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Purpose: Notification 2024/0374/IE

Part 5 of the Electoral Reform Act of 2022

Delivery of a detailed opinion pursuant to Article 6(2) of Directive (EU) 2015/1535 of 9 September 2015

Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015

Excellency,

As part of the notification procedure provided for in Directive (EU) 2015/1535 ⁽¹⁾, the Irish authorities notified to the Commission on 3 July 2024 the draft “*Part 5 of the Electoral Reform Act 2022*” (hereinafter referred to as “the notified draft”).

According to the notification message, the intention of the notified draft is to protect the integrity of elections in Ireland against online disinformation, online misinformation and online inauthentic and/or manipulative behaviour. To achieve these objectives, the notified draft introduces a criminal offence consisting of in “making, publication or promotion of several types of information, including electoral process disinformation, and the use of undisclosed bots” . It further imposes certain obligations on providers of online platforms as regards the dissemination of such illegal content, and other harmful content, on their service. According to the notified draft the *An Coimisiún Toghcháin* (hereinafter, the “Electoral Commission”) will be entrusted with monitoring and investigatory functions in relation to the dissemination of disinformation online relating to electoral processes, misinformation online relating to electoral processes as well as functions to prevent manipulative or inauthentic behaviours online in the context of electoral processes.

¹) Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and rules on Information Society services, OJ L 241 dated 17.9.2015, p. 1.

On 23 July 2024, the Commission addressed to the Irish authorities a request for supplementary information to obtain clarifications concerning the notified draft. The answers provided by the Irish authorities on 30 July 2024 are taken into account in the following assessment.

The examination of the relevant notified provisions led the Commission to issue the following detailed opinion.

1. Introduction

The Commission takes note of the notification message, according to which the notified draft pursues the objective of protecting the integrity of elections in Ireland against online disinformation, online misinformation and online inauthentic and/or manipulative behaviour.

The Commission shares the objectives of the notified draft, to address the dissemination of illegal and harmful content online, which are aligned with those of the Union legal framework for online services, in particular Regulation (EU) 2022/2065 (the Digital Services Act, hereinafter, DSA).⁽²⁾ The Commission also shares the goals of better protecting the online information space from disinformation, which is crucial to safeguard our democratic processes especially in the context of elections.

The Commission has been actively supervising and enforcing the DSA in relation to designated Very Large Online Platforms (“VLOPs”) and Very Large Online Search Engines services (“VLOSEs”), including as regards their obligations to identify, analyse, assess and mitigate systemic risks related to electoral processes.⁽³⁾ In this regard, in April 2024 the Commission issued a Communication providing guidance aimed at supporting providers of VLOPs and VLOSEs in their compliance with their obligation to mitigate specific risks linked to electoral processes.⁽⁴⁾

In this context, the Commission would like to emphasise that the DSA provides effective EU-wide horizontal rules to address certain of the problems that the notified draft aims to resolve. In particular, the DSA sets out a fully harmonised legal framework under which, amongst other things, hosting service providers and providers of online platforms are obliged to combat illegal and harmful content online. More generally, this fully harmonised legal framework, applicable to providers of online intermediary services, aims at effectively protecting the fundamental rights of their users enshrined in the Charter. As an EU Regulation, the DSA is directly applicable in all Member States, without the need for implementing measures.

²) Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (DSA), OJ L 277, 27.10.2022, p. 1-102.

³) [Commission opens formal proceedings against X under the DSA \(europa.eu\)](#) On 18 December 2023, the Commission opened a formal investigation to assess whether X may have breached the DSA, including as regards the effectiveness of measures taken to combat information manipulation on the platform, notably the effectiveness of policies mitigating risks to civic discourse and electoral processes.

[Commission opens formal proceedings against Meta \(europa.eu\)](#) On 30 April 2024, the Commission opened a formal investigation to assess whether Meta, in relation to both Facebook and Instagram, may have breached the DSA, including as regards the mitigation measures put in place to address the dissemination of deceptive advertisements, disinformation campaigns and coordinated inauthentic behaviour in the EU.

⁴) Communication from the Commission – Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065, C/2024/2537, OJ C, C/2024/3014, 26.4.2024 [EUR-Lex - 52024XC03014 - EN - EUR-Lex \(europa.eu\)](#).

2. Detailed opinion

2.1 Assessment in the light of Regulation (EU) 2022/2065

a) *Applicability of the DSA to the notified draft*

The notified draft falls within the scope of the DSA.

Firstly, concerning the personal scope of the notified provisions, the notified draft sets out obligations applicable to providers of online platforms. In their replies to the request for further information addressed by the Commission, the Irish authorities confirm that the notified draft is intended to apply to providers of intermediary services within the meaning of Article 3(g) of the DSA, including providers of online platforms.

The DSA applies to all providers of online intermediary services offering their services in the EU, which include online platforms as defined in Article 3(i) thereof. The DSA became fully applicable as of 17 February 2024 to all providers of online intermediary services. For providers of services designated by the Commission as VLOPs and VLOSEs, pursuant to Article 33(4) of the DSA, the additional obligations set out in Section 5 of Chapter III of the DSA applied as from four months after their designation. ⁽⁵⁾

Secondly, as regards the material scope of the notified draft, the notification message clarifies that the notified draft aims at addressing online disinformation and misinformation surrounding electoral processes. To that end, it imposes obligations on providers of online intermediary services, mainly online platforms, in order to address the presence of illegal and harmful content on their services. Notably, the notified draft imposes specific obligations on providers of online intermediary services during election campaign periods as regards illegal content (content qualifying as electoral online disinformation under the notified draft) ⁽⁶⁾ and other harmful content and practices (content qualifying as electoral online misinformation under the notified draft and manipulative or inauthentic behaviours surrounding elections). Additionally, Chapter 5 announces the publication of mandatory Codes of conduct in respect of online electoral process information that may be addressed, among others to providers of online intermediary services.

Further, in the context of the present notification, the Irish authorities have also explained that, in light of the legislative developments in the European Union since the enactment of the Electoral Reform Act 2022, the proposal to amend Part 5 of that piece of legislation is aimed at aligning and harmonising its provisions with those of the DSA.

The notified draft hence falls within the fully harmonised fields of the DSA.

b) *Assessment in view of the scope of the DSA*

The Commission would like to stress that the DSA aims to contribute to the proper functioning of the internal market for intermediary services by establishing fully harmonised rules for a safe, predictable and reliable online environment. In particular, it

⁵ ()At the time of issuing this detailed opinion, the Commission has formally designated 17 very large online platforms (hereinafter, “VLOPs”) and 2 very large online search engines (hereinafter, “VLOSEs”) on 25 April 2023; further 3 very large online platforms on 20 December 2023; 1 further on 26 April 2024; another one on 31 May 2024; and the last one on 10 July 2024.

⁶ ()The notified draft clarifies the notion of electoral online disinformation, which is qualified as illegal content under Irish national law.

establishes a fully harmonised regulatory framework concerning the accountability and responsibilities of intermediary service providers as regards their obligations to combat illegal and harmful content of their services. Recital 9 of the DSA explains that this Regulation aims at “*addressing the dissemination of illegal content online and the societal risks that the dissemination of disinformation or other content may generate, and within which fundamental rights enshrined in the Charter are effectively protected*”. Thanks to this common set of rules, the DSA prevents regulatory obstacles in the European single market.

In this context, the Commission recalls that, being a regulation, the DSA does not allow for additional national requirements unless otherwise expressly provided.⁽⁷⁾ This is because, pursuant to Article 288 TFEU, regulations are directly applicable throughout the Union. Unlike in the case of directives, national implementing measures are therefore not permitted in relation to regulations, unless the regulation itself leaves it to the Member States to adopt the necessary legislative, regulatory, administrative and financial measures to ensure the effective application of the provisions of that regulation.

The Commission points out that, in as much as the notified draft pursues the same objective as the DSA concerning the fight against disinformation and the negative effects on civic discourse and electoral processes of illegal and harmful content online, some of its provisions fall within the harmonised field of the DSA.

Notably, the Commission observes that Section 148(1) of the notified draft creates an obligation for providers of intermediary services to notify the Electoral Commission of electoral process disinformation, electoral process misinformation or manipulative or inauthentic behaviour on their services. It should be recalled in that context that the DSA already establishes the instances in which providers of intermediary services shall inform national judicial or administrative authorities of the presence of specific illegal content. In particular, Article 18 of the DSA provides that in case a hosting provider becomes aware of any information giving rise to a suspicion that a criminal offence involving a threat to the life or safety of a person or persons has taken place, is taking place or is likely to take place, it shall promptly inform the law enforcement or judicial authorities of the Member State or Member States concerned of its suspicion and provide all relevant information available. It should be recalled in that context that the DSA already fully harmonises the instances in which providers of intermediary services shall be required to inform national judicial or administrative authorities of the presence of specific illegal content, and therefore Member States are prevented from supplementing the DSA framework in that respect.

In addition, Section 148(2) of the notified draft provides for the transmission of the risk assessments carried out by VLOPs and VLOSEs under Article 34(1) of the DSA from the Irish Digital Service Coordinator to the Electoral Commission.⁽⁸⁾ In this context, it should be recalled that Article 56(2) of the DSA establishes that the Commission shall have exclusive competence over Section 5, Chapter III, namely, over the risk assessment and mitigation measures, and that transmission of the risk assessment itself is not in fact

⁷ ()Case 40/69, Bollmann, EU:C:1970:12, para 4; Case 74/69, Krohn, EU:C:1970:58, paras 4 and 6; and Joined Cases C-539/10 P & C-550/10 P, Stichting Al-Aqsa, EU:C:2012:711, para 87 (on the risk of divergent definitions under EU and national law).

⁸ ()In their reply to the request for supplementary information, the Irish authorities clarified that the Electoral Commission is not intended to be designated as a competent authority within the meaning of Article 49 DSA.

envisaged, even to the Commission. What is included in the system of the DSA is the transmission, pursuant to Article 42(4)(a), of a report setting out the results of such risk assessments, to both the Commission and the Digital Service Coordinator of establishment. Furthermore, it is only this report that shall be made publicly available, and only after receipt of the corresponding audit report. Therefore, it is clear that the system established by the DSA does not provide for the circulation of risks assessments as such. In that context it is also clear that, while Article 49(2) of the DSA protects the existence of mechanisms for cooperation between a Digital Services Coordinator and other national authorities, such cooperation cannot be interpreted as permitting a provision such as Section 148(2).⁽⁹⁾

Based on the above elements the Commission therefore considers that Section 148(1) and (2) of the notified draft overlap with and supplement the fully harmonised regime set out in the DSA. For the reasons set out above, Section 148(1) and (2) of the notified draft is deemed incompatible with the maximum harmonisation achieved in the DSA.

c) Monitoring and enforcement system

In order to ensure that the DSA is fully effective in the pursuit of objectives such as the fight against disinformation and the negative effects of illegal and harmful content online on civic discourse and electoral processes, which is also pursued by the notified draft, it is essential to ensure full effectiveness of the DSA and preserve its harmonising effect and its supervision and enforcement system which is instrumental to achieving these goals.

In accordance with Chapter IV of the DSA, the supervision and enforcement of the DSA are based on close cooperation, between, on the one hand, the appointed national digital services coordinators (and other competent authorities) under the country-of-origin principle and, on the other hand, the Commission.

Therefore, inasmuch Section 148(1) goes beyond what is open to a Member State as a result of the harmonisation effect of the DSA, conferring the monitoring function in relation to the requirements laid down in that provision to the Electoral Commission – a body that is not, as confirmed by the Irish authorities, a ‘competent authority’ within the meaning of the DSA is also contrary to that Regulation, which lays down a specific supervision and enforcement framework.

The Commission therefore calls on the Irish authorities to ensure that the notified draft does not call into question the supervision and enforcement architecture of the DSA.

d) Absence of general monitoring obligations

On the basis of the information made available to the Commission, it is not clear that providers of online platforms will understand the extent of their obligations under Section 148(1) of the notified draft. In particular, as described above, pursuant to that provision providers of online platforms are required to notify the Electoral Commission of electoral process disinformation, electoral process misinformation or manipulative or inauthentic behaviour available on their services when the provider is satisfied, when in possession of actual knowledge of the same, that particular content falls within one of

⁹ (In this context, it is also worth recalling that pursuant to Article 84 of the DSA, Digital Services Coordinators and Competent Authorities are bound to preserve the professional secrecy of the information received pursuant to the DSA.

those categories. The notified draft does not specify how providers of online platforms are to gain such knowledge to determine whether certain content meets the definition of those categories.

Given the broad nature of the categories of content that are subject to the obligation, and the difficulty that might be encountered in practice in determining whether particular content qualifies, the Commission is concerned that providers of online platforms may understand that they are expected to carry out additional verification, monitoring or fact-finding tasks.

Thus, on the basis of the information available to the Commission, it cannot be excluded that the obligations set out in Section 148(1) of the notified draft would be interpreted, by providers of intermediary services, in particular online platforms, as imposing on them an obligation to perform general fact-finding exercises and monitoring the content available on their services, which would be contrary to Article 8 of the DSA.

For the reasons set out above, the Commission hereby issues a detailed opinion in accordance with Article 6(2) of Directive (EU) 2015/1535.

The Commission reminds the Irish authorities that, in accordance with that provision, the issuing of a detailed opinion requires the Member State that is the author of the notified draft technical regulation concerned to postpone its adoption by 4 months from the date of its notification. This deadline therefore ends on 04.11.2024.

Furthermore, the Commission draws the attention of the Irish authorities to the fact that, under the same provision, the Member State to which a detailed opinion is addressed is required to inform the Commission of the action it intends to take on such an opinion.

If the Irish authorities fail to comply with the obligations laid down in Directive (EU) 2015/1535 or if the text of the notified draft under consideration is adopted without taking account of the objections raised or is otherwise contrary to Union law, the Commission reserves the right to initiate proceedings against Ireland in accordance with Article 258 of the TFEU.

3. Comments

As regards Article 6 of the DSA

The Commission notes that, under the notified draft, and especially under Section 166, electoral process disinformation would constitute “illegal content” within the meaning of Article 3(h) of the DSA. This is confirmed by the Irish authorities in their reply to the request for supplementary information.

National authorities remain competent to legislate, in compliance with EU law, in relation to the illegality of certain types of content. Article 3(h) of the DSA defines illegal content as “*any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or*

the law of any Member State which is compliance with Union law, irrespective of the precise subject matter or nature of that law”.

The Commission notes that Section 166 of the notified draft creates a criminal offence for “a person who, or any director of a body or association” to “make, publish or promote” online, during an electoral campaign period in Ireland, certain types of information, including, but not only, electoral process disinformation. In this respect, the Commission notes that the liability regime of Chapter II of the DSA clearly establishes the conditions under which intermediary services can be held liable for the content transmitted in their service. In particular, Article 6 of the DSA fully harmonises the liability exemptions for providers of hosting services for the content they intermediate.

While those exemptions appear to be reproduced in Section 148A, the Commission is concerned that Section 166 could be interpreted in a manner which precludes the applicability of those exemptions, through an expansive interpretation of the notions of “publish” or “promote”, or the ways in which a provider can establish the fulfilment of the conditions for exemption, again by equating the notions used in the text with the “actual knowledge” referred to in Article 6 of the DSA. Such broad interpretations of the text of the Irish draft would render it incompatible with Article 6 of the DSA insofar as they would lead to establishing liability of the online intermediary for acts of third parties in situations where the DSA has provided for an exemption from liability.⁽¹⁰⁾ The Commission calls on the Irish authorities to ensure that the final law clarifies this point in a manner aligned with the DSA including by clarifying the extent to which the notified draft law was intended to include online intermediaries within the scope of Section 166.

As regards Article 56 of the DSA

The Commission notes that the Irish authorities clarified in their reply to the request for further information that the intention of the notified draft is to respond to specific instances of electoral process disinformation and/or, as the case may be, manipulative or inauthentic behaviour that may appear on intermediary services. However, from the notified draft it is unclear whether the Electoral Commission would also have competences going beyond specific instances of a content related to the electoral process disinformation and/or, manipulative or inauthentic behaviour to also cover systemic risks resulting from content relating to electoral processes, within the meaning of Article 34 of the DSA, and related mitigation measures, within the meaning of Article 35 of the DSA, and therefore encroach upon the exclusive competence of the Commission for the supervision and enforcement of the rules in Section 5 of Chapter III of the DSA vis a vis VLOPs and VLOSEs. In particular, Section 145 of the notified draft mandates the Electoral Commission to “monitor” the dissemination of electoral process disinformation, manipulative or inauthentic behaviour, and “*trends in respect of electoral process disinformation, electoral process misinformation, and manipulative or inauthentic behaviour*”.

Article 56 of the DSA sets out the distribution of competences for the supervision and enforcement of that Regulation, between the competent authorities of Member States and the Commission. In this context, it is worth recalling that, as indicated by the Irish authorities in their replies to the request for further information sent by the Commission

¹⁰ (10) The CJEU case law has clarified the applicability of the limited liability exemption set out in Article 14 of the Directive on electronic commerce (now replaced by Article 6 of the DSA) as regards third party content intermediated on hosting services including in the absence of a merely neutral role (case C-324/09 and joined cases C-682/18 and C-683/18).

services, the Electoral Commission is not a competent authority for the purposes of the DSA. In particular, Article 56(2) of the DSA recognises the exclusive competence of the Commission for the supervision and enforcement of the rules in Section 5 of Chapter III of the DSA vis a vis VLOPs and VLOSEs, hence including the obligations concerning the assessment and mitigation of systemic risks for electoral processes set out in Articles 34 and 35 of the DSA.

The Commission calls on the Irish authorities to clarify in the final text of the law that the competences of the Electoral Commission do not cover the matters addressed in particular in Articles 34 and 35 DSA, for which the Commission alone is competent.

The Commission invites the Irish authorities to take into account the abovementioned comments in order to ensure that the national legislation is adopted and applied in conformity with the applicable Union law.

The Commission services are open to a close cooperation and discussion with the Irish authorities on possible solutions to the identified issues in full respect with Union law.

I remain, your Excellency, yours faithfully,

For the Commission,

Margrethe Vestager
Executive Vice-President

