

### Introduction

As part of the Government Decision of 10<sup>th</sup> July on the *1<sup>st</sup> Report of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation*, it was agreed to advance the following recommendation:

#### ***Regulate transparency of online political advertising***

*This is to be considered in the first instance through engagement with stakeholders (political parties, industry organisations, academia, civil society and NGOs) at an Open Policy Forum*

### Objective

Following publication of the Report, the aim of this paper is **to outline the issues and challenges involved in regulating transparency of online political advertising, and provide a basis for a public consultation in advance of an open policy forum to be held in the autumn.**

### Findings of First Report

While the 1<sup>st</sup> Report found overall that risks to the electoral process in Ireland are low, it did however find that the spread of disinformation online carries a high level of risk.

The report looked at online platforms and also considered micro-targeting as a separate area of risk, given it is inherently non-transparent.

It found that the risk posed by online political advertising, that is neither regulated nor transparent, is significant, which is in line with EU and international findings.

### Where are the risks?

The 1<sup>st</sup> report highlighted the following risks in respect of online advertising:

- Online advertising is not subject to direct regulation and absence of transparency of sourcing and targeting of advertising
- No limit to volume of advertising or spend in respect of referendums – statutory spending limits are in place for Dáil, European, local and presidential elections.
- The speed at which disinformation can be spread and accessed online means that online platforms present a particular risk in relation to disinformation and deliberate bias.
- Online manipulation (including bots)
- Particularly in respect of micro-targeting:
  - Opaqueness in privacy and consent controls
  - Influencing Outcomes unlawfully or in a concealed manner

### **Mitigating Factors identified:**

- Digital media literacy awareness/education initiatives
- Industry initiatives, e.g. Facebook pilot advertising transparency tool, changes to the Twitter API in January 2018.<sup>1</sup>
- Fact checking initiatives, i.e. Facebook and the Journal.ie partnership to identify fake news<sup>2</sup>
- Data Protection law requires data processors to have consent from data subjects for processing their data. It also compels any entity holding personal data to take a range of specific measures to protect that data, including data security measures likely to have the effect of reducing the risk to the electoral process by increasing the resilience of the IT systems used by entities holding relevant information.

### **Fundamental Rights in Democratic Process**

The right to freedom of expression is a fundamental human right. It is guaranteed by the Constitution which provides in Article 40.6.1<sup>o</sup>

*“The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –*

- The right of the citizens to express freely their convictions and opinions.*

*The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavor to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.*

*The publication or utterance of blasphemous, seditious, or indecent matter is an offence which shall be punishable in accordance with law.”*

The right is also recognised and protected by Article 10 of the European Convention on Human Rights which provides –

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

---

<sup>1</sup> <https://www.irishtimes.com/business/technology/new-facebook-feature-explained-1.3464713>

<sup>2</sup> <https://www.siliconrepublic.com/companies/facebook-and-the-journal-team-up-on-fact-checking-project>

The EU Charter of Fundamental Rights also makes provision as follows in Article 11

*Article 11*

**Freedom of expression and information**

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

Any measures introduced to regulate public discourse will have to take full account of fundamental rights.

**Framing Transparency Requirements that Respect Freedom of Expression & other rights**

**Current Regularity Provisions on Advertising**

***Linear Broadcasting***

S41(3) of the Broadcasting Act 2009 provides that *“A broadcaster shall not broadcast an advertisement which is directed towards a political end or which has any relation to an industrial dispute.”*

This is elaborated upon in section 4.6 of the Broadcasting Authority of Ireland’s *“General Commercial Communications Code”* - Commercial communications that are directed towards a political end or that have any relation to an industrial dispute are prohibited. This rule does not prohibit the broadcasting of a party political broadcast provided that a broadcaster does not, in the allocation of time for such broadcasts, give an unfair preference to any political party. This rule does not apply to commercial communications broadcast at the request of the Referendum Commission in relation to a matter referred to in section 3 of the Referendum Act 1998 concerning a referendum.

***Print Media***

Advertising in print media is subject to the self-regulatory code of the Advertising Standards Authority of Ireland. However, political advertising is not within the scope of this code, and therefore the ASAI does not consider any complaints in relation to this category of advertising.

***Electoral Acts***

The Electoral Acts do not regulate the content of political advertising nor the content of electoral material, including election posters, during or outside of electoral or referendum campaigns. Similarly, there are no specific requirements under the Electoral Acts in relation to online advertising.

Under section 140 of the Electoral Act 1992, the sole provision in relation to advertisements provides that every notice, bill, poster or similar document having reference to a Dáil election or distributed for the purpose of furthering a particular result at a Dáil election is required to bear upon its face the name and address of the printer and of the publisher thereof. Any person who prints, publishes or posts a notice, bill, poster or similar document having reference to a Dáil election which fails to meet these requirements shall be guilty of an offence. The sole exception to these requirements relate to notices, bills, posters or similar documents printed, published or posted by returning officers.

Sections 2(3)(b), 2(3)(ff) and 2(3)(gg) of the Referendum Act 1994 apply these provisions to the holding of referendums while sections 3(3)(b) and 3(3)(s) of the Presidential Elections Act 1993 equally apply these provisions to the holding of presidential elections. Similar provisions are provided for in section 109 of the European Parliament Elections Act 1997 in respect of elections to the European Parliament and in Regulation 101 of the Local Elections Regulations 1995 having regard to notices, bills, posters or similar documents printed or published in connection with local government elections.

## Questions on the definition and scope of political advertising:

- **How should political advertising be defined?**

While the Electoral Acts do not define “political advertising”, a definition is provided for “political purposes” in the context of the donations regime provided for under Part IV of the Electoral Act 1997. While advertising connected with any of the activities set out in the definition of “political purposes” could also be considered to be “political advertising”, it should be noted that a number of civil society groups have raised strong concerns on the broad ranging nature of this definition. A number of civil society groups have cited that it brings a wide range of non-governmental organisations within the scope of the Act despite the fact that their activities may not be related to any electoral or referendum campaign. In addition, it is alleged that the definition may adversely affect the means by which civil society groups legitimately raise funds to run their normal day-to-day operations. The Standards in Public Office Commission have also expressed their concerns in relation to the broad ranging nature of the definition having regard to its impact on civil society groups and their ability to fund their legitimate activities. The definition is as follows: -

*‘Political purposes’ means any of the following purposes, namely -*

- (i) (I) *to promote or oppose, directly or indirectly, the interests of a political party, a political group, a member of either House of the Oireachtas or a representative in the European Parliament, or*
- (II) *to present, directly or indirectly, the policies or a particular policy of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament or a third party, or*
- (III) *to present, directly or indirectly, the comments of a political party, a political group, a member of either House of the Oireachtas, a representative in the European Parliament or a third party with regard to the policy or policies of another political party, political group, a member of either House of the Oireachtas, representative in the European Parliament, third party or candidate at an election or referendum or otherwise, or*
- (IV) *to promote or oppose, directly or indirectly, the interests of a third party in connection with the conduct or management of any campaign conducted with a view to promoting or procuring a particular outcome in relation to a policy or policies or functions of the Government or any public authority;*
- (ii) *to promote or oppose, directly or indirectly, the election of a candidate at a Dáil, Seanad or European election or to solicit votes for or against a candidate or to present the policies or a particular policy of a candidate or the views of a candidate on any matter connected with the election or the comments of a candidate with regard to the*

*policy or policies of a political party or a political group or of another candidate at the election or otherwise;*

- (iii) *otherwise to influence the outcome of the election or a referendum or campaign referred to in paragraph (i)(IV) of this definition;*

The concerns that have been raised in connection with the definition of “political purposes” would need to be carefully considered should a definition of “political advertising” be developed for the purposes of regulating in this area in order to minimise the risk of unintended consequences.

The definitions of “online advertising”, “online political advertising” and “political end” which are set out in the Online Advertising and Social Media (Transparency) Bill 2017 should also warrant further consideration – similar to the definition of “political purposes” in the Electoral Act 1997, the meaning of “political end” appears quite broad, applies to institutions outside of the State and include matters that may be speculative.

- ***Should it be limited to the promotion of candidates or proposals (the subject of potential elections or referendums)?***
- ***Should any regulation in this area apply to both candidates and political parties campaigning at elections and also apply to referendum proposals?***
- ***Should controls be limited to defined time periods in advance of referendums and/or elections?***

### **Transparency questions:**

- ***What should be made transparent?***
  - Identity and location of the person or organisation that bought the ad?
  - If consistency is desired, should any regulation in this area broadly mirror the transparency provisions in the Electoral Acts in relation to notices, bills, posters and other similar documents, i.e. the advertisement’s printer and the publisher?
  - Should the geographic location of the printer and publisher also be included?
  - Intended target of the ad?
  - Organization whose custom target list the recipient belongs to?
  - The “lookalike audience” target list? In online advertising, a “lookalike audience” is one made up of users with similar profiles/qualities to the original audience.
- ***Are there models or proposals which assist in defining these issues? For example:***
  - [Application of the Self-Regulatory Principles of Transparency & Accountability to Political Advertising](#)  
Guidance published by the Digital Advertising Alliance in May 2018 on how the Principles apply to certain online political advertising.
  - [Transparent Referendum Initiative \(TRI\) digital political advertising draft policy proposal](#)

Proposal on transparency requirements/regulations developed by the TRI – a volunteer led initiative set up to increase transparency of advertising during the referendum on the 8<sup>th</sup> amendment.

- [Online Advertising and Social Media \(Transparency\) Bill 2017](#)  
This is a private members bill put forward by Deputy James Lawless which includes legislative proposals for the regulation of online advertising and social media. The bill is currently at second stage before Dáil Éireann.
- [UK Digital, Culture, Media and Sport Committee Interim Report on Fake News and Disinformation](#)  
The first interim report arising from the Committee’s Disinformation and ‘fake news’ inquiry. It outlines recommendations to tackle these issues. Political advertising is discussed in depth in Chapter 4 of the report.
- [European Commission Communication – Tackling online disinformation: a European Approach](#)  
The Communication, published in April 2018, sets out a number of measures which the Commission is proposing to take to address the subject of disinformation at an EU level. See Section 3.1 for measures focused on transparency.

- ***Which stakeholders will be impacted?***
  - Political parties and candidates
  - Referendum campaigns
  - Advocacy groups
  - Advertising platforms – social media platforms, online platforms of traditional media, non-linear audio-visual media services, video sharing platforms
  - The Electorate
  
- ***Are there other stakeholders likely to be impacted?***
  
- ***What impact will regulation have on which stakeholders?***

## **Technical / Operational Capability to Control Advertising/ Governance:**

- ***What technical capability have social media and online platforms to control advertising?***
  
- ***What limitations are there for online platforms?***
  
- ***What organisations should come within the scope?***
  
- ***How can regulations protect against/prepare for technological advancements?***
  
- ***How to control right to be free from microtargetting/right to know origin of microtargetting concerning political preferences?***

## Legal Framework for Regulating Online Communications:

- E-Commerce Directive – A mere conduit.  
The European Communities (Directive 2000/31/Ec) Regulations 2003 (S.I. No 68 of 2003)<sup>3</sup> states that an Information Society Service Provider (ISSP) shall not be responsible for the illegal content of material that appears on their site. In the context of political advertising, the effect of this provision is that an ISSP takes the role of a “billboard” as opposed to a third party providing material for a political purpose on the poster to be placed on the billboard. Once an ISSP has been made aware of the illegal content it is obliged to operate a notice and take down procedure by which it gives notice to the person posting the information requesting them to remove the material.

EU Recommendation – Voluntary arrangement

Recent EU Recommendation encourages ISSPs to take effective, appropriate and proportionate measures to identify illegal content on line while still operating under voluntary agreement, for example, two platforms offered to place an embargo on material generated from outside the state in relation to the referendum on the 8<sup>th</sup> amendment.

- ***How can transparency of online political advertising be regulated – Obligations placed on sellers or buyers of advertising or both?***
- ***What challenges arise from extraterritoriality?***
- ***Who should monitor compliance with governance norms?***
  - Short-term – existing authority eg. SIPO?
  - Long-term – Electoral Commission?
- ***How will enforcement work?***

END.

---

3

[http://www.europarl.europa.eu/RegData/docs\\_autres\\_institutions/commission\\_europeenne/com/2003/0702/COM\\_COM\(2003\)0702\\_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0702/COM_COM(2003)0702_EN.pdf)