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Technology Ireland comments on the TRIS notified Part 5 of the Electoral Reform Act 2022

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Technology Ireland's position on Part 5 the Electoral Reform Act and its compatibility with EU law

Technology Ireland welcomes the opportunity to comment on the compatibility of Ireland's proposed amendments to Part 5 of the Electoral Reform Act with EU law t.

Technology Ireland is an association within Ibec, which represents the ICT, Digital and Software Technology Sector. Technology Ireland is committed to promoting trust in our industry, particularly as the online world has accelerated in its importance to our lives.

While Technology Ireland supports the goals of the Act generally, we would like to use this opportunity to highlight that a number of the provisions in Part 5 of the Act are incompatible with the internal market harmonisation sought to be achieved, and in particular with Regulation (EU) 2022/2065 (the DSA).

Key Issues

(1) **General lack of alignment with EU law**

Technology Ireland supports the efforts of the Irish government to strengthen the legitimacy of the electoral process and welcomes the establishment of An Coimisiún Toghcháin for the oversight of election integrity and to encourage greater democratic participation. In the intervening time since 2022, the EU regulatory landscape on online content has significantly changed, with a number of additional important measures now in place which specifically address issues of online misinformation and which the Act must comply with. Notwithstanding, the 2022 Act is out of alignment with multiple EU priorities that form part of the European Democracy Action Plan[1].

Firstly, the DSA, which regulates the obligations of digital services that act as intermediaries in their role of connecting consumers with goods, services, and content, was agreed in April 2022 and entered into force in November 2022. The DSA addresses disinformation in several ways including:

- 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*" (Art. 3(h)). Disinformation is a form of "*information*" and therefore, to the extent it is illegal under Member State law, it will fall within providers' obligations under the DSA regarding "*illegal content*".]

- In connection with Art. 34's provisions on risk assessments:

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0790&from=EN

- Recital 83 refers to "*coordinated <u>disinformation campaigns</u> related to public health, or from online interface design that may stimulate behavioural addictions of recipients of the service*".

- Art. 34(2) notes that providers' risk assessments should take into account whether and how the systemic risks identified are "***influenced by intentional manipulation of their service, including by inauthentic use or automated exploitation of the service**, as well as the amplification and potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms and conditions*". Recital 84 notes that "*Such providers should therefore pay particular attention on how their services are used to disseminate or amplify misleading or deceptive content, **including disinformation***".

- *Recital* 84 further notes that "*Providers of very large online platforms and of very large online search engines should, in particular, assess how the design and functioning of their service, as well as the intentional and, oftentimes, coordinated manipulation and use of their services, or the systemic infringement of their terms of service, contribute to such risks. Such risks may arise, for example, through the **inauthentic use of the service**, such as the creation of fake accounts, the use of bots or deceptive use of a service, and other automated or partially automated behaviours, which may lead to the rapid and widespread dissemination to the public of information that is illegal content or incompatible with an online platform's or online search engine's terms and conditions and **that contributes to disinformation campaigns***".

- Recital 88 also notes that: "*In particular, where risks are shared across different online platforms or online search engines, they should cooperate with other service providers, including by initiating or joining existing codes of conduct or other self-regulatory measures. They should also consider awareness-raising actions, in particular where risks relate to **disinformation campaigns***".

● In the context of online advertising:

- *Recital* 69 sets out that "*When recipients of the service are presented with advertisements based on targeting techniques optimised to match their interests and potentially appeal to their vulnerabilities, this can have particularly serious negative effects. In certain cases, manipulative techniques can negatively impact entire groups and amplify societal harms, for example by contributing to **disinformation campaigns** or by discriminating against certain groups*".

- Recital 95 notes that "*Very large online platforms or very large online search engines should ensure public access to repositories of advertisements* presented *on their online interfaces to facilitate supervision and research into emerging risks brought about by the distribution of advertising online, for example in relation to illegal advertisements or manipulative techniques and **<u>disinformation</u>** with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality*".

- In the context of codes of conduct under Art. 45, Recital 104 states that: "[a*nother area for consideration is the possible negative impacts of systemic risks on society and democracy,* ***such as disinformation*** *or manipulative and abusive activities or any adverse effects on minors. This includes coordinated operations aimed at amplifying information,* ***including disinformation****, such as the use of bots or fake accounts for the creation of intentionally inaccurate or misleading information, sometimes with a purpose of obtaining economic gain, which are particularly harmful for vulnerable recipients of the service, such as minors… The mere fact of participating in and implementing a given code of conduct should not in itself presume compliance with* [the DSA]".

- In the context of the voluntary crisis protocols, under Art. 48, Recital 108 notes that: "*the Commission may initiate the drawing up of voluntary crisis protocols to coordinate a rapid, collective and cross-border response in the online environment. Such can be the case, for example, where online platforms are* ***misused for the rapid spread of illegal content or disinformation*** *or where the need arises for rapid dissemination of reliable information*".

- In addition, at a more general level, Recital 9 reflects the careful balance that the EU legislature has struck in the DSA between protecting users of intermediary services while at the same time protecting fundamental rights. Recital 9 addresses disinformation in the context of the DSA by noting that the DSA "*fully harmonises the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, 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 and innovation is facilitated*".

Moreover, under the DSA, Very Large Online Platforms (VLOPS) have the obligation to put in place "reasonable, proportionate, and effective" mitigation measures for, among others, electoral risks identified under DSA Article 34. In this context, it should be noted that, on 26 April 2024, the European Commission (EC) published guidelines on recommended measures to VLOPs to mitigate systemic risks online that may impact the integrity of elections, with specific guidance for the European Parliament elections that took place in June. Whilst these guidelines are non-binding, they represent, for the EC, best practices for mitigating risks related to electoral processes at this moment in time and, as such, VLOPs which do not follow these guidelines are expected to demonstrate to the EC that the measures undertaken are equally effective in mitigating the risks.

In light of the above, the regulation of disinformation on intermediary services, in particular in the electoral context, is fully harmonised by the DSA, and Member States are pre-empted from developing national rules on these matters. This is expressly acknowledged by DSA Recital 9, that notes that: "*This Regulation* ***fully harmonises the rules applicable to intermediary services in the internal market*** *with the objective of ensuring a safe, predictable and trusted online environment,* ***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 and innovation is facilitated.* ***Accordingly, Member States should not adopt or maintain additional national requirements relating to the matters falling within the scope of this Regulation****, unless explicitly provided for in this Regulation, since* ***this would affect the direct and uniform application of the fully harmonised rules applicable to providers of intermediary services in accordance with the objectives of this Regulation****. This should not preclude the possibility of applying other national legislation applicable to*

providers of intermediary services, in compliance with Union law, including Directive 2000/31/EC, in particular its Article 3, where the provisions of national law pursue other legitimate public interest objectives than those pursued by this Regulation". Part 5 of the Act seeks to impose a number of measures which are pre-empted by the DSA and would disrupt the DSA's harmonisation, effectively requiring intermediary services providing services in Ireland to address "the societal risks that the dissemination of disinformation…may generate" in a different and more onerous way than such services would be otherwise required to address those risks under the DSA in other EU Member States.

Secondly, the DSA fosters a co-regulatory framework for online harms, including codes of conduct, such as the strengthened 2022 Code of Practice on Disinformation which sets out self-regulatory standards to fight disinformation. Such code addresses many of the same issues that Ireland seeks to solve via Part 5 of the Act, and includes commitments on transparency in political advertisements, measures to reduce manipulated behaviour used to spread disinformation, and a system of reports to the European Commission on disinformation, thereby providing a robust framework for monitoring its implementation. The 2022 Code of Practice is currently in the process of being converted into a Code of Conduct recognised under the co-regulatory framework of the DSA.[2]

Thirdly, on 11 March 2024, the European Council adopted a new regulation on the transparency and targeting of political advertising, aimed at countering information manipulation and foreign interference in elections. The regulation is intended to make it easier for citizens to recognise political advertisements, understand who is behind them and know whether they have received a targeted advertisement, so that they are better placed to make informed choices. The new rules cover the transparency and targeting of political advertising in relation to an election, referendum, or a legislative process at EU level or in a member state. According to the rules:

- Political advertisements must be made available with a transparency label and an easily retrievable transparency notice. These must clearly identify political advertisements as such and provide some key information about them, including their sponsor, the election or referendum to which they are linked, the amounts paid, and any use of targeting techniques.

- Targeting political advertising online will be permitted only under strict conditions. The data has to be collected from the data subject and it can be used only after the data subject have given explicit and separate consent for its use for political advertising. Special categories of personal data, such as data revealing racial or ethnic origin or political opinions, cannot be used for profiling.

- To prevent foreign interference, there will be a ban on the provision of advertising services to third country sponsors three months before an election or referendum.

In short, it's clear that the EU regulatory landscape on online content has significantly changed since 2022, with a number of additional important measures now in place which specifically address issues of online electoral misinformation, and which not only pre-empt but would also be disrupted by the proposals in Part 5.

[2] The 2022 Code of Practice on Disinformation | Shaping Europe's digital future (europa.eu)

(2) **Lack of clarity of services in scope**

A number of Part 5 obligations now apply to "intermediary services" (although the term "online platform" is still used in places and appears to be used interchangeably with "intermediary service"). For example: ss.148(1), 153(1), 154(1), 155(1), 156(1), 157(1).

Neither the term "intermediary service" or "online platform is defined in Part 5". Both terms are already defined under the DSA and, as such, in order to ensure legal certainty and alignment with EU law, such definitions should, to the extent appropriate, be applicable here.

In addition, it should be noted that "intermediary services", as defined under the DSA, include "mere conduits", which in turn can include interpersonal communications services (ICS). However, it is unclear whether the legislative intention is to cast the net so wide that obligations would apply to ICS.

To the extent that the legislative intention is to cast wider net and extend application of obligations harmonized by the DSA to intermediary services which are not in scope of such obligations under the DSA, the Commission should take into account that the EU legislature chose to exempt certain categories of intermediary services from those obligations and, thus, Part 5 cannot impose more onerous obligations on such intermediary services.

Accordingly, references to "intermediary services" should be removed and replaced by "online platforms", which in turn should be defined by reference to the DSA definition of that term.

(3) **Obligation to Notify the Irish Electoral Commission of Certain Content/Behaviour**

Section 148 (1) of the Act requires online platform to notify the Irish Electoral Commission when it is satisfied from information of which it is aware that:

(a) its services may be being used for the purposes of disinformation,
(b) there may be misinformation on its services, or
(c) there may be manipulative or inauthentic behaviour on its services, and must notify the Commission of "such disinformation, misinformation or manipulative or inauthentic behaviour".

First, the notification requirements for intermediary services are exhaustively dealt with in Article 18 of the DSA, which sets out the circumstances in which an intermediary service is required to notify content to Member State authorities. Intermediary services should not be required to notify content to Member State authorities unless that content gives rise to a suspicion of the committal of 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. As such, this obligation is pre-empted by the DSA. Imposing special national notification requirements would permit Member States to impose obligations on intermediary services over and above those considered necessary and proportionate by the EU legislature, and would accordingly disrupt the harmonisation of the internal market sought to be achieved by the DSA.

Second, as acknowledged by the European Commission during the EU TRIS procedure, such a requirement does not, and in fact, cannot, impose a general monitoring or fact-finding obligation on online platforms.

The legislation should be amended to clarify that point. Furthermore, in line with principles on intermediary liability set out in the DSA and the eCommerce Directive, the legislation should be amended to clarify that such an obligation will only exist when online platforms have **actual knowledge** that (a) their services ***are*** being used for the purposes of disinformation, (b) there ***is*** misinformation on their services, or (c) there ***is*** manipulative or inauthentic behaviour on their services (see article 6 of the DSA and article 14 of the eCommerce Directive).

As noted in Recital 22 of the DSA, "*In order to benefit from the exemption from liability for hosting services, the provider should, upon obtaining actual knowledge or awareness of illegal activities or illegal content, act expeditiously to remove or to disable access to that content. […] The provider can obtain such actual knowledge or awareness of the illegal nature of the content, inter alia through its own-initiative investigations or through notices submitted to it by individuals or entities in accordance with this Regulation in so far as such notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess and, where appropriate, act against the allegedly illegal content. However,* ***such actual knowledge or awareness cannot be considered to be obtained solely on the ground that that provider is aware, in a general sense, of the fact that its service is also used to store illegal content***". As currently drafted, the 2022 Act does not comply with this principle, and, as such, should be amended.

Third, Part 5 should be amended to clarify that online platforms are only required to notify the Commission, under Section 148 (1) in the event that they do not remove the relevant content (i) under their terms and policies, or (ii) for local law violation. Several potentially in-scope online platforms will already have terms and policies in place which address disinformation, misinformation and manipulative or inauthentic behaviour on their service. When this is the case, online platforms should be free to remove the relevant violating content from their services, without being required to first notify the Commission of such content. Moreover, Sections 166 and 167 appear to criminalise such content, as offences of electoral process disinformation and offence of using undisclosed bot to mislead election or referendum. Such intention is further confirmed by Section 160(1), which require a person who considers the presence of suspected electoral process disinformation to be on the services of the provider of intermediary services to first notify the provider in accordance with the requirements of Art. 16 of the DSA, i.e., under the notice and action mechanism for illegal content. As such, requiring that intermediary services notify the Commission when they gain knowledge of that content, without removing it from their services, can potentially put intermediary services on notice of illegal content and, thus, potentially liable for such content.

(4) **Use of Bots to Disseminate Disinformation**

Part 5 of the Act undermines the harmonisation sought under the DSA on the approach to be taken in respect of the rapid and widespread dissemination to the public of disinformation by imposing specific obligations in relation to bot use, namely:

- Section 157(1) of the Act contains an obligation to publish a statement informing users of the unlawful use of manipulative or inauthentic behaviour or the use of undisclosed bots on the service.

- Section 157(3) of the Act contains an obligation to take reasonable steps to prevent/prohibit manipulative or inauthentic behaviour (including through the use of bots).

Both of these obligations are pre-empted by the DSA, for the following reasons.

- The use of bots to disseminate disinformation widely is specifically highlighted in Recital 84 DSA as an issue to be considered as part of the Article 34 risk assessment process for providers of very large online platform (VLOP)/ very large online search engine (VLOSE) services. The DSA harmonises the approach for dealing with such risks through the obligation to develop mitigation measures (Article 35 DSA), which measures must be submitted to the European Commission and will also be subject to an independent audit. Accordingly, Ireland's proposed laws could have the effect of both (a) imposing obligations on non-VLOP/VLOSE services being provided in Ireland over and above the obligations that the EU legislature decided to impose on such services in the DSA, and (b) imposing obligations on VLOP/VLOSE services which go beyond Article 35 DSA risk mitigation measures required by the DSA.

- The use of bots in the dissemination of disinformation is specifically considered in the DSA (Recital 104), as an issue which should be addressed by self- and co-regulatory codes of conduct pursuant to Article 45 DSA. Recital 104 DSA also makes clear that there is an expectation that VLOPs and VLOSEs will participate in such codes and that a failure to do so could be taken into account by the European Commission in determining the provider's compliance with DSA. The EU Strengthened Code of Practice on Disinformation is an example of a code of conduct and it includes a specific commitment to put in place policies to address bot-driven amplification of disinformation (see Commitment 14). The Strengthened Code of Practice on Disinformation cannot function as intended (and as envisaged by Recital 106 DSA) if individual Member States adopt unique national requirements.

(5) **Obligations to Publish Statements from the Irish Electoral Commission**

The Act contains the following obligations to publish statements from the Irish Electoral Commission in respect of electoral process disinformation:

- Section 153 requires publication of the Irish Electoral Commission's statement of reasons for a take-down.

- Section 154 requires publication of the Irish Electoral Commission's notice correcting disinformation.

- Section 155 requires publication of a statement that relevant content is currently being investigated by the Irish Electoral Commission as to whether it constitutes disinformation.

- Section 156 requires publication of the Irish Electoral Commission's statement of reasons for access blocking.

These obligations are preempted by the DSA:

- Article 9 of the DSA exhaustively harmonises requirements in relation to orders to act against illegal content; Article 14 DSA exhaustively harmonises the requirements in relation to the enforcement of a provider's terms of service; and Article 17 DSA exhaustively harmonises a provider's obligations to provide a statement of reasons where it removes content.

- None of these DSA obligations envisage a proactive obligation on a provider to publish a regulatory statement to correct online content.

- Accordingly, the above Part 5 obligations seek to impose additional obligations which are over and above the harmonised requirements of the DSA

- As noted above, the DSA expressly acknowledges (in Recital 9) that it fully harmonises the rules applicable to intermediary services in the internal market with the objective of ensuring a safe, predictable and trusted online environment, addressing the dissemination of illegal content online and the **societal risks that the dissemination of disinformation** or other content may generate. To this end, with exception to where a content which constitutes disinformation is also illegal under the relevant local law, DSA does not provide for notice and take down mechanisms for such content. Inversely, the DSA addresses disinformation in the context of Articles 34 and 35, the latter of which, in particular, harmonises the approach that should be adopted to address systemic risks.
- On the assumption that the notice measures in Part 5 Act are intended to reduce the risk of users being influenced by violative content, they would appear to be measures aimed at mitigating systemic risks, a matter harmonised under Article 35 of the DSA, as described above.
- Accordingly, these obligations are contrary to the DSA's maximum harmonisation principle.

Moreover, as mentioned above with regard to the obligation to notify the Commission, sections 166 and 167 appear to criminalise the content to which the correction notices and labelling orders should apply to. However, under sections 154 and 155 of the Act, intermediary services are not required to take down the relevant illegal content, but rather to apply correction and labelling notices, which could potentially cause such services to be liable for such content.

In addition, the obligation under section 155 of the Act to publish a statement that the relevant content is under investigation by the Irish Electoral Commission constitutes a disproportionate interference with users' freedom of expression pursuant to Article 11 of Charter of Fundamental Rights of the European Union and Article 10 of the European Convention on Human Rights, as well as a user's reputational rights.

- The Irish Electoral Commission should either be of the view that information constitutes disinformation or not. In order to ensure that freedom of expression is not infringed, the Act should err on the side of not interfering with information until the Irish Electoral Commission comes to a conclusion.
- Further, a legal obligation should not be placed on intermediary services to publish potentially defamatory remarks about a user's content.

The DSA and Code of Practice on Disinformation are the more appropriate mechanisms through which to deal with this issue because they address other critical elements of a flagging/reporting system which are not addressed in Part 5. For example, Commitment 24 takes account of the need for a transparent appeal

mechanism - a crucial requirement where there has been a prima facie interference with the right to free speech.

Accordingly, these obligations (sections 153 - 156) should be removed and replaced by a requirement for the Irish Electoral Commission to maintain publicly accessible databases of these notices, along with explanations for their issuance.

This approach would be in alignment with the DSA, and would streamline the process, centralise information, and reduce the burden on online platforms. This would also balance the need for transparency and accountability with the complexities of content moderation and legal compliance.

(6) **Codes of Conduct**

Section 163 of the Act provides the Irish Electoral Commission with powers to publish optional or mandatory codes of conduct in respect of online electoral process information.

This provision is preempted by Article 45 of the DSA, which envisages codes of conduct for intermediary services being drawn up "at Union level to contribute to the proper application of this Regulation" (our emphasis). In particular, as mentioned above, Recital 104 specifically envisages the use of codes of conduct to address the dissemination of disinformation, and such a code exists in the form of the EU's Strengthened Code of Practice on Disinformation. The adoption of codes of conduct for intermediary services at a national level, as opposed to at an EU level, will impose different operating requirements for intermediary services in different Member States, which distorts the internal market harmonisation sought to be achieved by the DSA.

If such codes were to be permitted, notwithstanding the distortion they would cause to the internal market, to the extent that any code adopted in accordance with section 163 of the Act is intended to apply on a mandatory basis, it should be confirmed that this will be submitted to the TRIS process for examination by the European Commission, other Member States and interested parties.