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| From: | General Secretariat of the Council |
| To: | Delegations |
| Subject: | Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising<br><br>- Comments from Member States on the Presidency compromise text (ST 8647/2/22 REV2) |

Delegations will find attached the comments from Germany, Italy and Latvia on the revised Presidency compromise text (ST 8647/2/22 REV2) following the GAG meeting of 14 June and an informal video conference organized by the Presidency on 24 June 2022.

**Member States' replies**

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising**

**- Comments from Member States on the Presidency compromise text (8647/2/22 REV2) following the GAG meeting of 14 June and an informal VTC organized by the Presidency on 24 June 2022**



## Contents

## Germany

***General Comments***

- In view of the short time, we had only the chance to get a first rough overview of the changes in the new text. We therefore enter a **scrutiny reservation** that applies to the entire revised compromise text.
- In our view, the first two chapters of the revised compromise text essentially take our positions into account and therefore, with the exception of a few points, meets our approval.
- The situation remains different for **Chapter III**: **We see no significant progress here**. Unless we find a solution in dealing with the results of the DSA, we will continue to tread water here. To put it in a nutshell: **We cannot agree to a (partial) general approach unless we reach an agreement on Art. 12**.

**Chapter I ("General Provisions"): Art.1 - 3 and recitals 1-27**

- We welcome the important clarification (exception of purely ancilliary services) of the definition of the "provider of political advertising services" in Art. 1(5a).
- We support the aim of revising the editorial content requirements in Art. 2(2) and Rec. 19, as they serve to all media.
- The new inclusion of Article 2a seems quite helpful as it facilitates the applicability of the regulation.

**Chapter II ("Transparency Obligations"): Art. 4 – 11 and recitals 28 - 46**

- The addition in Art. 5(1) seems reasonable, but remains **without further consequence**. What happens if "good faith" is not acted upon?
- It should be examined whether, according to Art. 5(2), not only the relevant information to comply with Art. 6(1) but also to comply with Art. 7(1) should be transmitted.
- The revised compromise text proposes in Art. 5(3) and Rec. 28a, 28b that advertising service providers should require sponsors to correct their statement if a statement or information provided by sponsors is "manifestly erroneous". This would require providers to actively investigate for possible incorrectness and review all information received from sponsors. We see **an inconsistency with the DSA**, which prohibits general monitoring obligations for intermediary services. At

the same time, the principle of self-declaration of Art. 5(1) is undermined. The assessment of whether or not the sponsor has correctly labelled an advertisement as political should not be the responsibility of the provider.

- The addition in **Art. 5(3)(**2) ensures that the sponsor also has to act and thus fulfil its responsibility in an appropriate manner. **However, it should be added, that publishers should no longer publish/broadcast the advertisement until correction**. Wording proposal: ***"Until the information has been completed or corrected, political advertising publishers shall not make available or shall discontinue the publication or dissemination to the public of the political advertisements not fulfilling the transparency requirements under this Regulation"***.
- The addition in **Art. 7(3)** makes sense: After becoming aware of the incompleteness/incorrectness, sponsor and provider should act without undue delay. However, it should also be added here that no further publication/broadcast should take place until the correction. Wording proposal: *"**Until the information has been completed or corrected, political advertising publishers shall not make available or shall discontinue the publication or dissemination to the public of the political advertisements not fulfilling the transparency requirements under this Regulation.** […]."*
- We welcome that the new Art. 10(2) adequately considers the role of SMEs and provides for extended transmission deadlines.
- We would like to emphasise once again 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. Therefore, we see the **need for an EU-wide repository that does not only cover political advertisements published by VLOPs**. However, SMEs cannot be burdened with the costs in the same way as VLOPs and real-time transmission (as with VLOPs) is not necessary, but given the technical possibilities for automated transfer the time period should be short.

**Chapter III ("Targeting and Amplification of Political Advertising"): Art. 12 and 13 recitlas 47 - 54**

- As far as Art. 12 is concerned, in our view, **essential points are still open**: This concerns in particular the question of whether personalised political advertising using sensitive data [such as ethnic origin or health data] should be permissible if the person concerned consents.
- The question also arises as to why the agreement on the Digital Services Act (DSA) should be deviated from here. In our opinion, the **agreement on the DSA regarding personalised advertising has to be considered as the base for the level of protection**. According to Art. 24 DSA, the processing of special categories of data for the purposes of personalised advertising is prohibited and not possible even with consent. This should apply all the more for political advertising. In our opinion, the compromise text is therefore still insufficient and should be revised.
- The term "profiling" in the DSA refers to the definition in Art. 4(4) GDPR, and - as we understand it - includes the relevant "targeting and amplification techniques". Against this background, the result should be transferable to the political ads proposal. If the Presidency and the Commission see this differently, we ask for clarification.
- If the agreement on the DSA, as we assume, can be transferred, we also have a quite simple proposal: **Art. 12(2) is deleted completely and without replacement**.
- Downstream, but no less important for us, are the questions which techniques are already covered by the GDPR and which require special regulation. This includes in particular the question of whether "**delivery optimisation techniques**" are already covered by the GDPR or need to be included as well in the scope of this regulation. As we have explained in detail in our written comment on Chapter III, there is a need for regulation. If it is doubtful whether these techniques are covered by the GDPR, a clear regulation should be made here.

**Italy**

**RECITAL 49** We welcome the clarification provided in **recital 49 of the compromise text** with regard to the complementarity of the safeguards envisaged by the Proposal with the existing safeguards set out in Regulation (EU) 2016/679 and Regulation (EU) 2018/1725, **including those concerning automated decision-making**. In line with this clarification, we suggest replacing the reference to Article 24 of Regulation (EU) 2016/679 and Article 26 of Regulation (EU) 2018/1725 (accountability principle) by a **reference to Article 22 of Regulation (EU) 2016/679 and Article 24 of Regulation (EU) 2018/1725 establishing the safeguards with regard to automated individual decision-making, including profiling**.

**For the sake of clarity,** the same clarification should be included in the text of the Proposal. Therefore, **in Article 1 it could be specified that the Proposal complements and is without prejudice to the application of Regulation (EU) 2018/1725.**

**DEFINITIONS** We reiterate the relevance attached to a better clarification of the concept of "purely private" [message] of Art. 2, para. 2, letter a). In particular, the Regulation could specify (e.g., in Recital 30) that the messages posted in closed groups which are able to reach a vast number of users in very limited time cannot be considered as "purely private" messages.

The definition of the messages in Art 2, Para 2 letter b) is significantly wide and it is advisable to narrow it down through a specific reference to the purpose of the message. The proposed wording "liable AND DESIGNED to influence" a voting behaviour goes in the right direction.

We suggest replacing the reference to Article 3(8) of Regulation (EU) 2016/679, in **Article 2(12) of the compromise text, by a reference to Article 4(7) of Regulation (EU) 2016/679** which defines the notion of 'controller'. Likewise, the reference to Article 4(8) of Regulation (EU) 2018/1725 should be replaced by a **reference to Article 3(8) of Regulation (EU) 2018/1725**.

**REPOSITORIES**

**From our perspective, the lack of a provision on repositories could undermine significantly the effectiveness of monitoring activities**.

- We reitertate the proposal that the text includes a specific provision related to the **obligation for each publisher (not only the VLOPSEs) of political advertising to keep**

**its own political ad repository,** to be made accessible in real time and designed in accordance to guidelines provided by the competent authorities or the Commission.

- **The publishers should provide APIs** (designed in accordance to the mentioned guidelines) that allow competent authorities, as well as researchers and other relevant stakeholders, to access the political ads repositories in real time and carry out an in-depth monitoring and analysis of the data.



**Art. 12** With regard to the **prohibitions of targeting or amplification techniques involving the processing of special categories of personal data,** laid down in **Article 12(1) of the compromise text, the exceptions envisaged by paragraph 2** of the same provision -currently in the text in square brackets – **should be deleted** 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 processing 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). We highlight the importance of a cautious and attentive stance related to the "inferred data" which allow to retrieve information related to political orientations of the citizens.

We welcome the clarification provided by **Article 12(4) of the compromise text** with regard to the list of the information to be provided by political advertising publishers, making use of targeting or amplification techniques involving the processing of personal data, since it is specified that this **includes the additional elements mentioned in 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").

According to the explanatory memorandum of the Commission's Proposal, the latter will apply to all controllers making use of targeting and amplification techniques, beyond providers of political advertising services. Since the concept of controller plays a crucial role in the application of data protection law, as this determines the main responsibilities for compliance with data protection rules, **for the sake of clarity, we suggest replacing the term 'controllers', in Recital 50(a) and Articles 12(4a), 12(4b) and 13 of the compromise text, by "controllers using targeting or amplification techniques"**. In addition, as **controllers using targeting or amplification techniques and political advertising publishers may act as "joint controllers"** we suggest **adding, even in a recital, that in this case they shall togeter ensure compliance with Article 26 of Regulation (EU) 2016/679 and Article 28 of Regulation (EU) 2018/1725** as applicable, so as to ensure that the allocation of responsibilities between them is clear and accessible in order to allow data subjects to fully exercise their rights under the GDPR.

**In Article 12(5) of the compromise text, the term 'making use of' should be deleted as it is redundant**

**ART. 15** In **Article 15(1) of the compromise text, the reference to the monitoring of the application of Article 12 with regard to data protection authorities should be deleted,** since this could be interpreted as limiting the competences of those 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.

Recital 62 stipulates that "*the contact point should, if possible, be a member of the European Cooperation Network on Elections*". As far as we aware, not many national regulatory authorities are also part of the European Cooperation Network on Elections. As a consequence, if Recital 62 was applied, the contact point could be different authorities than those appointed under paragraph 2 or 3 of Article 15 of this Regulation. Such aspect could complicate the coordination

amongst different authorities and undermine the supervision of online platforms. For this reason, we recommend that the mentioned clause in Recital 62 is deleted.

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

**ENFORCEMENT AND SANCTIONS**

Since online advertising services are often provided on a cross-border basis, we recommend the adoption of a more coordinated sanctioning regime to secure the effective implementation of the Regulation, with the introduction of proportionate, dissuasive sanctions in all Member States. In particular, minimum and maximum penalty ranges could be set, in order to provide member States with the adequate marge of manoeuvre.

**Latvia**



**- Subject matters and objectives, as well the scope of the Regulation**

a) regarding offline/online advertising, as expressed before, Latvia supports the regulation regarding online advertisements, but asks to maintain the national regulation on the printed media/advertising – Latvian national regulations regarding offline media is more detailed as this proposal.

b) Article 1a(2) lacks a state control mechanism on the regulatory framework, it should be incorporated in this Article of Recital 13.

For legal clarity and to provide that sponsor also can be other person, we suggest in Article 2(7) to the definition of "sponsor" add "or the entity ultimately controlling the sponsor" so that definition reads as following "sponsor or the entity ultimately controlling the sponsor", as it is in Article 6(1)(d).

Latvia still has concerns with the application of national regulation in the context of this Regulation, as in the Regulation is mentioned specific and limited information which should/could be sent to the competent authorities. Latvia considers that in the current wording of Article 10, service providers, especially large online platforms, can avoid providing additional information to the competent authorities regarding certain time limits, amounts, etc.

Latvia asks in Article 10(1a)(a) to incorporate after the words "prosecution of criminal offences" words "and administrative offences", because there are also administrative proceedings, not only criminal proceedings, which are investigated in connection with this provision.

Latvia has concerns regarding allegedly free of charge political opinions and so called "hidden political advertising" which are not part of the scope of this Regulation, as "The rules on transparency laid down in this Regulation should only apply to political advertising services, i.e. political advertising that is normally provided against remuneration, which may include a benefit in kind" (Recital 29, 1st sentence). We refer also to remuneration, which is mentioned not only in Recital 29, but also in Recitals 14, 19, 28 and Article 2(1), 2(2)(2), also in the Latvian version Article 2(5) and the presumption that the political opinion is free of charge and that the service provider "has not received remuneration" (or any other reward). We consider that the scope of Recital 28 is not sufficient to underline hidden political advertising problems, nor above mention Recitals and Articles are solving the issue of hidden political advertisements. We consider that additional provisions regarding "hidden political advertising" must be incorporated in the text.

Regarding Article 12 - we maintain our position which we submitted in our previous written comments.