



EUROPEAN COMMISSION

*Brussels, 7.6.2022
C(2022) 3873 final*

Dear President

The Commission would like to thank the Bundesrat for its Opinion on the proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising {COM(2021) 731 final}.

The Commission welcomes the Bundesrat's constructive and active engagement and its appreciation of the proposal's objectives. This proposal, adopted under the 'Reinforcing democracy and integrity of elections' package, provides a comprehensive European approach to the piecemeal development of political advertising services and to the use of targeting practices for political purposes. It sets out specific measures to align the establishment and functioning of the internal market with the legitimate need to ensure transparency and accountability in the context of political advertising, and upholding relevant fundamental rights and data protection principles.

Discussions between the Commission and the co-legislators, the European Parliament and the Council, concerning the proposal are currently underway and the Commission remains hopeful that an agreement will be achieved in the near future.

The Commission stands determined to ensure that the agreed text will strengthen the internal single market and reinforce democracy and the right to the protection of personal data in a cross-border context of political advertising providers.

The concerns raised by the Bundesrat in its Opinion will be given further consideration in the ongoing technical discussion on the proposal. In response to the Bundesrat's comments on other aspects of the proposal, the Commission would like to refer to the attached annex.

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The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat in its Opinion and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Věra Jourová
Vice-President*

Annex

The Commission is pleased to have this opportunity to provide the Bundesrat with information and clarifications regarding its proposal to address the questions raised.

Regarding the impacts of the proposed regulation on political advertising services addressed in points 3, 4 and 7 of the Bundesrat's Opinion, the Commission notes that its impact assessment for the proposal considered that the potential compliance costs of economic actors would, in most cases, be very modest and would at least in part be offset by efficiency gains through increased legal certainty and reduced fragmentation. Such costs are also set off against the expected positive impact on the public trust in the use of political advertising, and more generally in the public political debate and the integrity of the electoral process.

The Commission fully agrees with the need to respect the principle of subsidiarity as indicated in point 5 and notes, in response to point 6, that, for the reasons specified in the relevant explanatory memorandum and impact assessment, the need for EU action is demonstrated with respect to both aims that the proposal pursues. Member States acting individually cannot sufficiently achieve these aims.

With respect to the proportionality of the measures, the Commission reiterates that the proposed Regulation does not go beyond what is necessary in addressing EU-wide problems stemming from fragmentation of national rules in the field of transparency of political advertising and increased cross-border nature of its provision.

The Commission takes note of the requests to examine the extent to which advertising services are offered across borders in the context of local and regional elections, particularly by micro-enterprises and small and medium-sized rural enterprises, and whether a directive would be a more suitable instrument in that respect. The Commission also notes the suggestion made in point 7 to exempt rural small and medium-sized enterprises from the requirements of the proposed Regulation to avoid significant additional financial and organisational costs.

The Commission recalls that political advertising, also in the context of local and regional elections, is increasingly multimedia and liable to include cross-border services, in particular with respect to online services, which are intrinsically cross-border. Relevant services are identified in the impact assessment as being offered by small and medium-sized enterprises across borders, including but not limited to sophisticated targeting services. Providing for specific carve-outs, such as to exclude local and regional elections or services provided by small and medium-sized enterprises, would introduce legal uncertainty and open the proposal to circumvention. Specific measures are already included in the proposal to address the impact on small and medium-sized enterprises. A directive would not offer any additional scope for the mitigation of impacts in that respect. The Commission took into account the role played by relevant small and medium-sized rural enterprises in the problem description in the impact assessment, for instance in the 'Cambridge Analytica' scandal.

Moreover, the General Data Protection Regulation already applies to actors in local and regional elections, and to small and medium-sized enterprises providing services in this connection. The Commission has sought to ensure that the proposed Regulation would have a minimal impact on the activities of the majority of enterprises addressed and has aimed to include obligations which rely on ordinary business processes and the information which they generate, and which avoid additional administration once implemented. The Commission took this into account when providing for annual reporting on political advertising activity in the context of a company's management report. The Commission assesses the overall impact of the measures as positive, including on small and medium-sized enterprises, especially due to the increase in legal certainty, the simplification of requirements for offering services across borders, and the strengthening of opportunities to scale up services and enter more markets. The Commission made explicit provision to encourage the drawing up of codes of conduct intended to contribute to the proper application of the transparency requirements under Article 7 of the proposal, which will take into account the specific needs of micro, small and medium-sized enterprises. The Commission intends to support the compliance process including by encouraging the drawing up of codes of conduct intended to contribute to its proper application, and supporting the establishment of standards among industry and other stakeholders to facilitate its technical requirements.

The Commission takes note of the view presented in point 8 that obligations should only be imposed on the 'publishers of political advertising' and that the definition of 'political advertising service' should include a direct link to the provision of political advertising. The Commission's proposal imposes obligations on relevant service providers to retain information and, under certain circumstances, for them to provide this information to political advertising publishers, competent national authorities and other interested parties. Service providers are only required to retain information which they control, and the proposal is clear in that no obligation is imposed which would require the general monitoring of political advertising services. Ensuring the effectiveness of the envisaged transparency obligations requires the contribution of all relevant political advertising service providers. The Commission notes that the definition of political advertising service is reinforced by several recitals and provisions¹ indicating the types of political advertising services, namely the preparation, placement, promotion, publication and dissemination of political advertising.

As to the observations made in points 9 to 12 on the role of transparency and the need to align the proposal to the Member States' media regulatory competences and respect media pluralism and diversity, the Commission recalls that recital 13 states that the proposed Regulation 'should not affect the substantive content of political advertising nor rules regulating the display of political advertising including so-called silence periods preceding elections or referendums'. The proposed Regulation does not intervene in other aspects regulated at national level such as the legality of the content of political advertisement and the periods during which advertisements are permitted, or

¹ Recitals 2, 6 and 33. Articles 7(2)(c) and Annex 1 (f).

the nature of participants in the democratic process. The harmonised transparency requirements proposed are intended to ensure that political advertisements are clearly labelled and accompanied by information to support democratic accountability and oversight. The supervision and enforcement provisions provided in Articles 15 and 16 respect the specificities of national competences, including for media regulation, and allow Member States to determine the authorities to be responsible for the application and enforcement of the aspects of the Regulation which would fall outside the scope of Regulation (EU) 2016/679.

The Commission takes note of the specific requests under points 13 and 14 to add definitions beyond the ones proposed for ‘service’, ‘political advertising’ and ‘political advertising service’.

Point 15 requests clarification of the concept of political advertisement. Recital 21 of the proposed Regulation indicates that ‘it is necessary to define political advertisement as an instance of political advertising. Advertisements include the means by which the advertising message is communicated, including in print, by broadcast media or via an online platforms service’.

With respect to point 16 – on the mechanism required under Article 9 of the proposal to enable individuals to report to political advertising publishers that a particular political advertisement, which they have published, does not comply with this Regulation, and its interaction with the notice and action process to be established by the Digital Services Act proposal –, the Commission would like to flag that the proposed regulation complements the Digital Services Act and that it will work with the co-legislators to ensure that this articulation is preserved. Recital 45 of the proposal clarifies that ‘political advertising publishers should be able to rely on existing mechanisms where appropriate’ including the notification process to be provided by the Digital Services Act. Article 9(3) of the Proposal provides that ‘the political advertising publisher shall inform individuals of the follow up given to the notification as referred to in paragraph 1’.

Regarding points 17 to 20 on the broad scope of the definition of political advertising and on its possible overlap with commercial advertising, the Commission notes that the definition of political advertising is relevant for the whole Regulation covering both the provisions based on Articles 16 and 114 of the Treaty on the Functioning of the European Union. Recital 15 explains that, in the absence of a definition of political advertising or political advertisement at Union level, ‘a common definition is needed to establish the scope of application of the harmonised transparency obligations and rules on targeting and amplification. This definition should cover the many forms that political advertising can take and any means and mode of publication or dissemination within the Union, regardless of whether the source is located within the Union or in a third country’. Recitals 19 and 25 of the proposal make it clear that the definition of political advertising is not intended to affect national definitions of political party, political aims and campaign periods at national level or to cover political views.

On point 21 regarding the request to examine whether the ‘political actor’ in the definition of ‘political advertising’ is useful as a connecting factor and whether it covers the relevant circle of persons or institutions, the Commission would like to point to recital 16 that indicates ‘since advertisements by, for or on behalf of a political actor cannot be detached from their activity in their role as political actor, they can be presumed to be liable to influence the political debate, except for messages of purely private or purely commercial nature’, and highlight that they are as such usually to be considered political advertising. The definition of ‘political actor’ provided in Article 2(4) of the proposal is composed of relevant elements already defined under Union law, as well as under national law in line with international legal instruments, such as those of the Council of Europe. The concept of ‘political parties’ should include their affiliated and subsidiary entities established, with or without legal personality, in order to support them or pursue their objectives, for instance, by engaging with a specific group of voters or for a specific electoral purpose.

With regard to the clarification of the exclusion of online intermediation services in absence of a remuneration from the scope of the Regulation, as requested in point 22, the Commission notes that the transparency obligations provided by chapter 2 of the proposal apply to political advertising services, which are normally provided for remuneration. However, as recital 29 of the proposal clarifies, ‘the transparency requirements should not apply to content uploaded by a user of an online intermediary service, such as an online platform, and disseminated by the online intermediary service [...], unless the user has been remunerated by a third party for the political advertisement’.

On the Bundesrat’s observation in point 23 that ‘sponsor’ and ‘political actor’ are not clearly distinguished, the Commission notes that, for the purposes of its proposal, ‘political actor’ is defined in the proposal as one factor for establishing political advertising, and, as such, is a subset of the broader category of ‘sponsor’ of political advertising.

With respect to point 24 on the need to ensure consistency with the Audiovisual Media Services Directive², it should be flagged that the proposed regulation complements that Directive where relevant, taking into account that the two instruments are different in scope and purpose.

The Commission takes note of the Bundesrat’s recommendations in its points 25 and 26 to increase the clarity of Article 12 of the proposal and ensure articulation with the Regulation (EU) 2016/679. The Commission notes that Article 15(1) of the proposal states that the supervisory authorities under Regulation (EU) 2016/679 shall be competent to monitor the application of Article 12 of the Regulation.

² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Text with EEA relevance), OJ L 95, 15.4.2010, p. 1-24.

Furthermore, the Commission would like to clarify that it is up to Member States to designate the relevant authorities to monitor the compliance with the provisions of the Regulation. The Commission agrees with the Bundesrat in its point 27 as regards the need for independence, plurality and separation from the executive in organising the supervisory structures of the proposed Regulation. As the Bundesrat rightly notes, recital 58 of the proposal clarifies that, for the oversight of those aspects of the proposal which do not fall within the competence of the supervisory authorities under the General Data Protection Regulation, such authorities should be structurally independent from external intervention or political pressure and are appropriately empowered to effectively monitor and take the measures necessary to ensure compliance with this Regulation, in particular the obligations laid down in Article 7. Article 15(3) of the proposal, also states that each designated competent authority shall structurally enjoy full independence both from the sector and from any external intervention or political pressure and it shall in full independence effectively monitor and take the measures necessary and proportionate to ensure compliance with the Regulation. The Commission agrees that the independence of authorities in the areas of media regulation is important and notes that equivalent structural independence is provided in supervisory authorities and bodies envisaged in the Audiovisual Media Services Directive.
