulation, we recommend the strengthening of the wording related to the need to fight disinformation and foreign unlawful interference.

CHAPTER 1 – GENERAL PROVISIONS

Article 1a (2)- Scope

While welcoming the new provision related to national rules related to political advertising, we deem necessary to further clarify that the Regulation does not affect specific national bans which may be in place (for example bans on electoral political advertising).

Furthermore, since online platforms are usually exempted by the abovementioned bans, the application of the principle “*what is illegal offline is also illegal online*” should be upheld and further reiterated so that the legislation applied to the traditional/offline media should, in principle, apply to the services available online (e.g. online media and digital platforms).

Article 2 - Definitions

The text should clarify the concepts of “purely commercial” and “purely private” (para 2 letter a). In particular, with reference to the notion of “purely private”, the proposed Regulation should clarify that this notion does not include groups which are in principle “closed” but are able to reach hundreds of thousands of users thanks to the use of amplification techniques and of automated re-circulation software (for example the groups of Telegram and WhatsApp)

CHAPTER 2 – TRANSPARENCY OBLIGATIONS FOR POLITICAL ADVERTISING SERVICES

Article 7 - Transparency requirements for each political advertisement

The proposed regulation does not expressly impose on the publishers specific obligations regarding the keeping of political advertising repositories. Given the importance of this obligation for the monitoring of the compliance to its provisions, Italy recommends that the proposed Regulation dedicates a specific article to the ad repositories and recommends that each publisher of political ads should be obliged to keep its own political ad repository, which must be accessible in real time and designed in accordance to precise standards identified by the competent authorities or by the EU Commission in a set of guidelines. Furthermore, the publishers should provide APIs (always designed according to guidelines drafted by the competent authorities or by the EU Commission) that allow the competent authorities, as well as the researchers and other relevant stakeholders, to access the repositories in real time and carry out an in-depth analysis of the data, and at the same time to be able to compare the results of the analysis carried out among various repositories.

CHAPTER 3 – TARGETING AND AMPLIFICATION OF POLITICAL ADVERTISING

Article 12 - Specific requirements related to targeting and amplification

With regard to the prohibitions of targeting or amplification techniques involving the processing of personal data, laid down in Article 12(1) of the compromise text, **we suggest deleting the exceptions envisaged by paragraph 2 of the same provision** since they would significantly limit the practical effects of the said prohibition and its likelihood of addressing the detrimental effects that may result from the use of personal data for microtargeting activities for political purposes (see EDPB Guidelines 8/2020 on targeting of social media users, point 25 and EDPS Opinion 2/2022 point 34).

In addition, we suggest **introducing** in Article 12 of the compromise text further restrictions of the categories of personal data that may be processed purposes of political advertising, such, as **the prohibition of targeted advertising** based on pervasive tracking i.e. the processing of information concerning individuals' behaviour across websites and services with a view of targeted advertising on the basis of profiling (EDPS Opinion 2/2022 point 34).

It should be also clarified **whether the list of the information to be provided by those political advertising** publishers making use of targeting or amplification techniques involving the processing of personal data **under Article 12(4), replaces or includes the elements mentioned in Annex II of the original Proposal**. We deem necessary that the transparency requirements should include the additional specific elements listed Annex II of the original Proposal which take into account the EDPB Guidelines 8/2020 on targeting of social media users (i.e. the reference to the "same level of detail as used for the targeting" with regard to the parameters used to determine the recipients to whom the advertising is disseminated"; the reference to the "information, where applicable, that the personal data was derived, inferred, or obtained from a third party and its identity as well as a link to the data protection notice of that third party for the processing at stake" with regard to the source of personal data used for the targeting and amplification; the "reasons for choosing the inclusion and exclusion parameters"; and the "indications of the size of the targeted audience within the relevant electorate")

Recital 50(a), Article 12(4), 12(4)(b) and 12(4a) of the compromise text seem to imply that "political advertising publishers making use of targeting or amplification techniques involving the processing of personal data" and "providers of advertising services" might not act as "controllers" either alone or jointly with other entities, with regard to the processing of personal data. Since making use of targeting services or of political advising publishing services offered for instance by a social media provider, in many cases, gives rise to **joint controllership** between the social media provider offering those services and the entity making use of the services, **we suggest amending these provisions by referring consistently to "controller/s using targeting or amplification techniques"**. In particular, controllers using targeting or amplification techniques and political advertising publishers may act as "joint controllers" and in this case the allocation of responsibilities between them should be clear and accessible in order to allow data subjects to fully exercise their rights under the GDPR.

Article 13 - Transmission of information concerning targeting or amplification to other interested entities

For the same reasons mentioned above, **Article 13** of the compromise text should be amended in order to clarify if the obligation of transmitting the information referred to in Article 12 to other interested entities is incumbent upon “political advertising publishers” and “providers of advertising services” beyond the “controller/s using targeting or amplification techniques”.

CHAPTER 4 – SUPERVISION AND ENFORCEMENT

Article 15 - Competent authorities and contact points

We strongly suggest **deleting from Article 15(1)** of the of the compromise text **the reference to the monitoring of the application of Article 12**, since this could be interpreted as limiting the competences of data protection authorities to the use of targeting and amplification techniques. On the contrary, to avoid legal uncertainties hindering the provision of political advertising services and the smooth functioning of the oversight system laid down by the Proposal, **we suggest replacing this reference by the following**: “as far as personal data is concerned”, taking into account that other aspects of the activities of political advertising may affect or relate to the processing of personal data, thus following under the general supervision of data protection authorities referred to Article 51 of Regulation (EU) 2016/679 or Article 52 of Regulation (EU) 2018/1725.

As Article 15 refers both to “competent authorities” and “supervisory authorities” we suggest including a reference to supervisory authorities in **Article 15(6)** of the compromise text to avoid legal uncertainty with regard to the envisaged cooperation between different competent authorities involved.

Recital 62 stipulates that “the contact point should, if possible, be a member of the European Cooperation Network on Elections”, but not many national regulatory authorities under Article 30 of the AVMS Directive are also part of the European Cooperation Network on Elections. As a consequence, if recital 62 was applied, the contact point could not be the audiovisual regulator. For this reason, Italy recommends that the mentioned clause in Recital 62 is deleted.

Article 16 - Sanctions

The proposed Regulation allows the Member States to lay down their own rules in sanctions. However, since online advertising services are very often provided on a cross-border basis, it would only take a single Member State not to adopt adequate sanctions to jeopardize the success of the regulation and create a system in which the platforms could choose to locate their headquarters in the Country which have low sanctions or no sanctions at all. Therefore,

the Regulation should adopt a harmonized enforcement regime replacing the system proposed by art 16 and introducing proportionate, dissuasive, and effective sanctions in all Member States. In particular, minimum and maximum penalty ranges should be identified and the Regulation should provide for a sanctioning system that obliges the publisher to remedy the damage done in case the rules are breached.

Written comments by Slovenia – Chapter II

Article 4

We propose to consider adding in the second paragraph that the European Commission prepares standard contractual clauses in this matter.

Article 6

We would like to know would the situations where the advertisement would be prepared by the sponsors themselves (e.g. campaign organizers, political parties, or candidates themselves) without advertising agencies be considered? What if, for example, the sponsors themselves produce an advertisement and also order advertising on, for example, Facebook. Would it be perhaps in such a case appropriate that this requirement applies directly to sponsors?

Article 7

We believe that the proposal for regulation should more clearly specify how the stated is implemented in the context of different forms of advertisements, e.g. in the case of radio advertising and posters, it shall provide a transparency message with mandatory content prescribed in Article 7.2 (QR code,...).

Para 2b: Could you please explain what is the purpose of the new amendment to this paragraph, namely that the transparency notice shall also include the fact that the same advertisement has been disseminated in the past by the publisher of political advertising.

Para 2c: This requirement has already been implemented, for example, in the Facebook ad library (where however only information on the expenditure spent on advertising directly affecting the relevant publisher is published, excluding the costs of producing the advertisements). The question arises whether it is feasible with regard to all forms of advertising (in the case of posters or radio and TV advertisements) to indicate an overall amount spent on advertising (i.e. the cost of producing each type of advertisement and the cost of publishing).

Article 10

Para 1a: It is not clear why national authorities (e.g. the Court of Auditors, inspection bodies, in proceedings other than criminal offences) which have clearly defined statutory powers and which conduct procedures in accordance with the law, should explain in the request the general objective for which the information is required nor explain why the request is proportionate? This is already provided for in procedural provisions under national law, as a condition for a particular national authority to start the proceedings and act in accordance with its jurisdiction and powers. We believe that in this way, monitoring the implementation of the regulation can become more difficult. Furthermore, Article 11 does not require other interested entities to explain the objectives for which the information is requested nor why the request is necessary.

Comments by Spain on Chapter 2

Regarding articles 5 to 8, on the chain of responsibility

Spain considers that the chain of responsibility of the proposal is quite clear and coherent. Spain favours that the responsibility for the truthfulness of the declaration should rely on the sponsor or the service provider acting on his behalf, not on the service provider as such. Spain also considers that providers and editors will already have, if the Regulation comes into force, an increase of their administrative burden. Therefore, we consider that providers and editors should not have further obligations regarding the follow up of these declarations.

Regarding article 9, on the notification mechanism

According to the proposal, natural and legal persons will be able to notify advertising publishers that a particular advertisement does not comply with this Regulation. Spain considers that the deadline and procedure according to which a person is informed of the course given to his or her notification should be specified.

General comments from Sweden on Chapter II

Most or all of the requirements in Ch II seem excessive and not acceptable for media which is not online, especially for print media which is only self-regulated in Sweden. A solution thus has to be found for the outstanding issues in ch I for Sweden to be able to accept the requirements in ch II.

In general we would also argue that the suggested requirements in some instances are excessive and that it is important to only include what is necessary in the requirements to retain and make available information. The totality of ch II needs to be further discussed in order to find the right balance of what is necessary in the sake of transparency and what will only lead to extensive bureaucracy for all involved providers and authorities.

As an example; although we understand the idea to include the requirements from the Annex into Article 7.2, we are not convinced that these requirements are proportional.