



Submission to the public consultation on Regulation of Online Political Advertising in Ireland

Technology Ireland is an Association within Ibec, which represents the ICT, Digital and Software Technology Sector. The Association is a pro-active membership organisation with over 200-member companies located throughout Ireland. We advocate on behalf of Ireland's indigenous and foreign direct investment (FDI) technology companies to Government and policy makers. We welcome the opportunity to deliver this submission to the Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation, coordinated by the Department of the Taoiseach.

1. Industry is committed to making advertising more transparent

Technology Ireland members are committed to seeing political advertising made more transparent, so we very much support the objective of this legislation. Members have grappled with the tension between the freedom of information the web enables via issues-based campaigns and the need to ensure trust in information during election periods. Elevating accurate, quality content, and stemming the flow of misinformation is a continuing challenge that requires collaboration with leaders and experts in the field, the news industry, the research community, and digital platforms.

We welcome and support all efforts by the Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation to engage with stakeholders in considering the development of both legislative and non-legislative measures to support election integrity through greater advertising transparency online.

2. Online political advertising serves a useful democratic purpose

Online political advertising enables freedom of expression and provides access to political campaigning to more diverse groups. Technology Ireland believes that legislative transparency developments must be carefully implemented in order to avoid undue interference with the important democratic right to freedom of expression, including the right to seek, receive and impart information online.

In particular, the requirement for transparency needs to be carefully balanced against other important policy and constitutional considerations, including freedom of expression and rights and fundamental freedoms recognised under the European Convention on Human Rights and the Treaty on the Functioning of the European Union - any undue interference in such rights and freedoms should be avoided.

Without clarity and certainty as to what defines online political advertising and appropriate attribution of responsibilities between the advertiser and the media outlets where adverts are placed, there may be an unintended “chilling effect” on freedom of expression were online platforms required to over-censor and restrict, delete or block any advertisements with a potentially political message, even where that content is not obviously a political advertisement and/or unlawful.

3. Government should try to create a framework that facilitates free expression while ensuring greater transparency.

Technology Ireland recommend that the Irish Government should ensure the development of a legal framework that facilitates free expression online whilst ensuring greater transparency on the purchasing and use of political advertising on online platforms. Such a framework should discourage those who would seek to distort legitimate public debate and discourse on political issues, whilst also helping to educate citizens to distinguish high quality and credible sources of content online. This framework should also reflect the laws governing e-commerce in the EU (particularly, the E-Commerce Directive, Directive 2000/31/EC), which provides clarity that primary offenders are liable for any offence and the liability of internet intermediaries is limited.

4. A framework that is consistent with European Legal Frameworks

Technology Ireland members believe that it is essential that the introduction of new legislation to regulate online political advertising in Ireland is consistent with existing European legal frameworks, and in particular the regime set out in the E-Commerce Directive.

This was established in the late 1990s following a careful assessment of all of the relevant factors to ensure that the resultant online intermediary liability regime was practical, uniform, supported the open internet and also protective of consumers, citizens, institutions and businesses.

Unlike traditional print media, the internet allows for a multiplicity of content types on a single page or within a single service originating from the website owner, third parties, users and online platforms. It is therefore essential that, while remaining technologically neutral, any new legislative measures pay attention to these different activities to ensure that the law properly recognises the unique role of online intermediaries as a gateway not a chokepoint (as opposed to those with editorial control of content, such as website owners or advertisers) and that liability is attributed appropriately and in line with the E-Commerce Directive.

It is essential that Irish law be consistent with EU law – including those frameworks that specifically concern the internet, such as the E-Commerce Directive, but also relevant frameworks in other fields, such as privacy and data protection, jurisdiction and applicable law. In particular, we would highlight the need for national legislation to reflect the *'notice and takedown'* procedures specifically envisaged by the E-Commerce Directive and E-Commerce Regulation for information society service providers (ISSPs) in addressing notifications of unlawful information; this system strikes a careful balance between the interests of persons affected by unlawful information, ISSPs and internet users.

5. The advertiser is best placed to implement transparency

Technology Ireland members agree that transparency obligations should be placed on the advertiser including labelling within the ad creative and decisions about targeting so that the consumer protections and transparency are the same wherever an ad appears. Placing the burden of ensuring

the transparency notice is displayed on online platforms could mean that, for each campaign, multiple online platforms would have to:

- institute pre-screening for every single advertisement that it serves in Ireland to determine whether or not the ad amounts to "political advertising";
- make an assessment of whether an ad is directed towards a "political end";
- obtain from the advertiser information required to be included in the transparency notice; and
- design a website banner or similar notice incorporating the transparency notice information that would be displayed to internet users in Ireland when the ad is viewed.

Placing the onus for identifying a political advertisement on online platforms will inevitably result in duplication and a degree of automated decision-making which may not be the ideal or preferred outcome of law makers. Technology Ireland would suggest that this could mean that online platforms, through software it develops, becomes the arbiter of what amounts to a "political end", with the possibility that outcomes vary between platforms. We strongly believe that such judgments are best made by public authorities supported by a defined legislative mandate, rather than online service providers.

6. Decisions on what constitutes political communication are complex and subjective, so an Electoral Commission or other neutral, independent regulator is best placed to make such determinations

Technology Ireland believes that the subjective decision as to what constitutes political communication in a particular context must be determined by a neutral, independent, regulator, based in Ireland in order to apply the rules consistently to entire campaigns and across all media. It would not be in the public interest to place such an obligation on individual online platforms, which cannot be expected reasonably to adjudicate between the competing interests in an election cycle, would enhance the transparency, consistency and credibility of any process.

7. The scope of any transparency requirements should be limited to the promotion of candidates in elections and proposals that are the subject of referendums.

Technology Ireland believe clarity must be provided as to the scope of any regulation in order to ensure that there is not a general chilling effect on all online expression that might be considered political.

We would suggest that any restrictions be confined to actual election campaign advertising. This would protect the public interest in preventing communications that might "skew" an election campaign that is underway, while preventing an unnecessary and disproportionate interference in the right of free speech outside the campaign period.

8. Any proposals should be technology neutral to ensure any legislation does not become outdated but continues to work effectively as technology continues to evolve.

Technology Ireland believe the principle of technology neutrality to be very important. It is important that legislation should be drafted in a technology-neutral, and platform-neutral, fashion as possible. This will ensure that legislation does not become outdated but continues to work effectively as technology continues to evolve.

Conclusion

Technology Ireland member companies fully support greater transparency surrounding the purchase and use of political advertising on online platforms. Technology Ireland are supportive of this consultation process given that it closely aligns with our members ongoing efforts.

Technology Ireland asks that any discussion around political advertising online be considered in light of existing legal frameworks so as to not undermine finely-tuned statutes which underpin the internet and provide legal certainty to cross-border online services including those of the eCommerce Directive.

- The European Communities (Directive 2000/31/EC) Regulations 2003 which implement the EU eCommerce Directive limitations for third party illegal content or activity, provided an

intermediary has no knowledge (actual or constructive) of such content, and as long as they expeditiously remove it when they have “actual knowledge” about its existence.

- Given that the regulation of online political advertising presents similar operational challenges and public policy considerations as the regulation of other content, we hope the Interdepartmental Group on Security of Ireland’s Electoral Process and Disinformation conforms to the established expectation of EU law by making clear that the regulations would rely primarily on effective and timely notice and takedown procedures initiated by the regulator to non-compliant campaigns and place no requirement on online platforms to affirmatively monitor content or activity on its services.

Technology Ireland and its members support the work of the Interdepartmental Group on Security of Ireland’s Electoral Process and Disinformation and look forward to participating in the Open Policy Forum in November 2018